Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act

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CITIZEN COMMISSION IMPLEMENTATION
OF THE VOTING RIGHTS ACT

Justin Levitt*

Abstract

The Voting Rights Act, often praised as the most successful civil rights statute, is among the most fact-intensive of election regulations. California, the country’s most populous and most diverse state, is among the most challenging terrain for applying the Act. California is also the largest jurisdiction at the vanguard of a burgeoning experiment in indirect direct democracy: allowing lay citizens, not incumbent officials, to regulate the infrastructure of representation.

In 2011, fourteen California citizens strode into the briar patch where citizen institutions intersect the Voting Rights Act. These fourteen comprised the state’s brand-new Citizens Redistricting Commission: an official body of laypersons responsible for applying, in the face of substantial public skepticism, the most nuanced of regulations to the most complex political landscape in the country.

This Article, building on prior theoretical work regarding citizen control of public institutions, assesses the new Citizens Commission’s approach to complying with the Voting Rights Act. It offers the first comprehensive review of an actual citizen commission’s engagement with a legal structure that is poorly understood by most citizens. The Article opens a rare window not only on the procedures involved in implementing the Voting Rights Act — including new amendments applied to redistricting for the first time in 2011 — but on the process by which a citizens commission may undertake public responsibilities more generally. And in so doing, it highlights decision paths likely to inform not only future citizen bodies, but a range of officials confronting the Voting Rights Act across the country.

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INTRODUCTION

The California Citizens Redistricting Commission was assembled for the first time in December 2010. Fourteen citizens, culled from 30,725 applicants, prepared to overhaul the infrastructure of the democracy enjoyed by 37.3 million of their neighbors. They would redraw political district lines, and thereby determine the degree to which different interests would be represented in legislative delegations. By redrawing the district lines, they had the capacity to redraw the political landscape. Most remarkable was the fact that they were holding the pen at all.

As in most states, the California legislature controlled redistricting throughout the twentieth century. Incumbent control of electoral rules represents a hoary democratic difficulty, much studied and much lamented for the potential conflict of interest inherent in that control. Scholars have examined various means by which greater citizen involvement might (or might not) mitigate the potential conflict. Less often have they recommended substituting lay citizens for professional politicians as the principal relevant decisionmakers. Less often still have these ideas been put into practice.

California’s new Commission marks a profound, and profoundly unusual, real-world expression of the theory. It was put in place by the practice of what we may call “indirect direct democracy.” Our usual

2 U.S. Census Bureau, California Quickfacts, at http://quickfacts.census.gov/qfd/states/06000.html.
8 See, e.g., DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS’ ASSEMBLY 6-7 (Mark E. Warren & Hilary Pearse, eds. 2008).
process of indirect democracy — our standard “republican form of government” — involves legislation by a representative political class. Direct democracy, in contrast, features legislation by plebiscite. Indirect direct democracy is an amalgam of the two: plebiscite measures intended to substitute lay citizens for the political class, but only in controlling the electoral ground rules that govern negotiation of future legislation. It leaves professional politicians responsible for substantive lawmaking, but reclaims popular control over the electoral infrastructure of the political process. And in so doing, it provides a public check on the ability of the political class to insulate themselves from electoral feedback.

California’s new Commission is a remarkable product of this exercise of citizen power. A popular initiative in 2008 stripped authority over state legislative redistricting from the state legislature, and vested that authority in a new independent commission of citizens. A second initiative in 2010 extended the independent body’s authority to congressional districts. California was only the sixth state to have ceded control of its redistricting process to individuals unconnected to elected officials, and it was by far the country’s largest and most diverse jurisdiction to have done so. Indeed, it appears to be the largest jurisdiction in the world to have given individuals neither appointed by nor connected to elected officials the responsibility to make public law. The design of the commission, and the way in which it carried out its charter, will be closely studied for years.

9 U.S. Const. art. IV, § 4.
13 See ALASKA CONST. art. VI, §§ 3-4, 8; ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI, § 1; CAL. GOV’T CODE §§ 8251-53.6; IDAHO CONST. art. III, § 2; IDAHO CODE § 72-1502; MONT. CONST. art. V, § 14(2); MONT. CODE §§ 5-1-101, 102, 105; WASH. CONST. art. II, § 43; WASH. REV. CODE § 44.05.030-.100. Several local jurisdictions also rely on citizen redistricting bodies not beholden to particular legislative officials. See, e.g., N.Y. CITY CHARTER §§ 50-52.
14 See DESIGNING DELIBERATIVE DEMOCRACY, supra note 8, at 6-7.
The California Commission comprised fourteen individuals without established relationships to legislative incumbents. It also comprised fourteen individuals without established relationships to each other or, for the most part, to the practice of statewide redistricting. These fourteen individuals formed a brand-new state agency, with minimal infrastructure and eight months to draw four sets of statewide districts for the largest, most diverse state in the nation. They had to perform this task in the most complex legal environment in the country, with an equally new set of prioritized but occasionally competing criteria, some of which were laden with meaning derived from past legal battles, and some of which had never before been interpreted.

Of particular note here, among these legal requirements were two different sections of the Voting Rights Act (“VRA”): the most nuanced, demanding, and fact-intensive of election-related regulations. Early opposition to the Commission from civil rights groups centered on fears that a body of independent laypersons would be insufficiently attentive to minority concerns, including adequate compliance with the VRA. The Commission’s work is now complete for the current redistricting cycle. So how did it do?

This Article, building on prior theoretical work regarding citizen redistricting bodies, assesses the new California Commission’s approach to complying with the Voting Rights Act. It thereby adds an important experiential reflection to the scholarly debate about citizen redistricting bodies, and about the use of citizen bodies in public law more generally. Indeed, the Article offers the first comprehensive review of an actual citizen commission’s engagement with a legal structure that is poorly

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15 See, e.g., CAL. CONST. art. XXI, § 2(c)(1), (6); CAL. GOV’T CODE § 8252(a)(2).
16 See, e.g., CAL. CONST. art. XXI, § 2(d), (e).
18 See, e.g., Steven Harmon, Civil Rights Groups Worried About Effect of Remap Proposal, CONTRA COSTA TIMES, July 8, 2008; cf. Arturo Vargas, Opinion, Redistricting Effort Already a Flop, ARIZ. REPUBLIC, Feb. 20, 2001 (articulating similar concerns in Arizona). It may be that civil rights concerns about independent bodies to date stem from particular design or implementation choices in the commissions that have been established, rather than the inherent nature of an independent decisionmaking body. See NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., POLITICAL PARTICIPATION GROUP, INDEPENDENT REDISTRICTING COMMISSIONS: REFORMING REDISTRICTING WITHOUT REVERSING PROGRESS TOWARD RACIAL EQUALITY 3-5 (2010), http://naacpldf.org/files/publications/IRC_Report.pdf.
20 See supra notes 6-8.
understood by most public citizens. In so doing, this piece joins a distinguished line of scholarship tracing in detail the procedures by which various institutions tackle the thorny issues of the Voting Rights Act, though none thus far have turned their attention to independent citizen bodies. Moreover, this Article attempts to highlight the steps and missteps of California’s citizen commission with an eye to lessons that may inform not only future citizen bodies, but decisionmakers across the country contending with application of the Voting Rights Act.

The Article proceeds as follows. Part I reviews the substantive requirements of the Act that are applicable to redistricting, emphasizing the nuance that has escaped public understanding and that might be expected to surprise lay commissioners. This review includes an analysis of portions of the Voting Rights Act that were amended in 2006, applied for the first time to redistricting in 2011, and have not yet been construed by the courts. Part II then summarizes the procedural means by which a public body might optimally seek to ensure compliance with the Act without simultaneously running afoul of other legal constraints. Part III turns from theory to practice, examining for the first time in detail the process by which the California Citizens Redistricting Commission attempted to comply with the VRA, with particular focus on the Commission’s notable decision points. Finally, Part IV concludes with an assessment of the ways in which the Commission’s approach may have enhanced or hindered its ability to ensure compliance, identifying notable lessons and lingering questions for future citizen institutions.

It is worth emphasizing that this Article does not set out to determine whether the Commission’s work product actually complied with the Voting Rights Act. Instead, it is intended to assess whether the Commission appears to have gone about its task in a way that made compliance more or less likely. Beyond its more manageable scope, such a review has the benefit of informing the design and preparation of future efforts to comply with the Voting Rights Act, even under very different demographic and political conditions.

22 Though this Article draws from a comprehensive review of the public record, including all of the Commission’s public transcripts, it is also important to acknowledge the limitations of the methodology. Relevant portions of the Commission’s process — including discussions between small teams of Commissioners and their line-drawing technical consultants — are not captured in the public record and are difficult to infer or otherwise glean from public sources. Other relevant conversations were privileged, in anticipation of litigation, or otherwise held confidential.
I. **Substantive Requirements of the Voting Rights Act**

The Voting Rights Act is widely hailed as the most successful piece of civil rights legislation in the country’s history. It is, at present, our most significant shared national commitment to at least a modicum of political diversity within a prevailing system of majority rule, based in part on history that allows us to recognize that we all suffer when such a commitment is absent. The Act provides opportunities for racial and language minorities to achieve equitable political power, where conditions would otherwise threaten that ability. A tool this powerful is necessarily nuanced. And in a world where news is credibly presented and digested in 140-character snippets, it is perhaps unsurprising that the Act’s protections are sometimes poorly understood.

To begin, a few common misconceptions. The Voting Rights Act does not always require that districts always be drawn, wherever possible, to yield minority control. It does not always require preservation of districts controlled by minorities in the past. It does not establish a hierarchy of “more preferred” and “less preferred” minorities. It does not require districts drawn in order to benefit particular incumbents at the expense of minority populations within the district (though the interests of communities and their representatives may coincide). It does not require districts drawn in order to benefit particular political parties, and does not always have the effect of consistently benefiting particular political parties (though every adjustment of district lines necessarily produces a partisan impact). And compliance with the Act cannot be assessed merely by looking for pockets of minority voters or for minority incumbents.

The following sections summarize what the Voting Rights Act does do, striving for sufficient detail to assess the Commission’s efforts to put itself in position to comply with the law’s mandate. Two sections of the Voting Rights Act are relevant for these purposes: section 2 and section 5.

**A. Section 2**

Section 2 of the Voting Rights Act prohibits any law or practice that results in a “denial or abridgement of the right . . . to vote on account of race or color,” or because of membership in a language minority group.\(^{24}\)

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\(^{23}\) Because the focus of this analysis is the Commission’s implementation of the Act, where there are distinctions in the application of the VRA among the circuits, this Article follows the state of the law in California.

A redistricting plan will violate Section 2 if, in the totality of circumstances, the plan interacting with social and historical conditions provides the members of a protected class of racial or language minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”25

Because there are several plausible conceptions of what it might mean to “abridge” a group’s electoral opportunity, particularly with respect to redistricting decisions, the Supreme Court articulated a test refining the statutory standard in a seminal case entitled *Thornburg v. Gingles.*26 With some modifications, that test remains the governing standard today. Broadly, where groups facing historical discrimination are sufficiently large and sufficiently politically cohesive that they would be able to elect their chosen candidates in districts designed for that purpose — but where voting is sufficiently polarized that they would otherwise be more likely to lose — the Voting Rights Act steps in to require well-crafted districts.

In that sentence lies a wealth of detail.

1. *Gingles* threshold condition one

*Gingles* established three threshold preconditions for determining when a jurisdiction must draw districts designed to give a minority group the effective opportunity to elect representatives of its choice. First, the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district.”27

A group is “sufficiently large” if the minority group constitutes at least 50 percent of the voting-age citizens in a district-sized population.28 The precise size of a district depends on the nature of the district. Under the U.S. Constitution, Congressional seats must be as equally populated as possible, with very little leeway for deviation.29 State and local districts have more constitutional latitude to be smaller or larger than the mean, if there is

25 Id. § 1973(b).
27 Gingles, 478 U.S. at 50.
a sufficiently good reason for the deviation, although California law leaves substantial ambiguity about the extent of the permissible spread.


31 State legislative plans may generally leave a ten percent deviation between the largest and smallest district without running afoul of the constitution, if (and only if) a permissible (and consistently applied) reason supports the deviation. See Brown, 462 U.S. at 842-43; Larios, 300 F.Supp.2d at 1337-53.

In California, however, the standard may be different. In 1973, in the absence of valid legislatively enacted plans, the California Supreme Court drew state legislative lines. Legislature v. Reinecke, 10 Cal.3d 396 (1973). The Special Masters conducting the redistricting opined that “the population of senate and assembly districts should be within 1 percent of the ideal except in unusual circumstances, and in no event should a deviation greater than 2 percent be permitted”; that conclusion was approved by the California Supreme Court. Id. at 411. The basis for this ruling, however, is unclear.

It is possible that the court was articulating a standard for itself, as a court drawing lines: under the federal constitution, court-drawn plans must strive for lower population deviations than plans drawn by other state actors. Chapman v. Meier, 420 U.S. 1, 26-27 (1975) (“A court-ordered plan, however, must be held to higher standards than a State’s own plan.”); Nathaniel Persily, When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans, 73 GEO. WASH. L. REV. 1131, 1140 (2005). This general principle was established by the Supreme Court with respect to federal district courts, based on their comparative inability to balance difficult political choices in selecting an appropriate level of deviation. Many of the same concerns about comparative institutional ability extend to state judicial bodies as well. However, this rationale would not support strict deviation constraints for a Citizens Redistricting Commission acting as a stand-in for the legislature.

It is possible that the Reinecke court was construing the federal constitution generally: based on the extreme size of California’s districts, the court found that minimal percentage deviations might involve impermissibly large population deviations. If so, the extent to which the state court’s interpretation of federal law is binding on a Commission is unclear. State courts may interpret state law as they please, but they may not interpret federal law to impose greater restrictions than interpretations issued by the federal courts. Arkansas v. Sullivan, 532 U.S. 769, 771 (2001). Federal law itself contains some ambiguity: recent federal decisions grant latitude to states with substantial deviations for legitimate purposes, but none directly addresses the appropriate standard for California’s unusually large districts. It is possible that federal courts would construe the federal constitution along the narrow lines of Reinecke... and it is possible that they would not.

It is also possible that the Reinecke court was construing the state constitution, though the relevant portion of the discussion is quite short, and appears to rely exclusively on federal law. At the time, the state constitution required assembly districts “as nearly equal in population as may be.” CAL. CONST. art. IV, § 6 (1973); Silver v. Brown, 63 Cal. 2d 270 (1965). The California Constitution has since been amended in a manner that suggests more population flexibility for compliance with the Voting Rights Act. The governing standard states that “Senate [and] Assembly . . . districts shall have reasonably equal population with other districts for the same office [— the same “reasonably equal” standard articulated in Reinecke —], except where deviation is required to comply with the
This first *Gingles* condition requires not only that the minority group be numerous, but that it be sufficiently “geographically compact” to exercise power in a reasonable single-member district. The Supreme Court has not offered a “precise rule” defining compactness, but the concept essentially measures whether a group’s members live relatively close together, or whether they are relatively dispersed and far-flung. This is not an assessment based on Platonic geometry. The California Supreme Court has interpreted geographical compactness under the Voting Rights Act to have a strong “functional” component for electoral purposes: a minority population is more likely to be geographically compact when there is a potential sense of community. It is perhaps easier to recognize the absence than the presence of compactness: “a district would not be sufficiently compact if it was so spread out that there was no sense of community . . . or if it was so convoluted that there was no sense of community . . .” The U.S. Supreme Court has echoed this interpretation: “a district that combines two far-flung segments of a racial group with disparate interests” or one that “reaches out to grab small and apparently isolated minority communities” with little shared “political identity” is not reasonably compact for Section 2 purposes.

Moreover, though the assessment of compactness involves an assessment of shared political community, the appropriate analysis under the Voting Rights Act is not a search for the most powerful communities of interest in the abstract, or an inquiry into whether the members of the minority community share all of the same interests. Under the Voting Rights Act, decisionmakers are not permitted to follow the most strongly perceived communities of the area at the expense of a legitimate, reasonably proximate minority community with some shared interests. Rather, *Gingles* compactness is designed to test whether minority groups amounting to half of a district-sized population are so disparate, dispersed,
and far-flung that they share little other than race or ethnicity. If not, the first *Gingles* threshold condition has been satisfied.

2. *Gingles* threshold conditions two and three

The second *Gingles* threshold condition is that the minority group is politically cohesive; the third is that the majority votes sufficiently as a bloc to enable it “usually to defeat the minority’s preferred candidate.” Together, these conditions are generally known as “racially polarized voting”: the minority group generally prefers to vote as a bloc for one type of candidate, and the majority group generally prefers to vote as a bloc for a different type of candidate, and would generally defeat the minority’s preference. In such circumstances, the minority group would have little opportunity to elect representatives of its choice if the districts did not specifically protect minority political power.

Assessing the degree to which voting is racially polarized within a jurisdiction, and particularly in the area surrounding a sizable, reasonably compact minority population, is not a simple assessment of the partisan preferences of the majority and minority communities, nor is it based on majority and minority support in a few particularly prominent individual campaigns. Rather, courts have emphasized that the determination of polarization demands a “searching practical evaluation of the past and present reality and . . . a functional view of the political process” with respect to the real preferences of the minority community.

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37 In California, if two different minority populations in the same region vote as a politically cohesive bloc, they may together constitute a community protected by section 2. *See* Badillo v. City of Stockton, 956 F.2d 884, 890-91 (9th Cir. 1992); Skorepa v. City of Chula Vista, 723 F.Supp. 1384, 1390 (S.D. Cal. 1989) ("The Court does recognize that the minority group for a § 2 case may consist of members of two or more different minority groups."); cf. Romero v. City of Pomona, 883 F.2d 1418, 1423-24 (9th Cir. 1989) (assuming that Hispanic and African-American populations could together form a cognizable group for § 2 purposes if sufficiently sizable and cohesive, but finding lack of size and cohesion), overruled on other grounds by Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) (en banc).

By the same token, if two different racial or ethnic populations in the same region vote as a politically cohesive bloc, they may together constitute a majority serving to dilute the votes of a minority community protected by section 2. *See* Gomez v. City of Watsonville, 863 F.2d 1407, 1409, 1416-17 (9th Cir. 1988) (finding bloc voting among the non-Hispanic majority, including Anglo, Asian, and Black citizens).


Because of the secret ballot, it is not possible to determine racial or ethnic voting patterns by examining ballots themselves. And it is improper to assess the degree of polarized voting based on the ethnicity of a candidate alone, or based on overall election returns by city or county, because such assessments require broad-based and legally unsupported assumptions about individuals’ voting choices. Exit polling, if conducted reliably, may provide one indication of voting patterns based on voters’ race or ethnicity. But more frequently, the courts have endorsed a finely-grained analytical method based on actual election results. Essentially, analysts catalog the demographic makeup of a precinct and the sorts of candidates preferred by the precinct’s voters; aggregating many different precincts, over many different elections at various jurisdictional levels, begins to produce a portrait of the electorate’s preferences: whether minorities tend to band together behind certain types of candidates, and whether others tend to band together against those candidates. Sophisticated statistical techniques are used to assess whether the aggregate data reveal a legally significant pattern based on race or ethnicity.

This assessment of polarization depends primarily on the preferences of majority and minority voters, rather than the racial or language minority background of particular candidates. Sometimes, the minority voting community may coalesce around a minority candidate, but sometimes it will coalesce around a candidate who is not a minority. The most important lodestar for purposes of the Voting Rights Act is the degree to which the minority community regularly coalesces around a candidate (and the degree to which the majority community regularly coalesces around someone different), and not the racial or ethnic background of the candidates in question.

That said, a candidate’s race is not irrelevant to a polarization analysis. In determining minority cohesiveness — and particularly majority cohesiveness against the candidate preferred by the minority — all elections are not created equal. If the minority population prefers minority candidates, and the majority population prefers non-minority candidates,

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40 Gingles, 478 U.S. at 52-53.
42 Gingles, 478 U.S. at 67-68 (plurality); Ruiz v. City of Santa Maria, 160 F.3d 543, 551 (9th Cir. 1998); see also LULAC v. Perry, 548 U.S. 399, 423-24, 427, 439 (2006) (noting polarized Latino voting against a Latino candidate).
then elections pitting a minority candidate against a non-minority candidate will offer more probative evidence of the degree of polarization. In contrast, elections pitting non-minority candidates against each other, or elections evaluating ballot measures without substantial and widely understood racial connotation, may offer the voters fewer opportunities to express their true preferences — and thus their impact on determining overall levels of polarization within the electorate are likely to be less significant.

“The [Voting Rights] Act’s guarantee of equal opportunity is not met when . . . [c]andidates favored by [minorities] can win, but only if the candidates are white.”

Other factors may also render particular elections more or less probative when considering whether the relevant electorate is polarized in a manner usually leading to the minority-preferred candidate’s defeat. For example, courts will generally discount strong support for incumbents, which often persists despite otherwise pervasive polarization. In jurisdictions with a strong overall partisan preference, where the opportunity to elect candidates of choice is driven by success in a primary election, primary election results will be more probative than general election results, particularly when a candidate strongly preferred by the minority loses the primary election and a less-preferred candidate succeeds. And more recent elections will usually be more probative than more distant ones.

The degree of racial polarization that is sufficient to clear the Gingles threshold is not marked by a bright line, and will “vary from district to district.” Minorities must vote mostly as a bloc, and the majority must vote mostly as a bloc, and the minority community must, as a result, generally be unable to elect its candidate of choice outside of a district specifically tailored to grant that opportunity. The standard permits some crossover support in most elections, and substantial crossover support in

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45 Cano, 211 F.Supp.2d at 1236.
47 Gingles, 478 U.S. at 57, 60; Ruíz, 160 F.3d at 556. In contrast, strong minority support for a challenger against a non-minority incumbent, or strong non-minority voting against a minority incumbent, are more meaningful departures from the norm.
48 Ruíz, 160 F.3d at 552; NAACP v. City of Niagara Falls, 65 F.3d 1002, 1016-19 (2d Cir. 1995); Katz, supra note 43, at 668-69.
49 Ruíz, 160 F.3d at 555; Cano, 211 F.Supp.2d at 1239-40.
50 Gingles, 478 U.S. at 55-56.
isolated, anomalous elections; the focus, instead, is the overall pattern in the jurisdiction. “[I]n a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election.”

Similarly, the election of some minority-preferred candidates does not undermine a general finding that minority-preferred candidates are usually defeated by polarized voting in districts not specifically drawn to afford an effective opportunity to elect candidates of choice.

As seen above, this inquiry into the voting patterns of the second and third Gingles conditions must be thorough, nuanced, and broad-ranging, to assess whether a minority group usually supports candidates who are rarely supported by the majority, and whether the minority community would therefore usually lose absent concerted efforts to protect its political voice. It is no trivial task to determine the presence and degree of polarization.

3. “Totality of the circumstances”

If the three Gingles threshold conditions above have been established, the Voting Rights Act next requires an evaluation of the “totality of circumstances” to determine whether a redistricting plan, interacting with social and historical conditions, provides racial or language minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

Courts have consistently examined the “totality of circumstances” through the lens of factors listed in the Senate Judiciary Committee Report on the 1982 amendments to the Voting Rights Act that clarified the Act’s application to procedures with the effect of diluting minority voting power. These “Senate factors” are:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

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51 Gingles, 478 U.S. at 57, 75-76; Ruiz, 160 F.3d at 549-50.
52 Cano, 211 F.Supp.2d at 1237-38; see also LULAC v. Perry, 548 U.S. 399, 427 (2006).
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals; [and]
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.  

The Senate Report also specifically noted the probative value of evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group, and of an assessment that the policy underlying the jurisdiction’s use of the contested practice or structure is tenuous.  

The Senate factors above are helpful aids to determine whether, in the totality of circumstances, a minority group’s right to vote is abridged. They are neither comprehensive nor exclusive. And they are also not to be applied mechanically: vote dilution may still be established without the presence of one or more enumerated factors, or even without a majority of enumerated factors, or with factors present to differing degrees. They are meant merely as relevant considerations in conducting a searching practical and functional evaluation of equal access to the political process.  

In addition to the factors above, the Supreme Court requires an inquiry into whether the percentage of districts in which the minority population has the effective opportunity to elect candidates of choice is substantially proportional to the minority population’s share of the jurisdiction’s voting-

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55 Id.
56 Gingles, 478 U.S. at 45.
57 Id.
58 Id.
age population as a whole.\textsuperscript{59} While, like the Senate factors above, the proportionality inquiry is never itself dispositive, it is relevant in determining whether the minority group has less opportunity to elect representatives of choice. A minority group that controls a substantially disproportionate share of the jurisdiction’s districts is unlikely to have less opportunity than others to elect representatives of choice under the Voting Rights Act.\textsuperscript{60} In contrast, the fact that a minority group controls substantially fewer districts than its share of the jurisdiction’s eligible population would tend to bolster a finding of vote dilution.

4. Effective opportunity district

If, under the analysis described above, a jurisdiction has the obligation to draw one or more districts responsive to a minority community, any such district will comply with the Voting Rights Act only if it ensures that the minority group has an effective opportunity to elect candidates of choice.\textsuperscript{61} This is measured not by a single election, but by the ability of the minority group to control elections in the district in the usual course. The proportion of minority voters within a district necessary to yield a consistent effective opportunity to elect candidates of choice is not a number to be assessed in the abstract. In some cases, based on turnout or other considerations, a district may have to comprise more than 50\% minority voters to yield an effective opportunity district.\textsuperscript{62} In other cases, a district may be an effective opportunity district for the minority community with less than a majority of voters. Without a majority-minority district, however, the jurisdiction will have the responsibility to demonstrate that the district nevertheless provides the minority community with an effective pragmatic opportunity to elect candidates of choice. The courts have rejected reliance on rough generalizations about minority-voter percentages at which districts that are not majority-minority offer minority voters an effective opportunity to win elections.\textsuperscript{63} Instead, the same searching precinct-based statistical analysis described above, analyzing a series of

\textsuperscript{59} LULAC v. Perry, 548 U.S. 399, 426, 437 (2006); De Grandy, 512 U.S. at 1014.
\textsuperscript{60} Id.
\textsuperscript{61} See LULAC, 548 U.S. at 428-29 (tying the existence of a violation to efforts that “prevented the immediate success of the emergent Latino majority”).
\textsuperscript{62} Id. at 428 (acknowledging that “it may be possible for a citizen voting-age majority to lack real electoral opportunity,” but finding real opportunity in the challenged district at issue).
elections to deduce the overall patterns within the particular district in question, will be necessary to demonstrate that a district without a majority of minority voters nevertheless reliably offers that minority an effective opportunity to elect candidates of choice.

B. Section 5

Section 5 of the Voting Rights Act is distinct from section 2 in both its objective and its manner of operation. If section 2 is designed to prevent dilution of minority voting power from what it might otherwise be (given demographic and electoral realities on the ground), section 5 is designed to prevent dilution of minority voting power from what it has already been. That is, it is focused on preventing backsliding for gains that minority voters have already made.

1. Coverage for particular jurisdictions

While section 2 of the Voting Rights Act applies across the whole country, section 5 only applies to certain jurisdictions, where voting practices were of particular concern. A jurisdiction is covered 1) if it maintained a \textquoteleft\textquoteleft test or device\textquoteright\textquoteright as a prerequisite for voting on November 1, 1964, November 1, 1968, or November 1, 1972, and 2) if that the test was operating to depress voter participation, such that less than half of the voting-age population was registered to vote or voted in the presidential elections of 1964, 1968, or 1972.\footnote{42 U.S.C. § 1974b(b).} That is, the section applies to jurisdictions where a majority of the eligible electorate was not even participating in the democratic process.

Under this standard, nine states are wholly \textquoteleft\textquoteleft covered\textquoteright\textquoteright for purposes of section 5; portions — certain counties or towns — of seven other states are covered. Most of these states are in the deep South or southeast, but portions of Michigan, New Hampshire, New York, South Dakota are also covered. So are four California counties: Monterey and Yuba counties became covered based on participation rates in 1968, and Kings and Merced counties became covered based on participation rates in 1972.\footnote{28 C.F.R. pt. 51 app.} Coverage is not permanent: the Act itself requires Congress to \textquoteleft\textquoteleft reconsider\textquoteright\textquoteright the coverage formula in 2021, and in 2031, the coverage formula expires unless reauthorized before that date.\footnote{42 U.S.C. § 1973b(a)(7), (8).} Moreover, covered
jurisdictions are eligible to petition for “bailout”: a judgment issued by the U.S. District Court for the District of Columbia to jurisdictions that, within the prior ten years, have demonstrated improved behavior — including no liability under the Voting Rights Act, successful preclearance of all changes in voting practices without objection, and other “constructive efforts” to promote access to the political process.67 Such a judgment removes a jurisdiction from coverage for section 5 purposes. None of the four covered California counties had bailed out of coverage for the 2010 redistricting cycle.

2. Preclearance

Section 5 of the Voting Rights Act operates by means of a special procedure, reversing the normal presumption of legal validity for election-related changes in covered jurisdictions. Such jurisdictions may not implement any new prerequisite to voting, or standard, practice or procedure with respect to voting, that has not been “precleared” by one of two specific reviewing bodies: either the U.S. Department of Justice or a three-judge court of the U.S. District Court for the District of Columbia.68

Redistricting plans are included among the voting-related changes that must be precleared;69 any jurisdiction covered under section 5, in whole or in part, must therefore submit redistricting plans for preclearance.70 Because Kings, Merced, Monterey, and Yuba are covered for purposes of section 5, California must submit its statewide redistricting maps for preclearance, to ensure that the maps do not discriminate against minority voters in those counties. California’s Citizens Redistricting Commission submitted its plans for preclearance to the Department of Justice on November 16, 2011; the plans were precleared on January 17.71

A redistricting plan submitted under section 5 of the Voting Rights Act will be precleared if the jurisdiction can demonstrate that the plan “neither has the purpose nor will have the effect of denying or abridging the right to

67 Id. § 1973b(a)(1).
68 Specifically, a jurisdiction may petition the court for a declaratory judgment of preclearance (“judicial preclearance”) or may secure preclearance if, after submitting a voting-related change to the Department of Justice, the Department fails to object to preclearance within sixty days (“administrative preclearance”). 42 U.S.C. § 1973c(a).
vote on account of race or color” or membership in a defined language minority group, in the area covered by section 5.72

3. Discriminatory effect

There are two prongs to this inquiry: “purpose” and “effect.” The “effect” portion of section 5 is different from the “effect” portion of section 2, in part because section 5 focuses on the impact of a change in the election-related rules. In particular, the Supreme Court has ruled that the touchstone of section 5 is “retrogression”: whether a change diminishes the effective exercise of the electoral franchise for covered minorities within the jurisdiction, as compared to the ability that such minorities possessed before the implementation of the proposed change.73

In 2006, Congress amended section 5 of the Voting Rights Act, partially clarifying the conduct that constitutes retrogression.74 A procedure (including a redistricting plan) is impermissibly retrogressive, Congress explained, if it “will have the effect of diminishing the ability of citizens of the United States on account of race or color, or [membership in a language minority group] to elect their preferred candidates of choice.”75 This means that in any redistricting change subject to section 5, decisionmakers must at least prevent a decrease in minority citizens’ ability to elect preferred candidates in covered jurisdictions — or, put differently, that they must at least protect the tangible gains realized by minority voters in acquiring the ability to elect candidates within covered areas.76

The amendment’s language is written in one direction: it explains that a procedure diminishing the ability to elect will “abridge the right to vote” in violation of section 5.77 In context, this makes sense: before the amendments, the Supreme Court had allowed covered jurisdictions to trade minority citizens’ ability to elect candidates for their ability to influence elections (without the ability to drive results); Congress wanted to ensure

75 42 U.S.C. § 1973c(b). See also § 1973c(d) (explaining that the purpose of the amendment “is to protect the ability of such citizens to elect their preferred candidates of choice”). Professor Nate Persily examines at length the degree to which a “preferred” candidate of choice may be different from a candidate supported only reluctantly. Persily, supra note 21, at 225-27.
that jurisdictions could no longer diminish the ability to elect in order to achieve different objectives. But what the amendment does not say may also be important. The statute does not state that the only conduct deemed retrogressive is conduct that diminishes the ability to elect candidates of choice. For example, in a covered area where minority voters have the ability to elect candidates of choice, it is clear that that ability may not be diminished under section 5. But in a covered area where minority voters do not have the ability to elect candidates of choice, it may also constitute impermissible retrogression under section 5 for a redistricting plan to dilute the influence of the minority group, thereby abridging their effective exercise of the electoral franchise.

In part, the above uncertainty is caused by the fact that these 2006 amendments have not yet seen a full redistricting cycle; the first wave of judicial preclearance submissions is still underway, with relatively few detailed explorations of the revised retrogression standard. That said, a few lower courts have had occasion to construe section 5, as amended. And the Department of Justice has recently incorporated the 2006 amendments

78 See Georgia v. Ashcroft, 539 U.S. 461 (2003); VRARA § 2(b)(6); H.R. REP. NO. 109-478, at 65, 68-72 (2006). The House Judiciary Committee Report is considered the more authoritative source of legislative history for the 2006 amendments; because the Senate Judiciary Committee’s Report was not released until six days after the full Senate had passed the bill reauthorizing and amending the Voting Rights Act, with sharp partisan disagreement over the meaning of a provision that passed with unanimous support, its reliability as legislative history has been questioned. See, e.g., Texas v. United States, No. 11-1303, 2011 WL 6440006, at *18 n.30 (D.D.C. Dec. 22, 2011) (“[T]he Senate Report [to the 2006 Amendments] carries little weight as a piece of legislative history or evidence of legislative intent.”); Persily, supra note 21, at 185-92.

79 Similarly, § 1973c(d) explains that the amendment “protect[s] the ability of . . . citizens to elect their preferred candidates of choice,” but does not say that it only protects an ability to elect.

80 The relevant legislative history does little to resolve the ambiguity. Most relevant discussion was focused on correcting the construction advanced by Georgia v. Ashcroft, for districts where minorities do have the ability to elect, leaving some question about other areas of covered jurisdictions. And there are statements in the record that might each be seen to advance a different conclusion with respect to this question. Compare, e.g., H.R. REP. NO. 109-478, at 65 (2006) (explaining the need to amend the “effect” prong to “clarify the types of conduct that Section 5 was intended to prevent, including those techniques that diminish the ability of the minority group to elect their preferred candidates of choice”) (emphasis added), with id. at 70-71 (“in making preclearance determinations under Section 5, the comparative ‘ability [of the minority community] to elect preferred candidates of choice’ is the relevant factor to be evaluated when determining whether a voting change has a retrogressive effect”) (emphasis added).

into formally promulgated regulations, which are traditionally afforded “substantial deference” by the courts.

From these sources, it is possible to glean a few more details about the substantive section 5 standard. As with other portions of the Voting Rights Act, assessing the relevant impact of a change is a nuanced inquiry, dependent on a broad range of pragmatic factors that impact electoral success. The demographic composition of a district is unquestionably important in determining whether minority citizens have the ability to elect candidates of choice. But that ability — and determining whether that ability is preserved, enhanced, or diminished, or whether minority rights are otherwise abridged by a change — is not merely a product of a district’s percentage of minority voting-age citizens. Instead, a minority group’s practical electoral power, including its ability to elect candidates of choice, ultimately depends on a more robust contextual analysis of electoral behavior in the area in question, including comparative levels of voter registration and turnout, and levels of polarization. For example, drawing districts that preserve the same proportions of eligible minority voters, but that dramatically change the character of that electorate, may well decrease the minority group’s ability to elect candidates of choice.

In this context, it is important to note that neither a minority group’s ability to elect candidates of choice, nor protections the group is otherwise granted against an abridgment of power to influence elections, depend — as section 2 does — on showing that a particular minority group or groups comprises more than 50% of a district-sized population, either in the old districts or the proposed new ones. For example, section 5 protects a minority group’s ability to elect candidates where it is able to do so entirely on its own. But it also protects a minority group’s ability to elect candidates where “one group of minority voters joins together with voters of a different racial or language background to elect the minority voters’ candidate of choice.” The latter circumstances are generally known as

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84 Cf. LULAC v. Perry, 548 U.S. 399, 428 (2006) (acknowledging, in the section 2 context, that “it may be possible for a citizen voting-age majority to lack real electoral opportunity”).
85 Texas, 2011 WL 6440006, at *6-8; Persily, supra note 21, at 242-43.
86 See Persily, supra note 21, at 243.
“crossover” districts (where minorities combine with some majority voters to elect the candidates of their choice) or “coalition” districts (where minorities combine with other minority voters to elect the candidates of their choice). In such combination districts, if the minority group has the ability to elect the candidates of its choice in crossover or coalition districts, section 5 prevents a jurisdiction from decreasing that ability in a new proposed plan.

4. Discriminatory purpose

Section 5 also prohibits election changes undertaken with the purpose of discriminating against a racial or language minority. This “purpose” prong was also amended in 2006, and to understand the amendment, it is useful to understand the case to which it reacted.

In *Reno v. Bossier Parish School Board (Bossier Parish II)*, the Supreme Court held that section 5 “does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.” That is, the Court found that section 5 prohibited preclearance based on the purpose of a redistricting plan, but only for plans intended to reduce minorities’ ability to elect candidates of choice. In the Court’s construction, section 5 did not prohibit plans intentionally designed to limit the effective political power of minorities who had not previously had the ability to elect candidates of choice.

*Bossier Parish II* drew ample critique from commentators, and then from Congress. The 2006 amendments clarified that the term “purpose” in section 5 “shall include any discriminatory purpose,” retrogressive or not.

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89 Id. at 341.
90 Consider, in this context, Georgia’s 1981 congressional redistricting plan, which retained nine of ten majority-white districts. In the remaining district, to avoid retrogressive effect, the plan architects mildly increased the percentage of African-American voting-age population to 52%, while retaining a substantial Anglo majority of registered voters. Busbee v. Smith, 549 F.Supp. 495, 498-99 (D.D.C. 1982). The chair of Georgia’s House redistricting committee (and reputed architect of the plan) was quoted as explaining, “I don’t want to draw nigger districts.” Id. at 501.
And Congress made clear that discriminatory purpose is susceptible to proof via a broad range of evidence, circumstantial and direct.93

What it means to act with a discriminatory purpose is often misunderstood. One need not hold animus toward a particular racial or language minority group in order to intentionally discriminate against them. As then-Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit explained,

The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don’t matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.94

Thus, any drawing of districts intended to limit minorities’ effective exercise of the franchise, whether borne of animus or not, will violate the “purpose” prong of section 5.

C. Constitutional Limits

The above detail is important to the work of a citizens’ commission, because a redistricting plan that does not meet the statutory standard is unlawful — and for section 5 purposes, if it is uncertain whether the standard is met, the plan may not be implemented.95 The detail is also important because there may be constitutional limits on overcorrecting.


94 Garza v. Cnty. of Los Angeles, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

In a line of cases beginning in the 1990s, the Supreme Court established that when race or ethnicity is the “predominant factor” motivating the decision to draw a district, that decision is subject to enhanced constitutional scrutiny. That is, when other considerations have been entirely subordinated to racial considerations that are “dominant and controlling” — when a district is “unexplainable on grounds other than race” — the constitution demands a particularly good reason for the predominance of race.

This constitutional limitation is also much misunderstood. Even if race or ethnicity is the “predominant factor” motivating the decision to draw a district, that does not render the districting decision unconstitutional. Instead, such decisions must be evaluated under “strict scrutiny”: the decision must be “narrowly tailored to achieve a compelling interest.”

Though the Supreme Court has never ruled directly on the question, it has strongly suggested (and several Justices have outright stated) that drawing districts in order to comply with the Voting Rights Act is a constitutionally permissible — and therefore legally required — reason to draw districts based predominantly on race or ethnicity. So if the district is required by the Voting Rights Act, it ought to be constitutional as well, even if the

934, 941-42 (2012) (permitting courts to incorporate the policy choices of a covered jurisdiction’s unprecleared redistricting plan only if there is no “reasonable probability” that the plan will be denied preclearance or if a section 5 challenge is “insubstantial”); cf. Goosby v. Osser, 409 U.S. 512, 518 (1973) (“[‘I’]nsubstantiality’ has been equated with such concepts as ‘essentially fictitious,’ ‘wholly insubstantial,’ ‘obviously frivolous,’ and ‘obviously without merit[.] . . . A claim is insubstantial only if ‘its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.’”) (internal quotations omitted).


98 Miller, 515 U.S. at 920.

jurisdiction’s efforts to comply with the Act mean that the predominant reason for the district is race or ethnicity.

If, however, districts are unexplainable on grounds other than race where they are not required by the Voting Rights Act, those districts are likely to be constitutionally problematic. This does not mean that all consideration of race is forbidden except where required by the Voting Rights Act: accounting for race or ethnicity as factors among many others is permissible. That is, drawing districts while cognizant of the racial impact — indeed, even drawing districts because of the racial impact — does not provoke special constitutional scrutiny if the lines are also drawn as they are for other legitimate reasons, equally weighted. And so, overcorrecting — drawing districts with the intent to satisfy the Voting Rights Act, even when such districts are not actually required by the Act — is not constitutionally troublesome when other factors are equally in the mix. Many line-drawers adopt such an approach as standard practice. Still, because there may be circumstances when the Voting Rights Act demands that race or ethnicity take first priority, it is essential to understand the bounds of those requirements, because overstepping those bounds can in the wrong circumstances also lead to legal trouble.

II. CREATING THE CONDITIONS FOR COMPLIANCE

The above summary of the substance of the Voting Rights Act implies best practices for the process of attempting to comply with its mandates. Compliance cannot be guaranteed based on off-the-cuff guesses about the size and location of racial or ethnic minority groups, or anecdotal assessments about what has in the past or might in the future best serve the electoral interests of such groups. For both section 2 and section 5, the best practice involves the thorough collection and nuanced analysis of data.

A. Section 2

For purposes of section 2, demographics provide the most efficient starting point. In order to determine whether there are minority groups that satisfy the first Gingles condition, it will be necessary to look for sizable minority populations in reasonably compact areas. Line-drawers then have to further examine whether, carving out a district-sized territory, minorities constitute at least half of the voting-age citizens. There are many

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100 Miller, 515 U.S. at 916; id. at 928-29 (O’Connor, concurring); Cano, 211 F.Supp.2d at 1220.
techniques to conduct this analysis, and several software packages to assist the process; most involve visual geographic display of underlying population data, and an iterative approach to testing the minority proportion of the electorate within different mock-district configurations. Those configurations can involve as much art as science, especially in the assessment of whether a minority group is sufficiently compact to satisfy the first *Gingles* condition, since the inquiry is not intended to approach a compact ideal, but rather to screen out egregiously non-compact agglomerations of isolated minority groups with little else in common.

Most of the data required for this step is derived from the Census Bureau. Specifically, the decennial Census — the attempt, every ten years, to tally each individual in the United States — provides a population count by age, race, and ethnicity, for one point in time.

This Census does not, however, provide citizenship information: that information is collected by the Census Bureau via a rolling survey known as the American Community Survey, which provides periodic estimates of citizen voting-age population (“CVAP”). This survey is conducted over several years, using different geographic units — different blocks of territory, at different scale — from those used in the decennial census. Though ACS data may be used “as is” to arrive at initial guesstimates about the areas most likely to meet the first *Gingles* condition, the data must eventually be translated to ensure (greater) precision — and even when translated, it contains some known errors likely to affect the redistricting process. Still, it is the best available underlying data concerning CVAP. In California, the California Statewide Database, housed at Berkeley Law, attempts to undertake what translation it can, as a nonpartisan public service.

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101 For a good overview of the forms of data used in the redistricting process, see generally Kenneth F. McCue, Creating California’s Official Redistricting Database (Aug. 2011), http://swdb.berkeley.edu/d10/Creating%20CA%20Official%20Redistricting%20Database.pdf.

102 *See U.S. CONST.* art. I, § 2.

103 The American Community Survey also collects a variety of other demographic and socioeconomic data, including estimates of population by age, race, and ethnicity less precise (and over a different time period) than the counts produced by the decennial Census.


105 *See* Information About the Statewide Database, http://swdb.berkeley.edu/about.html.
Guaranteeing compliance with section 2 also requires the collection and evaluation of political data, to assess polarization under the second and third Gingles conditions. As explained above, this data gets quite granular quite quickly: in order to know whether different racial or ethnic groups within a given area (alone or in combination) tend to prefer different types of candidates, and to what degree, it is necessary to statistically analyze precinct-by-precinct returns for different elections over time, at multiple levels of government serving the area, prioritizing certain races and giving less weight to others. The sheer volume of this data means that line-drawers usually first look for minority populations that satisfy the first Gingles condition, in order to narrow the pool of electoral data to process.

At present, this data is not available from a single source. In California, the Statewide Database collects (and attempts to translate to consistent geographic units) precinct-based election reports for certain races: general and primary elections for statewide offices and ballot measures, and general elections for state legislative and congressional seats.\(^{106}\) It has not, however, processed the data to determine patterns of racial or ethnic polarization. (Given that the relevant analysis will differ based on the scale of each potential district, it is not possible to conduct such analysis in the abstract, without first identifying the geography to be analyzed.) Nor has the Statewide Database collected state legislative or congressional primary results, or results from local elections, all of which may — depending on the area — be more relevant to determining the degree of polarization in a proposed district than votes on statewide measures.\(^{107}\) These election results, at present, must normally be collected individually from the local election registrars.

Moreover, in order to weight the various elections in an area according to their relevance in assessing polarization, analysts must determine the race, ethnicity, and incumbency status of the various candidates in each race. In California, no single source appears to collect this information statewide.

Finally, ensuring section 2 compliance requires an assessment of the “totality of the circumstances” facing racial, ethnic, and language

\(^{106}\) See McCue, supra note 101, at 2, 7, 29-32.

\(^{107}\) Frequently Ask [sic] Questions, http://swdb.berkeley.edu/faq.html. In the past, local results may have been particularly important in compensating for the large rate of absentee ballots, which were tallied in precincts unrelated to geography in some of the most heavily minority counties of the state, with a potential to skew polarization analyses for areas smaller than a county. See McCue, supra note 101, at 7. In 2008, California legal requirements changed, to require absentee ballots to be tallied in connection with the voters’ appropriate geographic precincts. Id.
minorities. Here too, the available data will depend greatly on the jurisdiction. Minority voters have faced historical discrimination within California to different degrees and in different forms, and different minority groups show different lingering effects of that discrimination. Comparative turnout and registration statistics, and the comparative presence of minority elected officials in the area outside of districts drawn specifically to ensure an opportunity for minority control, may reveal or dispel concerns about the political legacy of past (or present) discrimination. The Statewide Database collects (and attempts to translate) turnout and registration figures; nonpartisan civil rights groups affiliated with the largest minority communities in California collect lists of elected officials who consider themselves members of each minority group.

B. Section 5

Much of the data listed above will also be useful for ensuring compliance with section 5. Assessing minority voters’ exercise of the franchise in California’s covered jurisdictions requires, first, a pragmatic examination of the “benchmark”: the degree to which minority voters were able to exercise political power in each of the old districts containing all or part of Kings, Merced, Monterey, and Yuba counties. As described above, this is a nuanced and pragmatic assessment, including not merely demographic data, but also registration, turnout, and polarization calculations, along with an evaluation of minority voters’ past success in electing candidates of choice in the area. This data can be gleaned from all of the same sources mentioned above.

The best practice is to then gather the same data for areas of proposed change. Even if, for example, a proposed district moves 20,000 Latino voters out of the district at the same time that it includes 20,000 Latino voters who are new to the district, if there are dramatic differences in the turnout of those two groups, the proposed change may very well impact the practical ability of the minority group as a whole to elect candidates of choice. In a pragmatic evaluation of minority groups’ ability to effectively exercise the franchise, these distinctions matter.

Relative to ensuring the absence of discriminatory effect, ensuring the absence of discriminatory purpose is more straightforward. The best way for decisionmakers to ensure that a plan is not designed to discriminate against minority groups is for line-drawers to not intend to discriminate against minority groups.

108 See 28 C.F.R. § 51.28(a), (d).
Still, because those who intentionally discriminate rarely announce their intentions, the Department of Justice looks at a wide array of circumstantial evidence in order to ensure the absence of such an intent. And this means that best practice for line-drawers involves not only engaging in redistricting with proper motives, but also designing the process to demonstrate this purity. Since the Department of Justice examines whether changes are supported by reasonable and legitimate justifications, best practice is to explain the justifications for districts drawn within covered areas. Since the Department examines whether racial and language minority groups had an opportunity to participate in the redistricting process and whether their expressed concerns were taken into account, best practice is to ensure that such groups have such an opportunity to participate, and to carefully consider their concerns.\footnote{See, e.g., supra note 93.}

Setting out to collect the appropriate data and procedural inputs does not guarantee compliance at the end of the day; conversely, a map may end up legally compliant even if it is not informed by the right inputs. But a well-designed process will best promote the chances of compliance, by ensuring that those drawing the lines understand the available options and constraints.

III. THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION

As with the Voting Rights Act, the California Citizens Redistricting Commission was designed with great attention to detail. There are inevitable benefits and detriments to imbuing a citizens’ body with control of the redistricting process;\footnote{Justin Levitt, \textit{Novel (and Not-so-Novel) Alternatives to Legislative Redistricting}, in \textit{AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS} 75, 85-91 (Benjamin E. Griffith ed., 2d ed. 2012).} the California Commission seemed to capture some of these effects (good and bad) and avoid others (likewise).\footnote{\textit{Id.} at 91-93.} The remainder of this Part focuses specifically on the efficacy of this layperson entity’s efforts to comply with the remarkable nuance and complexity of the Voting Rights Act.

\textbf{A. Qualifications}

Assessing whether the California Commission’s process was well designed to comply with the Voting Rights Act must begin with the Commissioners themselves. Overall, the Commission appointees seemed
well chosen for the task. All Commissioners were both accomplished and skilled, including several with specific training in legal interpretation and/or data analysis.

Moreover, several Commissioners had experience particularly relevant to the proper application of the Voting Rights Act. Commissioner Angelo Ancheta was a constitutional law and voting rights scholar at Santa Clara University School of Law, including coursework on the Voting Rights Act; in the 1990 redistricting process, he represented the Coalition for Asian Pacific Americans for Fair Reapportionment, including representation at statewide legal hearings. 112 Commissioner Vincent Barabba was the former director of the U.S. Census Bureau, with responsibility for the conduct of the 1980 Census, and intimate familiarity with the data provided. 113 Commissioner Maria Blanco was the National Counsel at MALDEF for the 2000 redistricting cycle, and had also served as the Executive Director of the Warren Institute at Berkeley and the Executive Director of the Lawyers’ Committee for Civil Rights of the Bay Area; all three organizations are deeply immersed in the redistricting process. 114 And in 1981, Commissioner Gil Ontai volunteered for a committee helping to conduct municipal redistricting for San Diego, including ensuring compliance with the Voting Rights Act. 115

This expertise — and the analytical capacity and intellectual engagement of the other Commissioners — was apparent through the redistricting process of the 2010 cycle. For example, the Commissioners evaluated, selected, and retained consultants with substantial expertise — including Q2 Data and Research, to assist with data collection and line drawing; Dr. Matt Barreto, to assist with racially polarized voting analysis; and Gibson, Dunn & Crutcher, to fill the specific state legal requirement of at least one attorney to the commission who “has demonstrated extensive experience and expertise in implementation and enforcement of the federal Voting Rights Act of 1965.” 116 Yet the Commissioners did not defer blindly to their consultants, including legal counsel. When the Commissioners were formulating their general approach to working with

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116 CAL. GOV’T CODE § 8253(a)(5).
VRA counsel, they discussed the relevant issues at a probing and nuanced level of detail;\footnote{Transcript at 141-43, 206-12, Legal Advisory Comm., Citizens Redistricting Comm’n (Mar. 15, 2011); see generally Transcript, Legal Advisory Comm., Citizens Redistricting Comm’n (Mar. 17, 2011). Transcripts of the Citizens Redistricting Commission are located at Citizens Redistricting Comm’n, Meeting Transcripts, http://wedrawthelines.ca.gov/transcripts.html.} the same is true of their approach to working with the technical line-drawing consultants.\footnote{Transcript at 66-76, Legal Advisory Comm., Citizens Redistricting Comm’n (Mar. 24, 2011).} And with respect to particular pieces of advice relating to the Voting Rights Act, many of the Commissioners offered exceedingly sophisticated pushback, testing with precision not only the definitions of various terms and the reliability of various data, but also the degree of ambiguity inherent in the law, and the extent to which their consultants’ advice revealed preferences but not requirements.\footnote{For examples of pushback to legal counsel, see, e.g., Transcript at 41-44, 63-65, 92-93, Citizens Redistricting Comm’n (Apr. 28, 2011); Transcript at 7-11, Citizens Redistricting Comm’n (May 1, 2011); Transcript at 34-36, 44-45, 72, 79-80, 255, Citizens Redistricting Comm’n (May 27, 2011); Transcript at 26-27, Citizens Redistricting Comm’n (June 1, 2011); Transcript at 26-29, 84-85, Citizens Redistricting Comm’n (June 16, 2011); Transcript at 210-11, Citizens Redistricting Comm’n (June 24, 2011). For an example of pushback to the line-drawers, see, e.g., Transcript at 197-202, Citizens Redistricting Comm’n (July 3, 2011).} They also showed a thorough understanding of the inherently nondeterminative nature of legal advice and its relationship to litigation and other risk; those Commissioners who were not themselves attorneys proved to be quite sophisticated consumers of legal advice.\footnote{Transcript at 115-16, Citizens Redistricting Comm’n (June 9, 2011); Transcript at 210-11, Citizens Redistricting Comm’n (June 24, 2011); Transcript at 47-50, Citizens Redistricting Comm’n (July 14, 2011).} Such pushback is evidence that the Commissioners retained control of the process throughout, rather than deferring overly to staff.

\textbf{B. Training}

That said, even Commissioners well-versed in other applications of the Voting Rights Act would have benefited from earlier training in the nuances of the VRA as applied to the task ahead. The scale and scope of a statewide redistricting, the limitations and gaps of the readily available data, and the interaction of the VRA with other criteria required by state law all presented novel challenges to this first Commission; specific training to assist Commissioners in understanding not only the law but its
ramifications for the process ahead would have been invaluable. This training was, unfortunately, long deferred.

Early in their tenure, Commissioners and staff recognized the need for such training, and quickly. On January 20, Counsel for the Secretary of State mentioned that “maybe one of the things we could do, sometime fairly soon, is have the AG come and talk to us about pre-clearance.” The next day, in the context of a “more in-depth review” of the Voting Rights Act, Commissioners mentioned that several organizations with expertise had offered “to do that kind of training about the Voting Rights Act, which I think is important that we get a lot of that thinking early on, since we all agree we need to deal with the pre-clearance issue first.” On February 10 and 11, there was further discussion of the need for “more [VRA] training rather than less, and start[ing] earlier, rather than later.”

That first formal training finally occurred on March 24, with a presentation by Ana Henderson, of the Warren Institute at Berkeley. The brief overview was designed to review the Act’s legal requirements, which is entirely appropriate. But it did not suggest how the Commission should structure its work so as to ensure compliance — neither the data the Commission should seek, nor the process it should pursue. The first hints of such advice had to wait for the Commission’s VRA counsel, in a training more than a month later, on April 28. That is, the Commission got its first formal sense of how it should go about ensuring VRA compliance only on the eve of May 2011, with final districts due just over three months later.

121 Transcript at 170, Citizens Redistricting Comm’n (Jan. 20, 2011) (emphasis added).
122 Transcript at 21, Citizens Redistricting Comm’n (Jan. 21, 2011).
123 Id. at 19.
124 Transcript at 41, 53, Legal Committee Meeting, Citizens Redistricting Comm’n (Feb. 10, 2011); Transcript at 396-98, 407-08, Citizens Redistricting Comm’n (Feb. 11, 2011); Transcript at 130, Citizens Redistricting Comm’n (Feb. 24, 2011).
127 CAL. CONST. art. XXI, § 2(g). There appear to be several reasons for the delay. Some were logistical; the Commission almost had an initial training on February 25, but the preferred presenter was unavailable. Transcript at 276, Citizens Redistricting Comm’n (Feb. 24, 2011). Some were based on triage: the discussion about hiring VRA counsel appeared to take up all of the available VRA oxygen, with the hope that counsel would facilitate training; unfortunately, the time required to hire counsel meant that training was also delayed. And some may have been based on a concern that choosing a VRA trainer risked the perception of a politicized choice among various interest groups, which made
C. Data

The delayed training may have contributed to a delay in acquiring data — including, most prominently, data regarding racially polarized voting.

The basic building blocks of the Commission’s primary Voting Rights Act dataset were being compiled and translated as the Commission was being formed. The Census Bureau’s American Community Survey covering 2005-2009 — the last population survey before the decennial Census — was released on December 14, 2010. A special compilation of ACS data covering citizen voting-age population was released on February 11, 2011. Despite the recognized imprecision of these figures, they provided the best available means to identify substantial minority populations until decennial Census data were delivered on March 8, 2011. And even after the Census data arrived, ACS data would remain the most accurate approximation of citizenship, crucial to application of the Voting Rights Act.

Yet despite Commissioner inquiries into the opportunity to get “preliminary and approximate data” from the Statewide Database as early as January 26, it is not clear that these initial datasets were available to the Commission — or used by consultants to preliminarily identify target populations — until the “full” dataset was made available in April.

1. Racially polarized voting data

deferral of the decision a more palatable alternative. Transcript at 26, Citizens Redistricting Comm’n (Jan. 21, 2011).


130 See supra text accompanying note 104 and note 104.


132 Transcript at 125, Citizens Redistricting Comm’n (Jan. 26, 2011).

133 Transcript at 26, Citizens Redistricting Comm’n (Mar. 24, 2011); cf. Transcript at 572, Citizens Redistricting Comm’n (Feb. 11, 2011) (asserting that without “complete” data, “[y]ou can start drawing; you just cannot start drawing any districts with Voting Rights Act concerns. So basically Section 5 counties and then anything Section 2, you would have to wait until you have the entire data set together.”).
Racial polarization data was even further behind. Recall that election data is required to assess whether voting in a particular area is polarized, such that populations of racial and language minorities might not have an equal opportunity to elect candidates of choice without districts drawn in race- or ethnicity-conscious fashion. Local election data, and analysis of that data to assess the prevalence of racial polarization, is therefore crucial to evaluating both an obligation under section 2 of the Voting Rights Act (in the second and third Gingles factors) and an obligation under section 5 of the Voting Rights Act (in assessing an “ability to elect”).

The Commissioners understood that they would have to acquire this information from sources outside of the Census submission. And though the Statewide Database was collecting some statewide voting data for use in polarization studies, it was not providing the most probative information: data from legislative primaries for the districts in question (which is exceedingly probative in a state with polarized partisan pockets, like California) or from local elections. The Database would also not be providing the polarization analysis itself.

The Commissioners also seemed to understand that they should begin gathering and analyzing this data quickly — “day one.” Commissioner Ancheta recognized, and expressed, the need as early as February 10, and repeated his concerns through the next three months.

The Commission finally began assembling a formal request for a racially polarized voting consultant on April 27; after an extended back-and-forth with procurement personnel, staff were still adjusting the invitation for bid on June 2. The Commission approved the hiring of Dr. Matt Barreto on June 9, and he was at work by June 16, even before

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134 See supra text accompanying notes 38-52, 106-107.
135 See supra text accompanying notes 75-76, 85-87, 108.
136 Transcript at 55-56, Citizens Redistricting Comm’n (Feb. 25, 2011).
137 Transcript at 20-21, 24-25, Citizens Redistricting Comm’n (Mar. 24, 2011).
138 Id.
139 Transcript at 131, Citizens Redistricting Comm’n (Feb. 25, 2011).
140 Transcript at 51-52, Legal Committee Meeting, Citizens Redistricting Comm’n (Feb. 10, 2011); Transcript at 399-400, Citizens Redistricting Comm’n (Feb. 11, 2011); Transcript at 12-13, 30-31, Technical Advisory Comm., Citizens Redistricting Comm’n (Feb. 23, 2011); Transcript at 206-07, Citizens Redistricting Comm’n (Mar. 24, 2011); Transcript at 11-12, Citizens Redistricting Comm’n (Apr. 8, 2011).
141 Transcript at 150-, Citizens Redistricting Comm’n (Apr. 27, 2011); Transcript at 52-53, Citizens Redistricting Comm’n (June 2, 2011).
the contract was completely finalized. But the exceptionally late start meant that the Commission was able to incorporate input from the research only exceptionally late in the process, after many preliminary decisions had already been made. It was June 24 before the Commission was able to start getting hints of the results of the analysis, and June 29 before counsel was able to advise definitively that certain areas of the state required drawing districts specifically to meet the demands of the Voting Rights Act. It was July 13 before the results in Los Angeles, for example, were formalized. Just 16 days remained in the map-drawing process.

It could have been worse. The Commission averted disaster by rejecting the suggestion that their technical consultant specifically avoid collecting local voting data, which would have seriously hampered any effort at compliance. The Commission also solicited, and received, some proxies for full racially polarized voting studies, in the form of input from the community: in May and June, for example, several organizations testified about the lack of polarized voting against African-Americans in Los Angeles. Still, this community testimony was only a proxy for more comprehensive analysis, and only for limited portions of the state. And the delayed acquisition of racially polarized voting analysis may have led to unnecessary difficulties.

2. Difficulties caused by late and limited election data

For example, the absence of election data likely shaped VRA counsel’s overall approach to drawing compliant districts. Recall that the predominant use of race or ethnicity invites heightened constitutional scrutiny. If a district is drawn based on race or ethnicity in order to comply with the Voting Rights Act, it likely meets constitutional muster; if, however, a district is drawn predominantly based on race or ethnicity where the Voting Rights Act does not require the district in question, it is

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142 Transcript at 69-71, Citizens Redistricting Comm’n (June 9, 2011); Transcript at 130, Citizens Redistricting Comm’n (June 16, 2011).
143 Transcript at 18-19, Citizens Redistricting Comm’n (June 29, 2011); Consolidated Preliminary Opposition to Petitions for Writ of Mandamus or Prohibition app. 405, 411-12 (vol. 3), Vandermost v. Bowen, Nos. S196493, 196852 (Cal. Oct. 11, 2011).
145 Consolidated Preliminary Opposition to Petitions for Writ of Mandamus or Prohibition app. 121 (vol. 1), Vandermost v. Bowen, Nos. S196493, 196852 (Cal. Oct. 11, 2011) (Black Farmers and Agriculturalist Association); id. 138 & nn. 6, 9 (vol. 2) (African American Redistricting Collaborative); id. at 186-88 (vol. 2) (NAACP); id. at 235 n.11 (vol. 2) (several organizations).
constitutionally vulnerable.\textsuperscript{146} It may be possible to avoid the conflict by identifying large minority populations that might be protected under the Voting Rights Act, and determining whether (remaining cognizant of race but not allowing race to predominate) the use of non-racial criteria affords the population in question the effective opportunity to elect candidates of choice. In the happy coincidence where other criteria preserve the effective voting rights of minority populations, districts will satisfy the Voting Rights Act without exposure to constitutional challenge.

However, nonracial redistricting criteria will not always clearly preserve a minority population’s ability to effectively exercise the franchise. Preserving a particular community or city boundary, for example, may operate to reduce or overpack minority population voting strength. In such circumstances, there is no legally “conservative” course of action. Drawing primarily based on race or ethnicity risks a legal challenge if there is no obligation under the Voting Rights Act; drawing primarily based on other criteria risks a legal challenge if there is an obligation under the Voting Rights Act. And the only way to know whether there is an obligation under the Voting Rights Act is to assess the extent of racially polarized voting.

The absence of this information made the Commission’s task considerably more difficult. For example, on May 28, the Commission realized that there might be a conflict between their other redistricting criteria and the potential obligation to draw districts under the Voting Rights Act for the African-American community of Los Angeles.\textsuperscript{147} It understood that it would need racially polarized voting analysis in order to determine whether the conflict actually existed … but an analyst was still weeks away from starting work. (Ultimately, the Commission determined that voting in Los Angeles was not polarized against the African-American electorate, creating no obligation under the Voting Rights Act.)

More generally, the Commission turned relatively frequently to legal counsel, to assess compliance with the Voting Rights Act. When districts drawn pursuant to other criteria looked like they might not fully effectuate the voting power of minority communities, however, in the absence of local electoral information, counsel had no way of knowing whether the districts were legally suspect or not.\textsuperscript{148}

\begin{itemize}
\item\textsuperscript{146} See supra text accompanying notes 99-100.
\item\textsuperscript{147} Transcript at 38-39, 43, Citizens Redistricting Comm’n (May 28, 2011).
\item\textsuperscript{148} Transcript at 115-116, Citizens Redistricting Comm’n (May 20, 2011); Transcript at 45-49, 61-64, Citizens Redistricting Comm’n (May 28, 2011).
\end{itemize}
In the absence of electoral data, counsel chose to advise that districts with large minority populations be drawn based on criteria other than the Voting Rights Act whenever possible, while still paying close attention to the relative percentage of the minority population. These districts would then be tweaked, if necessary, only once the data established a Voting Rights Act obligation. This recommendation is similar to the procedure recently mandated by the Alaska Supreme Court for its state redistricting, which is also conducted by an independent citizens’ body.

In theory, a redistricting body starting with other criteria and adjusting later for Voting Rights Act compliance should arrive at the same place as one starting with districts driven by Voting Rights Act compliance and building the remainder of the jurisdiction using other criteria. However, these two approaches yield equivalent results only if the drafters are highly attuned to Voting Rights Act obligations (and armed with the data necessary to recognize when those obligations are triggered) quite early in the process, before other district lines become legally or psychologically “set.” Otherwise, drafters may become overly attached to initial drafts that

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149 Gibson Dunn Presentation, supra note 126, tab A, at 4; Transcript at 54, 67-69, Citizens Redistricting Comm’n (Apr. 28, 2011); Transcript at 82-85, Citizens Redistricting Comm’n (May 28, 2011).

Though the strategy presented in the text reflects the thrust of counsel’s advice overall, on several occasions, counsel’s advice was ambiguous about whether they would ever recommend districts drawn for Voting Rights Act purposes that deviated from lower-ranked state constitutional criteria. Compare Transcript at 67-68, 110, Citizens Redistricting Comm’n (Apr. 28, 2011), with id. at 108. See also Video, Video Archive: April 28, 2011 — Los Angeles, Feed Three (video at 8:20-8:55) (Citizens Redistricting Comm’n 2011), http://wedrawthelines.ca.gov/video-archive-april-28-2011-los-angeles.html; STATE OF CAL., CITIZENS REDISTRICTING COMM’N, FINAL REPORT ON 2011 REDISTRICTING 13 (Aug. 15, 2011), http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf (stating that “the Commission’s map-drawing process relied on race-neutral, traditional redistricting criteria as its primary focus in crafting district lines, even in areas where the Voting Rights Act required the creation of a majority-minority district.”) (emphasis added).

150 Under the Alaska Supreme Court’s required procedure, “[t]he [redistricting] Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize [Alaska constitutional] requirements when minimization is the only means available to satisfy Voting Rights Act requirements.” Hickel v. Southeast Conference, 846 P.2d 38, 51 n.22 (Alaska 1992). In 2012, when the Alaska redistricting body did not construct a complete plan under the criteria in the Alaska Constitution — which, unlike California’s Constitution, does not expressly mention the Voting Rights Act — before adjusting for VRA compliance, the Alaska Supreme Court vacated the resulting redistricting plan and remanded for an application of the required procedure. In re 2012 Redistricting Cases, 274 P.3d 466, 467-68 (Alaska 2012).
are drawn around other criteria and without sufficient regard for the VRA, and fail to adjust fully for VRA compliance once obligations become clear. Similarly, because relatively small population shifts may cause relatively large and unanticipated repercussions elsewhere, there may be resistance to fully accommodating Voting Rights Act concerns late in the process, where doing so would cause significant changes to other districts around the state.

In Los Angeles, for example, even as late as June 24, the Commission questioned whether there was or was not racially polarized voting in Los Angeles, and whether it therefore should be changing its strategy based on the presence or absence of a Voting Rights Act mandate.\footnote{Transcript at 48-50, Citizens Redistricting Comm’n (June 24, 2011).} And when it finally became clear that voting in Los Angeles was polarized against the sizable Latino population, “adding” districts turned out to have “significant ripple effects.”\footnote{Transcript at 46, Citizens Redistricting Comm’n (June 23, 2011); Transcript at 104-05, Citizens Redistricting Comm’n (June 29, 2011).} Had the Commission earlier received definitive data about the voting dynamics in Los Angeles, there would have been no need to “add” districts for Voting Rights Act purposes — they would already have been built into the Commission’s mindset.

Similarly, without racially polarized voting information, the Commission attempted to draw districts primarily pursuant to criteria other than the Voting Rights Act, leaving some districts with extremely highly concentrated minority populations. The Commissioners attempted to prevent potential overpacking by “bringing them down” on the margins — spreading some of the minority population to other, adjacent districts.\footnote{Transcript at 84-85, Citizens Redistricting Comm’n (May 28, 2011).} Such a strategy might miss opportunities to draw districts ultimately required under the VRA. For example, given a district with an electorate that is 80% minority, and an adjacent district with a 75% minority electorate, it is possible to “bring each district down” individually, on the margins, without realizing that the districts might in combination yield a third, potentially required, 55% district. With electoral data in hand earlier, it would be easier to identify areas likely to fall definitively under Voting Rights Act protection, casting a brighter light on the consequences of — and solutions to — overpacking, with an appropriately greater (because legally required) emphasis on race, while the map is more in flux.

To be clear, these serious process difficulties do not amount to an assertion that the final maps were unlawful. Some Commissioners recognized that drafts might have to change substantially when data eventually arrived.\footnote{Transcript at 113-115, Citizens Redistricting Comm’n (May 20, 2011).} Even with approximate and tentative racial
polarization analysis, the Commission was comfortable absorbing new information and changing course. And when push came to shove late in the process — when it became clear that other redistricting criteria risked infringement of clear Voting Rights Act requirements — the other criteria gave way. For example, the Commission clearly understood that districts must be modified to prevent likely violations of the Voting Rights Act even if doing so split incremental cities or counties, or deviated from the expressed preferences for particular communities of interest.

The discussion above relates to the consequences of delayed election data on the extent to which the Commission had to look beyond, and substantially adjust, settled expectations when data finally arrived. But not all of the relevant data did arrive, even by the close of the process. Even as the final maps were delivered, the Commission had received polarization analysis for only part of the population, in only part of the state, with only part of the available probative election information.

The Commission ultimately decided to examine polarization patterns with respect to Latino communities in Fresno, Kings, Los Angeles, Orange, San Diego, Riverside, and San Bernadino counties; and patterns with respect to Asian American and Pacific Islander communities in the San Gabriel Valley area; based on community testimony, the Commission decided to forego polarization studies with respect to the African-American community in Los Angeles. Given that the analyst was engaged only in early June, these were reasonable triage decisions focusing on the largest populations of interest, though the late start meant that even this analysis was abbreviated — and in some counties, without the standard multi-level election analysis developed in even rudimentary litigation.

155 Transcript at 53, 61-64, Citizens Redistricting Comm’n (June 24, 2011).
156 Transcript at 22, 33-37, Citizens Redistricting Comm’n (June 29, 2011).
157 The Statewide Database, as explained above, collected only statewide election results for both primary and general elections, and legislative results for general elections. Presumably, these data were supplemented by other election data, including primary contests and other local elections, but it is not clear how thoroughly the Statewide Database was supplemented, or whether it was supplemented to the same degree in different areas of the state.
158 FINAL REPORT, supra note 149, at 17.
159 Id. at 21.
160 Id. at 19.
161 As one Commissioner rightly said, “we’re behind the eight-ball at this point in time in terms of trying to get some of the analysis done.” Transcript at 47, Citizens Redistricting Comm’n (June 9, 2011).
162 Transcript at 55, Citizens Redistricting Comm’n (June 9, 2011).
It would never be feasible, as the Commission realized, to conduct the most detailed level of analysis for “all the potential districts,” given time and monetary constraints. But other information would have been helpful to the Commission had they been able to engage the racially polarized voting analyst much earlier.

For example, the Commission did not appear to investigate bloc voting among multiple minority groups, to determine whether two or more sizable minority groups might together be protected by the Voting Rights Act. Consider Merced County. Last cycle’s Assembly district 17 showed a Latino citizen voting-age population (“CVAP”) of about 35%, which is well below the threshold for Voting Rights Act protection under *Gingles* condition one. However, total minority CVAP was about 55%. This indicates that there may be a minority population in the area sufficiently sizable to constitute the majority of a single-member district’s electorate. It does not appear that the Commission conducted a racially polarized voting analysis in the Merced area to determine whether these multiple minority groups would qualify for Voting Rights Act protection. As it stands, the Commission’s new Assembly district in Merced — district 21 — has a total minority CVAP of 47%, which might or might not afford the multiple minority populations in the area an effective opportunity to elect candidates of choice. Only a voting analysis can reveal whether there was an obligation under the Voting Rights Act, and if so, only a voting analysis can reveal whether that obligation was met. But it does not appear from the public record that such an analysis was ever conducted.

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163 Id. at 45-47.
165 Id.
166 By 2010, the old cycle’s district 17 contained 510,960 people, which is 9.7% above the average population for a new Assembly district — a significant overpopulation. 2010 Census Summary File 1, American FactFinder, tbls. P1, http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml. The district’s old configuration, therefore, does not definitively establish a majority-minority electorate within a district-sized area. It is likely, however, that within the old district 17, a smaller, appropriately district-sized population can be found with a compact minority CVAP above 50%.
Similarly, the lack of electoral data may have limited the Commission’s consideration of potential additional responsibilities farther south in California’s Central Valley. A submission by MALDEF shows that it is possible to draw an Assembly district around a relatively compact Latino population crossing the Kern/Tulare border, with a Latino CVAP of about 53%. The district is drawn by slightly reducing the Latino CVAP percentage in the neighboring Kings County Assembly district, which is protected by section 5. Whether the Kern/Tulare population shows a community protected by section 2, and whether the related reduction in Kings County amounts to a practical retrogression in the Latino population’s ability to elect candidates of choice, both depend substantially on the extent of racially polarized voting. Yet despite apparent recognition of the potential issue in early June, it is at best ambiguous whether meaningful polarization analysis was conducted in the area.

3. Potential reasons for late and limited election data

Multiple factors may help to explain why there was so much delay in acquiring data with respect to racially polarized voting. First, the process of finalizing a contract bid invitation took more than a month, and was not subject to some of the legal exceptions that allowed the comparatively speedy acquisition of legal services. California’s Department of General Services was apparently responsible for signing off on the final invitation for bid. And as the Commission’s general legal counsel explained, “[t]he DGS process works extremely well when you’re building a freeway or a

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168 The district is MALDEF Assembly district 34. MALDEF California Statewide Redistricting Plans, app. 1 at 4, app. 4 at 3 (May 26, 2011), available at http://maldef.org/news/releases/redistricting_ca/.

169 The district is MALDEF Assembly district 30, which corresponds to last cycle’s district 30, and the new 2011 district 32. Id.; FINAL REPORT, supra note 149, app. 3 at 7, http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_5appendix_3.pdf; Pre-clearance Submission, supra note 164, app. L.

170 The benchmark district’s Latino CVAP was slightly below 46.8%, and MALDEF’s plan would have reduced it to 45.6%. Id.

171 Transcript at 108-09, Citizens Redistricting Comm’n (June 1, 2011).

172 Counsel explained on July 8 that they were unable to establish racially polarized voting “in the Kings area.” Transcript at 185, Citizens Redistricting Comm’n (July 8, 2011). It is not at all clear whether the analysis included an examination of polarization in Kern and Tulare as well, or whether it included analysis of the legislative primary and local elections most probative to achieving a full answer.
new bridge. The challenge is to back it down to something much simpler.”

It should be noted that this is not a concern unique to California. On February 3, 2012, the Alaska Supreme Court described its own independent commission’s process:

[T]here was testimony that because the Board’s budget was under the Governor’s office, the hiring process took longer than normal because the Board had to submit an RFP for everything. There was also testimony that the Board was working on changing this process for the next round of redistricting. The court finds that this RFP process played a part in delaying the hiring of the VRA expert and was out of the Board’s control. It is also unclear whether the Board could have found a VRA expert to start sooner than Handley did. There was testimony that there are about 25 VRA experts. These experts work on elections and voting issues around the country and around the world. Handley was chosen and officially hired while she was working on a project in Afghanistan. Had the Board chosen another candidate, it is possible that the candidate also would have been in the middle of another project in a different country or state . . . . The next Board should take note of the problems this Board experienced and consider start date and availability of an expert closely.\footnote{174}

Future redistricting bodies well beyond Alaska would do well to heed the court’s admonition.

However, the contracting process cannot shoulder all of the blame. The Commission itself identified the need to gather racially polarized voting data in early February, but only began the initial steps toward soliciting a bid in late April. Some of the delay seems due to the simple magnitude of tasks that the Commission faced: with so much going on, it is inevitable that some pieces would be lost in the shuffle. Some of the delay may have been due to a lack of focus on gaps in the available input to the Commission; for example, the early presentation by the Statewide Database focused on the data that the Database \textit{did} have, and the utility of that data, without emphasizing the additional data that the Commission would have

\footnote{173 Transcript at 204, Citizens Redistricting Comm’n (May 20, 2011).}
\footnote{174 In re 2011 Redistricting Cases, No. 4FA-11-02209 CI, slip op. at 102 (Alaska Super. Ct. Feb. 3, 2012).}
to gather from other sources.\(^{175}\) Some of the delay seems due to a desire to wait for VRA counsel to confirm the need for additional data;\(^{176}\) the wait in hiring VRA counsel thereby contributed to the delay in seeking the appropriate information.

Finally, some of the decisions with respect to election data — both when it was acquired and the scope of analysis finally completed — appear to be based directly on substantive decisions of VRA counsel.

For example, if Dr. Barreto examined polarization data with respect to only single minority groups, and not to groups acting in blocs, it is likely that he did so because counsel consistently assessed Voting Rights Act compliance in terms of a single minority group, without attention to functioning minority coalitions.\(^{177}\) At various points, individual Commissioners indicated an interest in evaluating the voting patterns of coalitions of multiple minority groups, but it does not appear that these suggestions were followed.\(^{178}\)

Similarly, if districts affected by section 5 were essentially locked in before Dr. Barreto’s polarization analysis was complete, that may be because counsel consistently assessed minority populations’ “ability to elect candidates of choice” as a standard based purely on demographics, rather than including both demographics and past voting practice.\(^{179}\) This appears to be at odds with the Department of Justice’s more robust and pragmatic look at multiple factors on the ground, including registration rates and electoral performance.\(^{180}\) As above, some Commissioners expressed a desire to grapple with communities’ pragmatic ability to elect, rather than just demographics, but it is unclear whether they timely received the data offering them that choice.\(^{181}\)

\(^{175}\) Transcript at 44-65, Citizens Redistricting Comm’n (Mar. 24, 2011). The presentation was not misleading; it reasonably focused on the information that the Commissioners would be getting. The Commissioners, however, may have been overwhelmed by the amount of information that would be forthcoming, and may not have focused on the information they would not be receiving.

\(^{176}\) Transcript at 12, Citizens Redistricting Comm’n (Apr. 8, 2011).

\(^{177}\) Gibson Dunn Presentation, supra note 126, tab A, at 5; FINAL REPORT, supra note 149, at 17; Transcript at 11, Citizens Redistricting Comm’n (June 16, 2011).

\(^{178}\) Transcript at 35-36, Citizens Redistricting Comm’n (May 1, 2011); Transcript at 137-38, Citizens Redistricting Comm’n (July 1, 2011).

\(^{179}\) Transcript at 12-13, Citizens Redistricting Comm’n (May 27, 2011); Transcript at 21, Citizens Redistricting Comm’n (June 1, 2011).

\(^{180}\) See supra text accompanying notes 85, 108.

\(^{181}\) Transcript at 106-10, Citizens Redistricting Comm’n (June 29, 2011).
D. Decisionmaking Process

In contrast to the issues highlighted above, with respect to delays in training and acquiring and utilizing election data, there is little of noteworthy concern in the Commission’s overall procedural approach to making decisions pursuant to the Voting Rights Act.

The Commission seemed to use its line-drawing consultants and legal counsel in appropriate fashion, at least as Voting Rights Act compliance is concerned. Commissioners asked counsel to review both preliminary and final decisions for compliance and for legal risk, exactly as they should. They asked their technical consultants to explore and report back options, both in real-time and outside of Commission presence, exactly as they should. As mentioned above, they did not merely accept this feedback passively, but pushed back on staff advice in appropriate fashion. And the Commission asked their technical consultants to have conversations directly with legal counsel, about different configurations of districts, exactly as they should have. In and around late June, VRA counsel even met with legal counsel for other groups, in order to hear potential concerns about Voting Rights Act obligations; this represents extremely valuable input, albeit at that point acquired a bit late in the schedule.

On multiple occasions, options were generated and matters discussed outside of the public record, in what appeared to be very careful compliance with California’s open meetings statutes. For example, pairs of Commissioners would apparently explore district configurations with Q2 consultants, outside of full Commission time. And the Commission as a whole would occasionally go into closed session with counsel, off the record, which is appropriate for a body getting legal advice in contemplation of litigation. Though Commissioners’ understanding was no doubt informed by these meetings and conversations, there is no indication that either the Commission as a whole or any substantial quorum thereof made relevant decisions outside of the public eye.

The Commission also started its process in the right place, substantively. As early as January 20, the Commissioners realized that it would be wise to start honing in on districts starting with counties affected by section 5 of the Voting Rights Act. Accordingly, they asked Q2 to

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182 Transcript at 98-104, Citizens Redistricting Comm’n (June 9, 2011).
183 Transcript at 105, Citizens Redistricting Comm’n (May 20, 2011).
184 Transcript at 22-23, Citizens Redistricting Comm’n (June 16, 2011).
185 Transcript at 109-10, Citizens Redistricting Comm’n (June 9, 2011).
186 Transcript at 148, 167-68, Citizens Redistricting Comm’n (Jan. 20, 2011); see also Transcript at 8, Technical Advisory Comm., Citizens Redistricting Comm’n (Feb. 23,
start visualizing section 5 districts, with instructions to provide summaries of the available options where options exist. As a next step, they asked Q2 to identify geographically compact minority groups with a population over 50% of a potential district, to help focus on obligations under section 2. These are precisely the right initial directions.

As mentioned above, the lack of racially polarized voting data made it exceedingly difficult to address all Voting Rights Act issues, as planned, before the Commission issued initial draft maps in early June. And the difficulties continued as the delay continued.

Still, to the Commission’s substantial credit, they appeared to listen carefully to testimony they received, changing course often, if not in every circumstance. For example, the Commission modified its plans in Los Angeles County, at least in part on the basis of testimony indicating a lack of racially polarized voting with respect to the African-American community. As another example, testimony on June 23 specifically addressed Voting Rights Act obligations given the compact and similarly situated Latino population of the Anaheim and Santa Ana area, and by the next week, the Commission appeared to change its approach in response.

E. Substantive Decisions

Finally, the Commission made several substantive decisions affecting the likelihood that its final products would comply with the Voting Rights Act. In this context, “substantive decisions” refer not to decisions about individual districts’ lines, but rather to decisions about substantive principles more generally guiding or controlling the process.

1. Race-neutral principles

188 Gibson Dunn Presentation, supra note 126, tab A, at 5; Consolidated Preliminary Opposition to Petitions for Writ of Mandamus or Prohibition app. 58-59 (vol. 1), Vandermost v. Bowen, Nos. S196493, 196852 (Cal. Oct. 11, 2011).  
189 Transcript at 103, Citizens Redistricting Comm’n (Apr. 28, 2011); Transcript at 99, Citizens Redistricting Comm’n (May 27, 2011).  
190 E.g., Transcript at 61-64, Citizens Redistricting Comm’n (June 24, 2011).  
191 See supra note 145.  
192 Transcript at 19, Citizens Redistricting Comm’n (June 29, 2011).
As mentioned above, given ambiguities in the law and the delayed acquisition of racially polarized voting data, the Commission adopted a strategy — as recommended by counsel — for approaching minority representation.\textsuperscript{193} It looked for substantial pockets of minority population with the possibility to incur Voting Rights Act obligations; it then sought to draw lines in the area pursuant to other state-sanctioned criteria, while keeping an eye on the impact on the minority community’s voting power. If it became apparent that the Voting Rights Act required departure from the other criteria, the Commission declared that it would seek to adjust the relevant districts as necessary.

In the abstract, this strategy represents a reasonable approach to ambiguity in the face of insufficient data, and to avoiding constitutional challenges based on districts drawn primarily based on race without a corresponding Voting Rights Act obligation. However, the success of the strategy depends entirely on the strength of the final step: adjusting where necessary for compliance, even when the adjustments work to the detriment of other, lesser, criteria like the integrity of cities or communities of interest. And in turn, the later that this final step is applied, the more difficulty Commissioners will have in adjusting their own settled expectations. Moreover, the commitment to other criteria may make it more difficult for Commissioners to see options — for example, different configurations of multiple districts in heavily minority areas, drawn specifically to enhance minority representation where the Voting Rights Act requires such an approach — that would be more apparent if compliance represented an early adjustment rather than a late tweak. The Commission’s strategy does not make compliance impossible, but the later the explicit action on superseding VRA obligations, the larger the headwind.

2. Population disparity

The Commission’s approach to population disparity represents another example of the same phenomenon. As noted above, there is substantial legal ambiguity surrounding the maximum permissible population deviation for California state legislative districts.\textsuperscript{194}

\textsuperscript{193} See supra text accompanying notes 146-149.
\textsuperscript{194} See supra note 31.
Given the ambiguity, the Commission struggled mightily to adopt a governing standard.\textsuperscript{195} VRA counsel first recommended that districts deviate no more than two percent (presumably, following the standard that the California Supreme Court chose for its own line-drawing: ± 2\% from the ideal, for a total deviation of 4\%),\textsuperscript{196} even when drawing for purposes of the Voting Rights Act.\textsuperscript{197} On the same day, the Commission actually left itself a more flexible standard for preliminary drafts: as little deviation as possible, but up to ±5\% deviation from the ideal, with an explanation of any deviation over 2\%.\textsuperscript{198} On May 27, the Commission cut back a bit with respect to preliminary drafts: as little deviation as possible for the preliminary drafts, up to a total of 5\% deviation.\textsuperscript{199} However, the same day, it adopted a much more restrictive standard for the final maps: no more than 1\% total deviation, even including districts drawn for purposes of the Voting Rights Act.\textsuperscript{200} On June 16, it asked Q2 to flag deviations over 1\% that would aid compliance with the Voting Rights Act\textsuperscript{201} … but two weeks later, it rejected the attempt to effectuate any deviation over 1\% total.\textsuperscript{202} Finally, on July 3, the Commission approved a standard permitting a total deviation of no more than 2\%, with greater deviation permitted where required to comply with the Voting Rights Act.\textsuperscript{203}

Technically, the Commission’s final standard should not have impaired compliance with the Voting Rights Act, as it expressly authorized population deviations where necessary to comply.\textsuperscript{204} Presumably, this included an authorization to draw districts with up to a 10\% total deviation.

\textsuperscript{195} Along the way, and contributing to the ambiguity, the Commission’s general legal counsel rejected a Commissioner’s proposal to focus on the map’s average deviation rather than its total deviation, even though the legal basis for rejecting such a proposal (where the total deviation still falls well within federal constitutional guidelines) is unclear. Transcript at 288, Citizens Redistricting Comm’n (June 29, 2011).
\textsuperscript{196} See supra note 31.
\textsuperscript{198} Id.; see also Transcript at 212–236, Citizens Redistricting Comm’n (May 20, 2011).
\textsuperscript{199} Transcript at 167–73, Citizens Redistricting Comm’n (May 27, 2011).
\textsuperscript{200} Id. at 161.
\textsuperscript{201} Transcript at 96, Citizens Redistricting Comm’n (June 16, 2011).
\textsuperscript{202} Transcript at 305–306, Citizens Redistricting Comm’n (June 29, 2011).
\textsuperscript{203} Transcript at 172–78, Citizens Redistricting Comm’n (July 3, 2011).
\textsuperscript{204} It is worth noting that, even under the contested assumption that the California Supreme Court’s selection of a ± 2\% deviation for itself binds the Commission in the normal circumstance, the Commission chose a 2\% total maximum deviation, which is substantially more restrictive than the California Supreme Court’s own standard.
(the presumptive — albeit disputed — federal constitutional threshold for a prima facie case\textsuperscript{205}) if necessary to comply with federal law.

However, the Commission’s considerable struggles with a tighter standard — and its selection of a considerably tighter standard during the crucial drafting month of June — may have communicated a different set of priorities to the line-drawing consultants. Despite the Commission’s request to flag districts for which greater population deviations would aid compliance with the Voting Rights Act, it is not clear that any such deviations were identified. (It is possible that no such configurations existed.) And in the Commission’s final maps, every single district is within ±1% of the ideal — that is, within a total deviation of 2%.\textsuperscript{206}

That is, the process may have suffered from the same late approach to “tweaking” for compliance described above. If line-drawers became attached to population configurations within ±1% of the ideal, the extent to which they may have, quite late in the process, revisited initial assumptions about minority populations just below a 50% electorate threshold is unclear. And that may have translated to foregone opportunities to see areas where different districts may have been required in order to comply with the Voting Rights Act.

The maintenance of an overly restrictive population standard through June may have impacted compliance in another fashion as well. The final maps include several districts identified as drawn for Voting Rights Act purposes that are on the cusp of, or just below, 50% CVAP for the minority group in question.\textsuperscript{207} Recall that the ability to draw a majority-minority district is one of the threshold considerations for an obligation under section 2 of the Voting Rights Act — but the obligation is only satisfied if the district drawn as a result offers the minority population an effective opportunity to elect candidates of choice. If, due in part to historical discrimination, polarization is particularly high and registration or turnout is particularly low, a bare 50% district may not actually satisfy the requirements of section 2.\textsuperscript{208} Similarly, section 5 of the Voting Rights Act is concerned with the effective exercise of the electoral franchise, including a host of pragmatic electoral factors.\textsuperscript{209} Based on counsel’s focus on demographics alone (see below), the Commission does not appear to have

\textsuperscript{205} See supra note 31.
\textsuperscript{206} Final Report, supra note 149, at 11.
\textsuperscript{207} These districts include Assembly districts 31, 49, 52, 53, and 80; Senate districts 14, 32, and 33; and Congressional districts 29, 32, 34, and 44. Id. at 17-19, 21; id. at app. 3, at 7-8, 12, 19-20.
\textsuperscript{208} See supra text accompanying notes 61-63.
\textsuperscript{209} See supra text accompanying notes 84-87.
sought data to test its conclusions. But a byproduct of the focus on demographics may be that districts at the margins of VRA compliance based on demographics alone may not actually grant effective voting opportunities. (It is also possible that these districts are effective, given crossover voting or greater-than-average registration and turnout.) And it is therefore further possible that if districts drawn with ±1% deviation do not actually achieve compliance, greater deviations would allow the districts in question to do so.

3. Limited use of election data

The above decisions represent forms of potential detrimental path dependence: decisions to draw districts based on certain criteria, with adjustment for Voting Rights Act compliance in the event of a conflict only late in the process. The harm, if any, would materialize only if the late course correction did not fully satisfy the substantive goals.

There were also a series of legal choices, all undertaken pursuant to counsel’s advice, which had the potential to hamper compliance, and which do not appear to have been corrected. It is difficult to fault the Commission for seeking, and following, advice of respected counsel. But future citizen bodies might well wish to understand, and revisit if not avoid, these particular choices.

The decision to approach Voting Rights Act compliance almost exclusively in terms of demographics, rather than supplementing with election data, is one example noted above. For section 5 purposes, counsel maintained that the “ability to elect” candidates of choice — the linchpin of a central 2006 amendment to section 5 — is a term of art referring to nothing more than a majority-minority district. Both Congress and the courts thus far construing the Act disagree. And on the margins, counsel’s erroneous interpretation meant that the Commission did not seek to examine whether there were minority communities in covered jurisdictions with the practical ability to elect candidates of choice despite a population of less than 50% of the electorate.

Similarly, the Commission’s approach to section 2 compliance, with several districts poised barely on the cusp of 50% of the electorate for the minority group in question, has been discussed above. To the

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210 See supra text accompanying notes 179-181.
211 Transcript at 12-13, Citizens Redistricting Comm’n (May 27, 2011); Transcript at 21, Citizens Redistricting Comm’n (June 1, 2011).
212 See supra text accompanying note 87.
Commission’s credit, several of these districts resulted from a late attempt to reassess marginal districts, with minority populations just under 50% of the electorate, adjusted to put the targeted population over a 50% threshold. This demonstrates that the Commission was willing to prioritize what it perceived to be Voting Rights Act compliance over other potentially conflicting criteria. However, based on counsel’s focus on demographics, the Commission did not seek to examine whether actual past election data indicated that the bare-50% thresholds were insufficient to provide a meaningful effective opportunity to elect candidates of choice. (By the same token, it is possible that past election practice would indicate that districts below the 50% threshold would offer a meaningful opportunity to elect candidates of choice. The point, as above, is not that the resulting districts did not comply, but rather that the Commission could not be sure whether they complied or not.)

4. CVAP v. VAP

Counsel also determined that, for section 5 purposes, retrogression could be avoided in covered counties by maintaining the voting age population of each district’s relevant minority community, compared to the benchmark 2001 district for each covered county. That is, not only did the inquiry focus on demographic factors, but it emphasized the minority community’s voting age population (“VAP”) rather than its citizen voting age population (“CVAP”) — or, put differently, the electorate.

Part of the reason for stressing VAP undoubtedly involves legitimate concerns about the reliability of CVAP measures. But there are techniques to help adjust for the inherent error in CVAP estimates, which the Commission rightly applied. And given a legal test focused on

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213 Transcript at 101-02, 127-28, Citizens Redistricting Comm’n (July 1, 2011); Transcript at 113-18, Citizens Redistricting Comm’n (July 24, 2011).
214 Though CVAP figures were included with the Commission’s preclearance submission data, VAP figures are instead emphasized throughout the transcript … and throughout the narrative preclearance document itself. Consolidated Preliminary Opposition to Petitions for Writ of Mandamus or Prohibition at 37, 51, 102 n.61, app. 183-185 (vol. 2), Vandermost v. Bowen, Nos. S196493, 196852 (Cal. Oct. 11, 2011); Preclearance Submission, supra note 164; see also Transcript at 88-89, Citizens Redistricting Comm’n (June 1, 2011); Transcript at 30, 71, Citizens Redistricting Comm’n (June 16, 2011); Transcript at 112, Citizens Redistricting Comm’n (June 29, 2011).
215 See supra note 104; Transcript at 118-22, Citizens Redistricting Comm’n (May 27, 2011).
216 For example, Q2 appropriately checked marginal CVAP estimates against registration numbers, as another means to assess the reliability of the CVAP estimate for a given area. Transcript at 30-31, Citizens Redistricting Comm’n (June 29, 2011).
minority communities’ “ability to elect” and their “effective exercise of the franchise,” using VAP data as a proxy for information on the electorate seems risky where there are significant numbers of noncitizens. Tellingly, for section 2 purposes, counsel advised the Commission — correctly — to use CVAP as the best available data to reflect potential electoral power. The decision to use a different measure for section 5 was never fully explained on the public record.

On the margins, the decision to test retrogression using VAP may have had consequences for compliance. For example, the benchmark Congressional district for Kings County (which is covered by section 5 of the Voting Rights Act) was district 21, with a total Latino population of 70.36% and a Latino VAP of 65.72%. The Commission’s new district, district 20, has a total Latino population of 70.96% and a Latino VAP of 65.85%. No indication of retrogression yet. However, the benchmark district’s Latino CVAP was 50.53% — and the new district’s Latino CVAP is 49.26%. To the extent that 50% of the electorate represents a proxy for the “ability to elect,” that drop should have signaled a potential problem. It is worth emphasizing that crossover voting and differential registration rates may actually preserve the Latino community’s ability to elect in district 20; indeed, Latino voters tend to be registered at a slightly higher rate than the district average, which indicates that the district is likely to comply. Still, the general point persists: an overwhelming focus on VAP leaves potential to overlook retrogression within the real electorate.

As a side note, the Commission’s figures with respect to minority population — both VAP and CVAP — appear to address minority categories as if they were mutually exclusive. That is, adding the percentage figures for the defined categories of population by race or ethnicity — white, black, Latino, Asian, American Indian, etc. — sums to exactly 100% in every district. As mentioned above, the 2010 Census allowed individuals to indicate their membership in more than one racial and ethnic category; when evaluating districts for Voting Rights Act compliance, the Department of Justice reviews each category seriatim, such that its assessment of the black population includes individuals who have checked “black”, “black” and “white”, “black” and “Latino”, and so on. With the Commission’s categories summing to precisely 100%, the Commission’s data would only meet the Department of Justice’s announced standard if

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217 Preclearance Submission, supra note 164, at 21.
218 Id.
219 Id. app. K, L.
220 See supra note 104.
no individual checked more than one racial box, and if no minority individual also indicated that she were Latina.

It is not clear whether these two anomalies — the emphatic focus on VAP, and the mutually exclusive tally of race and ethnicity — came to the Department of Justice’s attention in the section 5 review process. California made its initial preclearance submission to the Department on November 16, 2011; the contents of this submission have been made available to the public. However, the file was supplemented on nine separate dates, either by the Commission or by private entities, and neither the Commission’s accessible records nor the Department of Justice’s accessible records show the content of these additional submissions.

5. Single minority groups

Counsel also recommended an initial emphasis, for purposes of complying with the Voting Rights Act, on areas of the state where a “single” minority group could form a majority of a relevant district. Much of the ensuing discussion and analysis thus emphasized districts responsive to mutually exclusive minority communities.

Such an approach ignores the possibility that two or more minority groups might form a sufficiently sizable, consistently polarized voting bloc meriting the protection of the VRA. With the possible exception of African-American and Latino communities in Los Angeles, it is not clear that the Commission assessed such combinations for potential legal obligations. At several points, the issue was raised in the abstract, but does not appear that the relevant data was actually gathered.

As a related issue, in assessing retrogression, counsel advised the maintenance of each group’s voting-age population within a benchmark

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223 Gibson Dunn Presentation, supra note 126, tab A, at 5; FINAL REPORT, supra note 149, at 17; Transcript at 11, Citizens Redistricting Comm’n (June 16, 2011).
224 Transcript at 35-36, Citizens Redistricting Comm’n (May 1, 2011); Transcript at 137-38, Citizens Redistricting Comm’n (July 1, 2011).
district, separately. That is, in a district with 47% Latino VAP, 6% African-American VAP, and 11% Asian VAP, counsel suggested that a new district with a 47-6-11 split would better comply with section 5 of the Voting Rights Act than a new district with a 55-4-5 split. It might, indeed. But it is also quite difficult to tell which configuration better preserves the effective exercise of the electoral franchise without both citizenship information (see above) and information assessing past voting information, including as assessment of whether the minority communities within the district tend to vote as a single bloc.

6. Section 5 populations without the ability to elect

Pertinent to the example above, counsel advised the Commission to maintain relative levels of smaller minority voting communities, without the ability to elect candidates of choice, under section 5 of the Voting Rights Act. In Yuba County, for example, Latinos represented 10% of the CVAP (and minorities as a whole represented 19% of the CVAP) in the benchmark 2001 congressional district. The Commission maintained minority electorate rates in this district across the board, even though the communities do not have the practical ability to elect candidates of choice, singly or together. In so doing, the Commission likely chose the correct interpretation of the Act, and certainly the litigation-averse interpretation.

Curiously, these smaller populations are not presented in the Commission’s narrative preclearance submission, which focuses almost exclusively on the larger Latino population. And in some cases, the Commission’s districts do reduce smaller minority populations in covered jurisdictions. For example, 2001 Assembly district 17 (Merced County) had a 9.7% Asian CVAP; its 2011 counterpart has a 5.3% Asian CVAP. Similarly, 2001 Assembly district 30 (Monterey) had a 12.5% Asian CVAP; its 2011 counterpart has a 6.7% Asian CVAP. Other covered districts’ smaller minority populations drop similarly, albeit not as substantially. It

225 Transcript at 35-39, Citizens Redistricting Comm’n (May 27, 2011);  see also Transcript at 23-24, 26-27, Citizens Redistricting Comm’n (June 1, 2011); Transcript at 9, 57, Citizens Redistricting Comm’n (June 16, 2011); Transcript at 23, Citizens Redistricting Comm’n (June 29, 2011).
226 Transcript at 16-18, 21-22, Citizens Redistricting Comm’n (June 1, 2011); Transcript at 47-49, Citizens Redistricting Comm’n (June 16, 2011).
227 Preclearance Submission, supra note 164, app. K, L.
228 See supra text accompanying notes 77-80.
229 Preclearance Submission, supra note 164, at 3 n.4.
230 Id. app. K, L.
231 Id.
may be that it was not possible to maintain these populations’ relative size consistently with the obligation to preserve larger populations’ larger electoral impact, and given voting patterns, it may be that the smaller size does not reflect meaningfully reduced voting power. Still, given counsel’s initial advice, it is curious that there appears to have been little attention to the impact of district changes on these smaller populations in the waning days of line-drawing, and curious that these impacts are not reflected in the Commission’s narrative preclearance submission.

It is also worth noting that the acontextual decision to maintain threshold levels of minority population even without the ability to elect candidates of choice leads to an interesting issue in the state Senate districts of California’s central coast — perhaps the most intriguing conundrum of the redistricting effort, and one whose significance seems to have almost entirely escaped the Commission’s attention.

In the 2001 district plan, citizens living in Merced and Monterey were represented in two state Senate districts: district 15 (Monterey), in which Latinos represented 16% of the CVAP, and district 12 (Merced and Monterey), in which Latinos represented 38% of the CVAP. In the Commission’s 2011 plan, citizens living in Merced and Monterey are again represented in two Senate districts: district 17 (Monterey), in which Latinos represent 17% of the CVAP, and district 12 (Merced and Monterey), in which Latinos represent 43% of the CVAP.

In its submission to the Commission, MALDEF drew an alternative set of Senate districts. In their submission, citizens living in Monterey are represented in two districts: district 15, in which Latinos represent 14% of the CVAP; citizens living in Merced are represented by district 12, in which Latinos represent 30% of the CVAP. District 4 satisfies the first Gingles threshold condition, and if voting is polarized in the Monterey area, this configuration may indicate a responsibility under section 2, with an obligation to draw a district in which Latino citizens of Monterey have the effective opportunity to elect a candidate of choice. Yet the consequence

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232 Id. app. L.
234 MALDEF California Statewide Redistricting Plans, app. 5 (May 26, 2011), available at http://www.maldef.org/assets/pdf/MALDEF_Final_Submission_052611_Appendix4-6.pdf. Note that district 4 is underpopulated by 4% from the district average, which is within constitutional bounds, but beyond the Commission’s self-imposed population deviation threshold.
of drawing this set of lines is that other Latino voters in the area see the Latino CVAP in their districts drop from 38% to 30% and 16% to 14%. The former, in particular, might indicate retrogression under section 5 in a purely district-by-district approach. That is, it is possible that the demographics of the area present a mutually exclusive choice between, on the one hand, an effective section 2 district with the potential for mild retrogression in two other communities without an ability to elect candidates of choice; and on the other hand, a clear absence of retrogression but without the ability to draw a section 2 district yielding an effective ability to elect.

With two conflicting mandates, it is not improper to choose either one, and it is unlikely that the Commission legally erred by choosing to preserve the section 5 districts as is. But note that to the extent that the Latino citizens of the central coast constitute a cohesive community, they might well prefer slightly decreased influence in two districts in exchange for the first opportunity to elect a candidate of choice in a district of the same region. And the MALDEF configuration might well satisfy both section 5 and section 2 of the Voting Rights Act, at the same time.

More important, the extent to which the Commission understood — and thought through — these options is unclear. It appears that the issue was briefly raised. But it is not at all clear that there was follow-up to explore the relative tradeoffs.

7. Statewide proportionality

It is clear that the Voting Rights Act does not require that districts be drawn in order to guarantee minority communities the opportunity to elect candidates proportional to their share of the overall statewide electorate. In particular areas of the state, if minority communities are dispersed in noncompact communities or voting is not particularly polarized, there is every reason to expect that legal compliance with the Voting Rights Act will not yield proportional opportunities to elect candidates. However, a thumbnail calculation of statewide proportion may nevertheless be valuable. Substantial underrepresentation of a population subject to polarized voting may, for example, indicate a need to try to

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235 Cf. LULAC v. Perry, 548 U.S. 399, 429 (2006) (indicating that it is acceptable to compensate for the loss of a section 2 district in one area by creating one in another area).
236 Transcript at 339-40, Citizens Redistricting Comm’n (May 28, 2011); Transcript 82-96, Citizens Redistricting Comm’n (July 2, 2011).
fashion incremental opportunity districts out of multiple adjacent “overpacked” districts, to avoid overall dilution.

California’s Latino population — with substantial polarization in multiple counties studied by the Commission — represents the most striking example of disproportion among California’s minority communities. California Latinos represent 23% of the statewide CVAP. Yet only 16% of the Assembly districts (13 of 80), 13% of the Senate districts (5 of 40), and 13% of the Congressional districts (7 of 53) are designated as districts drawn under the Voting Rights Act in order to preserve Latino citizens’ effective opportunity to elect officials of choice. To be clear, the disproportion alone does not indicate a violation of the Voting Rights Act. But it does show that the Commission did not reach a threshold where incremental districts would be disfavored if local conditions otherwise indicated a requirement.

At times, counsel appeared to issue advice to the contrary. Counsel first discouraged the Commissioners from considering statewide proportion even as a rough thumbnail guide. Later, counsel seemed to indicate that it would be acceptable to forego creating incremental opportunity districts if the commission created a “sufficient number” of effective districts — but without evaluating the statewide proportion, it is difficult to understand what number would be sufficient. Similarly, counsel seemed to believe that it would suffice to create “several” opportunity districts in Los Angeles, but without a focus on the statewide proportion, it is not clear whether “several” in fact sufficed, if other district configurations revealed sufficiently sizable and sufficiently polarized communities to create incremental opportunity districts. To the extent that counsel was relying on rough regional proportion as a rough proxy, such evaluations would have contravened the clear holding of the Supreme Court to focus on dilution statewide.

IV. CONCLUSIONS AND LINGERING QUESTIONS

It bears repeating that this Article is not designed to determine whether the California Commission’s final work product in 2011 either complied with or violated the Voting Rights Act. Even if the Commission was not

\[238\] Final Report, supra note 149, at 17-19, 21; id. app. 3, at 7-8, 12, 19-20.
\[239\] See supra text accompanying notes 59-60.
\[240\] Transcript at 222-23, Citizens Redistricting Comm’n (May 28, 2011).
\[241\] Transcript at 212, Citizens Redistricting Comm’n (June 2, 2011).
\[242\] Transcript at 88-89, Citizens Redistricting Comm’n (July 24, 2011).
always in the optimal position to assess compliance, the uncertainty does not itself indicate that communities with legal rights actually had those rights diluted. Conversely, the dismissal of several court challenges to the Commission’s work, including challenges based on the Voting Rights Act,\(^{244}\) speak more to the particular claims and evidence marshaled by the plaintiffs in the cases than to compliance in the abstract.

Nevertheless, the Commission’s experience is instructive. As the above review makes clear, there is much to commend in the Commission’s approach to its task, and to its approach to the Voting Rights Act specifically. And there were also components of the Commission’s work — some of which represented reasonable responses to the need to triage, and some of which represented errors — that could be improved by others. That is, there are predictable steps that future redistricting bodies can take to increase the likelihood of compliance with the Voting Rights Act in the future.

Perhaps most important, there appears to be little inherent in the nature of a citizens’ redistricting entity that would spur lack of compliance with the Voting Rights Act or other complex procedural or substantive requirements. California’s fourteen Commissioners succeeded in some ways in generating a process likely to achieve compliance, and missed opportunities in others, but the lapses were not caused by the fact that they were not legislators.

True, this Commission may have been hampered in some ways by institutional history: the Commission was a new institution, and each of the Commissioners was new to the task of statewide redistricting in an official role. Legislatures, by contrast, are hoary institutions; even though many individual legislators may be new to any given decennial redistricting, some officials — and more important, staff — will usually be veterans of a previous redistricting battle. Still, the advantage of legislative experience may be overrated; there is nothing inherent in the design of a redistricting commission forcing complete turnover of staff, and any given commission will accrue institutional experience over time. Commissioners themselves, even if new to the task in any particular cycle, may similarly be able to learn from the lessons of past cycles through talking to past commissioners, or

through outside evaluations of their predecessors’ work or of comparable work in other states.

Moreover, to the extent that a legislature’s relative institutional experience with seeking VRA compliance is an asset, that asset must be balanced against the profound temptation to prioritize self-interest when legislators redraw their own lines or those of their political comrades-in-arms. As then-Judge Kozinski of the U.S. Court of Appeals for the Ninth Circuit described an all-too-common scenario:

> When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. . . . Protecting incumbency and safeguarding the voting rights of minorities are purposes often at war with each other. Ethnic and racial communities are natural breeding grounds for political challengers; incumbents greet the emergence of such power bases in their districts with all the hospitality corporate managers show hostile takeover bids. What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge. . . . Incumbents who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act.\(^\text{246}\)

Certainly, incumbents do not uniformly elevate their own political preservation over the requirements of federal law — but neither was Judge Kozinski’s conclusion anomalous.\(^\text{247}\) It may be that the very independence of an independent body may promote compliance.

As for the ability of any individual redistricting body to establish a VRA-compliant process, that effort will begin with decisions made even before the official decisionmakers are in place. Reliable data is essential to ensuring compliance, and the collection of that data — by another government entity, if not the line-drawing body — must begin as early as possible. Of particular importance is the underlying data needed for

\(^{245}\) See Levitt, supra note 3, at 522-24.

\(^{246}\) Garza v. Cnty. of Los Angeles, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

racialized voting analysis: not only statewide tallies by precinct, but also local election data — for both primary and general elections — in areas with substantial concentrations of racial and ethnic minorities. Such data can be collected, and preliminarily analyzed, well before Census data arrives.

For that matter, even the collection of Census data need not wait for the results of the decennial Census. Redistricting bodies can begin experimenting with areas of concern under the Voting Rights Act by using the results of the prior year’s American Community Survey. These ACS data will be imprecise, and districts built upon them will have to be revised — but the estimated data may help line drawers experiment with rough (and decidedly non-public) configurations in order to foster familiarity with some of the trickiest issues in the trickiest areas of the state. This carries an admitted risk that those drawing the lines will become attached to configurations bound for substantial change once better data arrives. But with constant reminders that the initial options are merely tentative, early experimentation should help reveal some of the difficulties that California’s Commission discovered only belatedly, and some of the tradeoffs that California’s Commission never had the chance to consider fully in the press of late July.

Beyond reliable data, the ability of a redistricting body to ensure compliance with the VRA depends on the composition of the body itself. In California, the Commissioners chosen for the task were adept at technical and legal analysis, and savvy consumers of legal and technical advice, with the will and ability to push back when appropriate. It was also a great boon to the Commission to have several individuals with experience and expertise in applying the Voting Rights Act to redistricting problems. This sort of capacity is not the reliable result of a random canvass of citizens; rather, it required a concerted effort to recruit individuals with the appropriate qualifications, and a selection mechanism designed to ensure at least threshold ability. The design of future citizen bodies with public lawmaking responsibility should follow suit, fashioning a selection mechanism targeting skills appropriate to the complexity of the task that the citizen lawmakers will face.

Once the membership of a redistricting body has been selected, it will need training. Training in the nuances of the Voting Rights Act was on the wish-list for California’s Commission months before it was received. However, even training about the legal requirements of the Act, if delivered only in abstract form, may be insufficient. Redistricting bodies should seek

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248 See supra text accompanying note 151.
step-by-step recommendations for how they should go about their redistricting task, including incremental data to be gathered and incremental decisions to be made … and how long each step is likely to take. Beyond institutional staff and past officials, third-party groups that have attempted to draw legally compliant districts should be well equipped to offer such a blueprint.

As the process of drawing lines got underway, California’s Commission seemed to develop an admirable approach to using its VRA counsel and technical consultants. The flow of information seemed to suit the need, with constant communication between Commissioners and consultants. Moreover, VRA counsel did not merely review established plans at discrete milestones, but sat together with the technical line-drawing consultants for iterative drafts of particularly thorny portions of the state. Even with different personnel in different roles, future bodies may benefit by considering this California Commission’s method of engagement with its consultants and legal advisers as a baseline.

The Commission’s overall approach to applying criteria in the service of legal compliance also presents an intriguing baseline, albeit with a substantial caveat. It is not unreasonable to begin the redistricting process in areas with substantial minority populations by testing to see whether race-neutral principles provide those populations adequate political opportunity — but only as long as there is a shared and firm commitment to overriding those race-neutral principles if it becomes clear that such action is required by the Voting Rights Act. California’s Commission purported to revisit its earlier decisions, but for some principles — like the adoption of a questionably necessary population deviation — the extent of the commitment to revisit was far from clear. Future redistricting bodies that adopt a similar approach must ensure that their tentative lines do not become unnecessarily “sticky.” Such testing must include a commitment to revisit even basic assumptions, in order to ensure that early drafts do not foreclose opportunities for compliance that are not otherwise apparent. This, in turn, implies that any bounds driven by race-neutral principles must be sketched and reviewed for Voting Rights Act compliance early, before adjacent districts are formulated, and well before any districts are released to the public as drafts.

Finally, citizen bodies must be inoculated against seduction by surface simplicity. In part, this a concern of the preceding paragraph as well: districts that “look elegant” because they are compact or follow county lines must bend to the command of the VRA where there exist VRA responsibilities. But even where redistricting bodies have correctly made the VRA a clear priority, they must beware the allure of data built on ease
rather than propriety. California’s Commission — on the erroneous advice of counsel — focused almost exclusively on the demographics of single minority communities in assessing minority political opportunity. The Voting Rights Act, however, is calibrated to the effective exercise of the franchise. This requires attention to citizen voting-age populations, the willingness to look for distinct minority communities that vote as cohesive blocs, and a commitment to utilize polarization studies, registration rates, and past turnout in an attempt to gauge whether particular districts actually afford a pragmatic “opportunity” or “ability” to elect candidates of choice.

California’s first Citizens Redistricting Commission embarked on an inaugural journey of profound complexity. Its approach to understanding, and ensuring compliance with, the Voting Rights Act presents useful lessons to all who would follow in its path.