THE YALE LAW JOURNAL

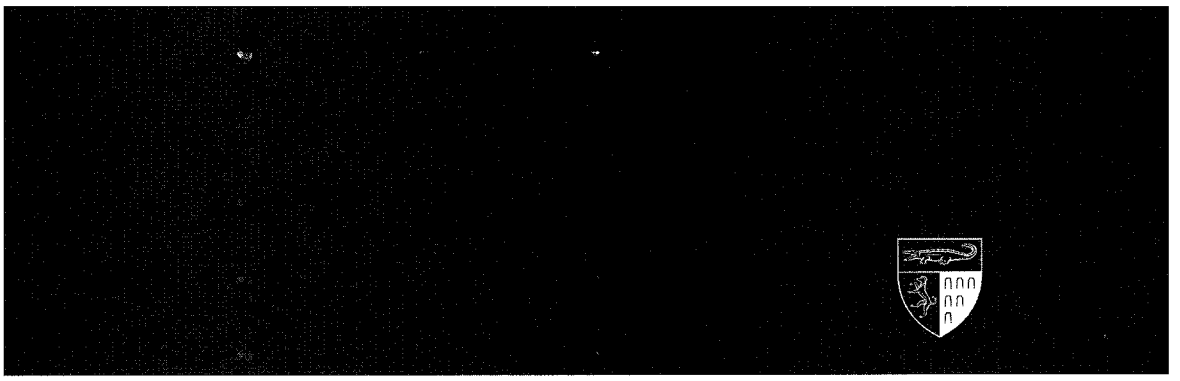
DAMIAN WILLIAMS

Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform

ABSTRACT. Section 5 of the Voting Rights Act (VRA) – the preclearance provision that is the most potent weapon in the nation's civil rights arsenal – quietly suffered an unexpected defeat in the aftermath of Hurricane Katrina. The "static benchmarking test" used to administer section 5 failed to fulfill a core VRA mandate: the preservation of minority political power. This Note provides the first critical account of this failure and argues that it transcends the specifics of Katrina. The Note then proposes a narrowly tailored doctrinal "fix" to resurrect section 5's enforcement powers after a disaster.

AUTHOR. Yale Law School, J.D. expected 2007; University of Cambridge, M.Phil. 2003; Harvard University, A.B. 2002. I am deeply indebted to Professors Owen Fiss and Heather Gerken who both inspired and challenged me to develop this Note, and to Professors Dennis Curtis and Robert Solomon who directed me in the Hurricane Katrina Clinic. Many thanks to Marie Boyd, Jessica Bulman-Pozen, Kristen Clarke-Avery, Natalie Hershlag, Sia Sanneh, Robert Scott, and Katherine Wiltenburg Todrys for their incisive comments and edits. Finally, I dedicate this Note to the memory of my sister, Tiffani Simone Williams, who I miss every day.

Imaged with the Permission of Yale Law Journal



NOTE CONTENTS

INTRODUCTION 1118

I. AN "UNCOMMON" ENFORCEMENT TOOL 1123
- A. Two Generations of Section 5 1123
- B. The *Beer* Retrogression Standard 1126

II. THE POST-KATRINA PRECLEARANCE PROCESS 1129
- A. The Emergency Voting Plan 1130
- B. The Preclearance Paradox 1137

III. RETROGRESSION RECONSIDERED 1140
- A. Dynamic Benchmarking 1140
  1. Assessing the Existing Voting Regime 1141
  2. Selecting a Replacement Benchmark 1143
  3. Exiting Dynamic Benchmarking: One Front Door, One Back Door 1146
- B. Support for Dynamic Benchmarking 1148
  1. Legislative History 1148
  2. Previous Departures from Static Benchmarking 1149
- C. Applying Dynamic Benchmarking to Post-Katrina Louisiana 1151

CONCLUSION 1157

Imaged with the Permission of Yale Law Journal

INTRODUCTION

In the aftermath of Hurricane Katrina, Louisiana and the Gulf Coast began the long march to recovery. Hurricane Katrina was the most destructive natural disaster in American history,[1] resulting in approximately 1500 deaths in Louisiana alone[2] and sparking a human displacement unrivaled since the Dust Bowl migration of the 1930s.[3] Although the Category 3 storm inflicted significant damage along the entire Gulf Coast, its wrath was felt most acutely in the city of New Orleans, where massive flooding overwhelmed poorly constructed levees and drowned vast stretches of the city.[4]

Katrina's primary victims were New Orleans's most vulnerable citizens – those who could not afford to evacuate or who had homes in low-lying areas hit hardest by the flooding.[5] Renters[6] and African-American residents[7] were

1. *See* THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 1 (2006) [hereinafter LESSONS LEARNED].

2. *See, e.g.*, Michelle Hunter, *Deaths of Evacuees Push Toll to 1,577: Out-of-State Victims Mostly Elderly, Infirm*, TIMES-PICAYUNE (New Orleans), May 19, 2006, at A1; La. Dep't of Health & Hosps., Reports of Missing and Deceased (Aug. 2, 2006), http://www.dhh.louisiana.gov/offices/page.asp?ID=192&Detail=5248.

3. *See* LESSONS LEARNED, *supra* note 1, at 8; Timothy Egan, *Uprooted and Scattered Far from the Familiar*, N.Y. TIMES, Sept. 11, 2005, § 1, at 1.

4. The flooding made much of New Orleans uninhabitable. According to one estimate, after Katrina, the city's population plummeted from 460,000 to 171,000. Adam Nossiter, *Bit by Bit, Some Outlines Emerge for a Shaken New Orleans*, N.Y. TIMES, Aug. 27, 2006, at A1.

5. *See* Christopher Tidmore, *The Unusual Nature of Nagin's Victory*, LA. WKLY., May 29, 2006, at 1 ("While Caucasian Lakeview received the bulk of the initial flooding, most of the damaged areas of New Orleans were predominately Black. With the exception of Lakeview, whites tended to live on the higher plane of the Mississippi River Ridge . . . . African-Americans lived in the low lying, newer sections of New Orleans, which took the brunt of the storm's damage when the floodwalls . . . ruptured . . . .").

6. *See* Class Action Complaint for Declaratory and Injunctive Relief para. 4, at 2, Ass'n of Cmtys. for Reform Now (ACORN) v. Blanco, No. 06-611 (E.D. La. Feb. 9, 2006) [hereinafter Class Action Complaint], *available at* http://www.loyno.edu/~quigley/blanco.pdf (noting that "more than half" of the 354,000 people who lived in areas that received moderate to severe damage were renters).

7. *See id.* para. 33, at 8 ("In four of the six neighborhoods that suffered the worst Katrina related damage, over 80% of the population is African-American. African-Americans resided in approximately 72% of the homes that flooded over six feet."); Shaila Dewan et al., *Evacuees' Lives Still Upended Seven Months After Hurricane*, N.Y. TIMES, Mar. 22, 2006, at A1 (noting that white evacuees were less likely than black evacuees to have depleted their savings, to have been forced to borrow money, or to have lost their jobs as a result of the storm); *see also* John R. Logan, The Impact of Katrina: Race and Class in Storm-Damaged Neighborhoods 1, http://www.s4.brown.edu/katrina/report.pdf (last visited Jan. 29, 2007)

Imaged with the Permission of Yale Law Journal

particularly harmed; African-Americans constituted the majority of the displaced and, in the post-disaster period, tended to live farther away from New Orleans than white evacuees.[8] Although many sought refuge in nearby cities like Baton Rouge, Katrina's "diaspora"[9] scattered most residents to cities outside of Louisiana, such as Houston and Atlanta.[10]

Against this backdrop of devastation, Louisiana's political leaders were charged with the unprecedented task of conducting elections with a displaced electorate. For generations, the state's political system existed in an uneasy partisan and racial balance, with black voters often determining the outcomes of state and federal elections.[11] New Orleans, with a population that was 67% African-American,[12] was the center of minority political power in Louisiana. But Katrina struck a deep blow to the city's minority electorate: between 27% and 48% of Orleans Parish voters were displaced, and of these voters, 75% were black.[13] With New Orleans's first post-Katrina municipal elections scheduled to take place in February 2006, and with rising speculation of an impending racial and political realignment,[14] the Louisiana State Legislature began the highly contested process of developing new voting rules for a devastated democracy.

("[T]he storm's impact was disproportionately borne by the region's African American community, by people who rented their homes, and by the poor and unemployed.").

8. Bruce Eggler, *Evacuees Can Vote Absentee or in La.; Judge Rules Against Out-of-State Polling*, TIMES-PICAYUNE (New Orleans), Feb. 25, 2006, at A1.

9. Matthew Ericson, *Katrina's Diaspora*, N.Y. TIMES, Oct. 2, 2005, § 1, at 24 (providing both data and a graphical display of displaced residents).

10. *See* HURRICANE KATRINA RESPONSE PROJECT, APPLESEED, A CONTINUING STORM: THE ON-GOING STRUGGLES OF HURRICANE KATRINA EVACUEES 1 (2006).

11. *See Democrats Focus on Louisiana Races: Next Governor Will Be Unique; Breaux Mulls Senate Decision*, CNN.COM, Nov. 7, 2003, http://www.cnn.com/2003/ALLPOLITICS/11/07/elec04.louisiana/ ("A key to the outcome of the race could be the black vote, particularly in the city of New Orleans, where a heavy Democratic tide secured Landrieu's margin of victory last year."); *see also* Class Action Complaint, *supra* note 6, para. 26, at 7 ("Over 32% of Louisiana's population is African American.").

12. The black population percentage is based on data from the 2000 census. *See* Greater New Orleans Cmty. Data Ctr., Orleans Parish: People & Household Characteristics (July 31, 2006), http://www.gnocdc.org/orleans/people.html.

13. Press Release, Advancement Project, Louisiana State Officials Sued for Violation of the Voting Rights Act (Feb. 9, 2006), *available at* http://www.advancementproject.org/press_releases/2006/020906.html.

14. *See, e.g.*, Sylvia Moreno, *Displaced Voters Make Wishes Known for New Orleans: Primary Election for Mayor Is April 22*, WASH. POST, Apr. 12, 2006, at A3 (quoting one displaced resident as saying that black voters "want to be a part of the rebuilding and have a voice in selecting someone who wants us back, because there's a lot of people in New Orleans that's trying to keep us out"); Peter Whoriskey, *Nagin Among Front-Runners in New Orleans*,

Imaged with the Permission of Yale Law Journal

Because of its deep history of racially discriminatory politics,[15] Louisiana must—in developing voting rules—comply with section 5, the most celebrated and controversial provision of the Voting Rights Act (VRA) of 1965.[16] Section 5 requires Louisiana and other "covered jurisdictions"[17] to preclear all changes in their voting laws with either the Department of Justice (DOJ) or a special three-judge district court in Washington, D.C., before the changes take effect.[18] The provision was originally crafted in response to the persistent and creative tactics employed by covered jurisdictions to avoid federal civil rights mandates.[19] By demanding preclearance for all voting changes—from the seemingly insignificant and uncontested, to the most critical and controversial—section 5 enlists the federal government as a constant chaperone in matters of state election administration.

The test used to enforce section 5, which I will call the "static benchmarking" test,[20] was conceived by the Supreme Court in *Beer v. United States* to ward off voting changes that would result in a "retrogression" in minority voters' "effective exercise of the electoral franchise."[21] The static benchmarking procedure detects movements in minority political power by

---

WASH. POST, Apr. 20, 2006, at A9 (quoting one political scientist as saying, "in blunt terms, some white voters see this as an opportunity to take back power").

15. For background on Louisiana's history of race relations, see Judge Wisdom's extensive recounting in *United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963). In addition to being the first state to enact the notorious Grandfather Clause invalidated in *Guinn v. United States*, 238 U.S. 347 (1915), Louisiana passed the railcar statute at issue in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and was home to the infamous David Duke, the longtime Ku Klux Klan leader, who won the majority of the white vote in three state-wide elections, *see* D. Stephen Voss, *Beyond Racial Threat: Failure of an Old Hypothesis in the New South*, 58 J. POL. 1156, 1156 (1996). *See generally* Richard L. Engstrom et al., *Louisiana*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 103 (Chandler Davidson & Bernard Grofman eds., 1994).

16. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

17. *See infra* note 37.

18. 42 U.S.C. § 1973c.

19. *See, e.g.*, Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* MINORITY VOTE DILUTION 145, 149 (Chandler Davidson ed., 1984); Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 791 (2006) ("Voting discrimination was . . . as resilient as the many-headed hydra, with new disenfranchising methods repeatedly sprouting up in place of the ones most recently removed.").

20. Commentators have used other terms to describe the test that enforces section 5. *See, e.g.*, Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 140 (1984) (calling it "the retrogression test").

21. 425 U.S. 130, 141 (1976).

Imaged with the Permission of Yale Law Journal

comparing a proposed voting change to the existing voting laws in the jurisdiction seeking preclearance. If, applied to the current circumstances, the proposed law increases minority political power relative to the existing law, it is deemed "ameliorative" and is precleared.[22] If the proposed law diminishes minority political power, it is deemed "retrogressive" and is permanently enjoined from taking effect.[23] The static comparison thus guards against the crumbling of minority political power under the weight of new, retrogressive laws and ensures that, in the face of a retrogressive proposal, the status quo ante holds firm.[24]

Despite its unrivaled success in advancing and protecting minority political gains,[25] section 5 quietly suffered one of its most disappointing failures in the aftermath of Hurricane Katrina, as the static benchmarking test fell apart. Critically, static benchmarking assumes that current laws are capable of preserving existing minority political power;[26] indeed, it is the step that completes the test's "sixth-grade arithmetic."[27] Katrina shattered this

---

22. *Id.*

23. *Id.* If a proposed voting change neither increases nor decreases minority voting strength, it is also entitled to preclearance under section 5. *See* City of Lockhart v. United States, 460 U.S. 125, 134 n.10 (1983) ("[T]he *Beer* Court did not distinguish between ameliorative changes and changes that simply preserved current minority voting strength. The Court explained that the purpose of § 5 was to prohibit only retrogressive changes.").

24. In this Note, I use the terms "minority political power," "minority voting power," and "minority influence" interchangeably to refer to minority voters' "effective exercise of the electoral franchise"—a concept that is inherently broad. Determining whether there has been retrogression in minority voters' effective exercise of the electoral franchise "depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." Georgia v. Ashcroft, 539 U.S. 461, 479 (2003). Furthermore, "'[n]o single statistic provides courts with a shortcut to determine whether' a voting change retrogresses from the benchmark." *Id.* at 480 (quoting Johnson v. De Grandy, 512 U.S. 997, 1020-21 (1994)).

25. For data on the impact of the VRA on Louisiana politics, see Engstrom et al., *supra* note 15, at 103.

26. This assumption is quite common. *See, e.g.*, John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CAL. L. REV. 1211, 1214 (1998) (stating that existing voting laws are often "beneficial procedures" for minority political power); Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 21 (2004) ("[S]ection 5 contains a natural benchmark that preserves the political gains minority voters have achieved through political or legal action.").

27. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1713 (2004). Justice Stewart charged that the static benchmarking test used "sixth-grade arithmetic" in *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting).

Imaged with the Permission of Yale Law Journal

assumption and, in the process, vindicated Justice Thurgood Marshall's prescient warning that static benchmarking "will not always be [able] to determine whether a new plan increases or decreases Negro voting power relative to the prior plan."[28] Marshall was concerned that in some contexts, a proposed law might always appear "positive—no matter how good or bad the result."[29]

Hurricane Katrina provided a perfect example of what Justice Marshall feared. The massive human displacement and immense election infrastructure damage caused by the storm rendered Louisiana's existing voting laws inadequate to conduct post-disaster elections: the number of absentee voters swelled, and those who remained in New Orleans lacked water, electricity, and stable shelter, much less access to polling locations and the Postal Service.[30] If Louisiana held a post-Katrina election with the pre-Katrina voting laws, minority voting power would collapse;[31] only aggressive procedural reforms could avoid this outcome. Yet when the state sought to preclear its emergency voting reforms, the static benchmarking test stubbornly relied on the inadequate pre-Katrina voting plan as a valid benchmark for comparison. Conceptually, this meant that compared to the broken pre-Katrina benchmark, almost any proposed law would appear ameliorative and would merit preclearance. A covered jurisdiction could therefore enact reforms that, despite improving existing laws, stopped far short of providing minority voters with the realistic opportunity to maintain their voting strength.[32] Simply put, Hurricane Katrina revealed a blind spot in section 5's enforcement powers.

This Note shines a critical light on section 5's post-Katrina failure and suggests a narrowly tailored doctrinal "fix" to repair the provision. The proposed model replaces the static benchmarking test with a more flexible counterpart that I call "dynamic benchmarking." Instead of automatically using existing voting laws as a benchmark, this procedure employs a multifactor examination to ensure that the current regime is actually capable of preserving minority political power. In the absence of a suitable existing benchmark, the dynamic test offers a "replacement benchmark"—a model voting plan that, if used after a disaster, would likely preserve minority influence. The replacement

28. *Beer*, 425 U.S. at 153 n.12 (Marshall, J., dissenting).

29. *Id.* at 154 n.12.

30. *See* Peter Henderson, *New Orleans Mayor Radiates Optimism Among the Ruins*, BOSTON.COM, Sept. 4, 2006, http://www.boston.com/news/nation/articles/2006/09/04/new_orleans_mayor_radiates_optimism_among_the_ruins/?page=full.

31. *See infra* note 77 and accompanying text.

32. See *infra* Section II.B for a discussion that explains this phenomenon in greater detail.

Imaged with the Permission of Yale Law Journal

benchmark thus resurrects section 5's coercive power; if a covered jurisdiction proposes a post-disaster voting plan that is less robust than the replacement benchmark, preclearance will be denied.[33]

The discussion that follows proceeds in three Parts. Part I introduces section 5 and outlines its development. It then details the contours of the static benchmarking test that has long defined section 5's administration. Part II recounts for the first time the post-Katrina preclearance process and diagnoses section 5's inability to adapt to the unprecedented challenges posed by Katrina. Part III unveils the dynamic benchmarking model and argues that it is both necessary and justified to remedy section 5's weaknesses. Finally, the Conclusion calls on Congress to amend section 5 and to incorporate dynamic benchmarking as an alternative to the current static procedure. In addition to presenting traditional arguments for congressional action, it departs from doctrine to provide an alternative justification for the model I offer.

I. AN "UNCOMMON" ENFORCEMENT TOOL

A. Two Generations of Section 5

Since its enactment in 1965, section 5 of the Voting Rights Act has proven to be the nation's most innovative and successful civil rights enforcement tool. The provision's history is aptly divided into two "generations" of enforcement: the first generation focused primarily on providing equal access to the ballot box, while the second generation has been concerned with eradicating more subtle barriers to minority political empowerment. This Section briefly considers each generation in turn.

The first generation of section 5 enforcement occurred in response to the "unremitting and ingenious" tactics employed by certain states and localities –

33. Although the merits of this proposal are discussed more fully *infra* Section III.A, it is in part attractive because it takes no particular position in the longstanding debate on section 5's merit, attempting only to fortify a central pillar of voting rights law. Most voting rights scholars who have participated in this debate are supportive of section 5's continued existence and effectiveness, but some are either openly skeptical or clearly opposed to the provision. Richard H. Pildes and Samuel Issacharoff can be counted as section 5's most notable skeptics. *See, e.g.*, Issacharoff, *supra* note 27; Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29 (2004). Other commentators, like Abigail Thernstrom, have been deeply critical of DOJ's section 5 administration and have called for allowing section 5 to expire. *See, e.g.*, Abigail Thernstrom, *More Notes from a Political Thicket*, 44 EMORY L.J. 911, 919-31 (1995); Abigail Thernstrom, Op-Ed., *Emergency Exit*, N.Y. SUN, July 29, 2005, at 10; Abigail Thernstrom & Edward Blum, Op-Ed., *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10.

Imaged with the Permission of Yale Law Journal

mostly in the former Confederacy—to deny black citizens the right to vote despite contrary federal mandates.[34] Prior congressional attempts to enfranchise black voters had generally been ignored by recalcitrant jurisdictions, and "[i]n those relatively few instances when a court actually enjoined a discriminatory practice, the affected jurisdiction would simply adopt a new exclusionary tactic not covered by the court order—sometimes within twenty-four hours."[35] To thwart the "outguess[ing]" of congressional and judicial mandates,[36] section 5 forced covered jurisdictions[37] to obtain preclearance from the DOJ or a declaratory judgment from a special three-judge district court in the District of Columbia before a new voting law could take effect. The covered jurisdiction maintained the burden of proving that its proposed voting laws would not disadvantage minority voters. Until convinced otherwise,[38] the federal government would presume that the jurisdiction's proposed changes either reflected a racially discriminatory intent or would produce a racially discriminatory effect. Section 5 thus cast a decidedly skeptical eye on all voting changes in covered jurisdictions. In *South Carolina v. Katzenbach*, the Supreme Court blessed this "uncommon"[39] enforcement structure—and its departure from federal deference to the states in election administration—so that the nation could finally "shift the advantage of time and inertia from the perpetrators of [voting discrimination] to its victims."[40] The focus on ensuring equal access to the ballot resulted in immediate success, evidenced by dramatic increases in minority registration and political participation throughout covered jurisdictions.[41]

---

34. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

35. Tokaji, *supra* note 19, at 791.

36. Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969).

37. When the VRA was passed, a jurisdiction could become "covered" if: (1) it employed literacy tests, and (2) less than 50% of its voting-age population was registered to vote by, or eventually voted in, the 1964 presidential election. Additional districts were added to the coverage list during the 1968 and 1982 congressional reauthorizations of the VRA's temporary provisions. *See* Civil Rights Div., U.S. Dep't of Justice, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Feb. 5, 2007) [hereinafter Civil Rights Div., About Section 5]. Section 5 was further extended in 1975 to target jurisdictions that conducted English-only elections. *See* Civil Rights Div., U.S. Dep't of Justice, About Language Minority Voting Rights, http://www.usdoj.gov/crt/voting/ sec_203/activ_203.htm (last visited Feb. 5, 2007).

38. *See infra* Section I.B.

39. 383 U.S. at 334.

40. *Id.* at 328.

41. *See generally* QUIET REVOLUTION IN THE SOUTH, *supra* note 15 (canvassing the impact of the VRA on covered jurisdictions).

Imaged with the Permission of Yale Law Journal

Despite this first generation success, subtle structural barriers hindered the growth of minority political power. Covered jurisdictions, fearing that minority electoral victories would flow from increased minority political participation, deployed seemingly race-neutral strategies to minimize the electoral power of the newly enfranchised citizens.[42] For instance, many jurisdictions adopted laws mandating that all candidates win elections in "at-large" districts, instead of in more localized, single-member districts.[43] This kind of institutional design change effectively prevented minority voters from forming electoral majorities in smaller districts where they were numerically dominant.[44]

The retreat behind this race-neutral veil prompted the Supreme Court in *Allen v. State Board of Elections* to broaden section 5's substantive reach to consider "the subtle, as well as the obvious" roadblocks employed by covered jurisdictions to frustrate minority political advancement.[45] The Court recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[46] Thus, seemingly harmless voting changes that diminished minority voting power were deemed just as illicit as outright vote denials. After *Allen*, stratagems such as at-large districting changes, run-off requirements, and voter identification laws required section 5 preclearance to ensure that they were not stalking horses for discriminatory voting practices. In this so-called second generation of section 5 enforcement, the provision has demonstrated its extraordinary ability to advance and protect minority political power. Indeed, the move toward a more robust vision for section 5 "was arguably of greater importance in advancing black electoral opportunity than even the dismantling of literacy tests."[47]

---

42. *See* Tokaji, *supra* note 19, at 794 (noting the tactics used to keep "legislative bodies largely segregated even after the VRA's enactment").

43. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980).

44. At-large elections contributed to the fact that "[t]en years after the enactment of the VRA, the number of southern African American legislators was only about one-third of its peak during Reconstruction." *See* Tokaji, *supra* note 19, at 793.

45. 393 U.S. 544, 565 (1969).

46. *Id.* at 569.

47. Issacharoff, *supra* note 27, at 1729.

Imaged with the Permission of Yale Law Journal

B. The Beer *Retrogression Standard*

In a key 1976 decision, the Supreme Court unveiled the doctrinal standard that has long guided section 5's administration. *Beer v. United States*[48] involved the review of New Orleans's 1970 city council redistricting plan, which created a black voting majority in one out of the city's five councilmanic districts. With the existence of racial bloc voting, or the cleavage of voting patterns along racial lines, this configuration meant that black voters would likely elect one black representative to the council. The city's proposed plan stood in contrast to the previous councilmanic plan, which included no districts with a black voting majority and under which, predictably, no black candidate had won election to the council.

The city of New Orleans first submitted its new plan to the Department of Justice for administrative preclearance but was twice rebuffed after the DOJ objected that the proposed plan would not give minorities adequate voting strength—that is, strength in proportion to their population.[49] The city subsequently sought preclearance from the three-judge district court, which also refused to sanction the new plan, holding that it had "the effect of abridging the right to vote on account of race or color."[50] The court noted that the city's reapportionment plan realistically only provided minority voters with the chance to elect one black representative to the five-person body, despite the fact that black residents accounted for a substantially larger proportion of the city's population.[51] In other words, although the new plan was an improvement over the previous plan, it was not good enough to merit preclearance.

The city appealed directly to the Supreme Court,[52] arguing that the district court applied an erroneous preclearance standard under section 5. A five-Justice majority of the Court agreed and, in the process, declared that a plan would merit preclearance as long as it did not "retrogress" minority political power.[53]

---

48. 425 U.S. 130 (1976).

49. *See id.* at 135.

50. *See id.* at 136.

51. *See id.* at 136-38 (recounting the district court's reasoning).

52. Section 5 permits direct appeal to the Supreme Court for judicial preclearance decisions made by the three-judge district court. *See* 42 U.S.C. § 1973c (2000).

53. *Beer*, 425 U.S. at 141 ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

Imaged with the Permission of Yale Law Journal

The Court's new "retrogression standard"[54] meant that a section 5 objection would attach only if a proposed change left minority voters with less political power than they had previously enjoyed. Under this standard, the Court found that the voting change in *Beer* was clearly ameliorative. Compared to the previous plan, which provided no minority representation, the new plan would reasonably lead to the election of one minority council representative. The city's failure to go further in its reapportionment plan was immaterial because, with respect to minority political power, the new plan was clearly an improvement over its predecessor.

Despite the *Beer* Court's assertion that the retrogression standard had "always" been the lodestar of section 5 review,[55] it relied on a thin slice of the VRA's legislative history to justify its holding.[56] The Court cited a House of Representatives report that declared that section 5 should detect whether minority political power is "augmented, diminished, or not affected" by a proposed law.[57] Relying heavily on this legislative language, the Court concluded that section 5 demanded a static comparison of a covered jurisdiction's proposed and existing plans to detect impermissible movements in minority power. The existing plan established a baseline or benchmark of minority power against which new laws should be compared.[58] Changes that augmented minority power relative to the existing plan would merit preclearance; changes that diminished minority political power would not.[59]

---

54. *See, e.g.*, Meghann E. Donahue, Note, *"The Reports of My Death Are Greatly Exaggerated": Administering Section 5 of the Voting Rights Act After* Georgia v. Ashcroft, 104 COLUM. L. REV. 1651, 1657 (2004).

55. 425 U.S. at 141.

56. *See, e.g.*, Haddad, *supra* note 20, at 143 (calling the Court's reading of the legislative history "highly interpretive"). Justice Marshall took issue with the *Beer* Court's reading of the VRA's legislative history in *City of Lockhart v. United States*, 460 U.S. 125, 144-45 (1983) (Marshall, J., concurring in part and dissenting in part).

57. *Beer*, 425 U.S. at 141 (emphasis omitted) (quoting H.R. REP. NO. 94-196, at 60 (1975)).

58. The *Beer* Court permitted an existing law to be used as a benchmark, even if that meant retrogression was a logical impossibility in the jurisdiction. In other words, if a jurisdiction provided no minority representation under an existing voting regime, the benchmark would be set at zero. Thus, a jurisdiction could conceivably gain preclearance for new laws that perpetually denied minority voters the chance to elect a minority representative. This less than charitable interpretation of section 5 has been vigorously criticized by four Justices, who, speaking through Justice Souter, argued that "the full legislative history shows beyond any doubt just what the unqualified text of § 5 provides. . . . [T]he preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles." Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320, 366 (2000) (Souter, J., dissenting).

59. *Beer*, 425 U.S. at 141.

Imaged with the Permission of Yale Law Journal

With the static benchmarking test, section 5 thus established a "one-way ratchet" for minority political power.[60]

Since *Beer*, the Court has consistently relied on the static test to enforce the retrogression standard and the "limited substantive" role it grants section 5.[61] Read as a whole, the Court's section 5 jurisprudence stands for a simple proposition: the retrogression standard, properly applied, promises only that minority voters will be protected from an impermissible "backsliding" in their political power.[62] So understood, the animating concern of section 5 is the preservation, not the advancement or maximization, of minority voting strength.[63] As I demonstrate later, the static test failed to uphold even this limited retrogression standard in the aftermath of Hurricane Katrina.

Substantive criticisms aside,[64] the inherent predictability of the retrogression standard is one of section 5's longstanding strengths. Jurisdictions know what is expected of them to clear the section 5 hurdle. The unwavering retrogression standard allows section 5 to operate principally as a deterrence tool—the "sword of Damocles"[65]—that curbs retrogressive laws

60. Issacharoff, *supra* note 27, at 1711. This conception of the VRA borrows from the constitutional "ratchet theory" discussed in a footnote in *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966). The constitutional ratchet theory holds that Congress, acting pursuant to its enforcement powers, may never take action designed to "restrict, abrogate, or dilute" constitutional rights. *Id.*; *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (affirming the ratchet theory).

61. Bush v. Vera, 517 U.S. 952, 982 (1996). The retrogression standard and, by extension, the static benchmarking test were upheld in *City of Lockhart*, 460 U.S. at 134 n.10.

62. *Bossier Parish II*, 528 U.S. at 335.

63. *See* Miller v. Johnson, 515 U.S. 900 (1995) (rejecting the DOJ's practice of denying preclearance to voting changes that increased, but did not maximize, minority political power); *see also* Reno v. Bossier Parish Sch. Bd. (*Bossier Parish I*), 520 U.S. 471 (1997) (ending the DOJ's longstanding practice of denying preclearance to voting changes that likely violated section 2 of the VRA). In its recent VRA reauthorization, Pub. L. No. 109-246, 120 Stat. 577 (2006), Congress overturned two of the Court's section 5 decisions, *Bossier Parish II*, 528 U.S. 320, and *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that seemed to narrow the *Beer* retrogression standard. *See* S. REP. NO. 109-295, at 15 (2006) ("The[se] changes work together and are designed to protect minorities from purposeful, unconstitutional discrimination and to eliminate potential obstacles to minority representation in elected bodies. With regard to redistricting plans, they protect naturally occurring districts that have a clear majority of minority voters.").

64. *See, e.g.*, Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1198 (2001) (questioning the *Beer* Court's interpretation of the VRA's legislative history); Haddad, *supra* note 20 (same).

65. Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 709 (2006).

Imaged with the Permission of Yale Law Journal

even before submission to the DOJ.[66] A preclearance denial serves a powerful shaming function,[67] as rejection is a publicly announced indictment that a covered jurisdiction's democratic process is tainted by racial discrimination.

Historical data tracking preclearance submissions attest to the provision's deterrent power. The majority of voting changes are crafted "in the shadow of section 5" and are therefore easily precleared.[68] Others are quickly amended after the fact to address concerns expressed by the DOJ. Functioning in this manner, the preclearance process lends the DOJ coercive power and the ability to negotiate with a covered jurisdiction from a position of strength.[69] Unless a jurisdiction is willing to endure the more onerous judicial preclearance process, DOJ review is the final word on whether a proposed plan ever becomes law.[70]

II. THE POST-KATRINA PRECLEARANCE PROCESS

This Part turns to a previously unexplored breakdown in section 5's enforcement powers. It recounts Louisiana's contentious post-Katrina

---

66. *See, e.g.*, Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 259 (2003) ("The deterrence factor, though, represents Section 5's greatest influence in the prevention of unconstitutional voting-related discrimination. Jurisdictions covered by Section 5 are acutely aware of the need to garner federal approval. For example, in the context of redistricting, discussion and debate at the state and local level often focuses on how the Department of Justice will view the changes made.").

67. *See* Gerken, *supra* note 65, at 721 n.43 (discussing section 5 as a "shaming" device).

68. *See* Karlan, *supra* note 26, at 36. Every year, the DOJ reviews between 15,000 and 24,000 voting changes. Civil Rights Div., About Section 5, *supra* note 37. Of these changes, only a handful are denied preclearance. *See* Richard L. Hasen, *Congressional Power To Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 192 (2005) (noting a decline, from 4.06% in 1968-1972 to 0.05% in 1998-2002, in the percentage of submissions denied preclearance).

69. *See* Drew S. Days III, *Section 5 and the Role of the Justice Department*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 52, 61 (Bernard Grofman & Chandler Davidson eds., 1992). *But see* HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 88-89 (1982) (discussing the DOJ's position of weakness in negotiations).

70. Though covered jurisdictions may obtain preclearance administratively from the DOJ or judicially from the three-judge district court, the overwhelming majority of jurisdictions opt for administrative preclearance. Compared to judicial preclearance, administrative review offers a faster, less expensive method of obtaining preclearance. The DOJ only has sixty days to grant or deny preclearance after the proposed change is submitted for review. If the sixty days pass without a decision, the proposed change automatically takes effect. If the Voting Section of the DOJ, which performs the bulk of the analysis and investigation during a review, requires more information, it can submit a formal request that automatically resets the sixty-day clock. *See* Civil Rights Div., About Section 5, *supra* note 37.

Imaged with the Permission of Yale Law Journal

preclearance process and ultimately diagnoses section 5 as doctrinally unequipped to adapt to the post-Katrina challenge.

A. The Emergency Voting Plan

Operating without a historical model and under heightened public scrutiny,[71] the Louisiana government was charged with crafting an emergency voting plan to respond to the damage caused by Katrina. After chronicling the legislative battle to reform simple voting procedures, this Section details the controversy surrounding a crucial point of contention: whether the state would rely on traditional mail-based forms of absentee voting to accommodate Katrina's displaced, or whether it would instead adopt a far-reaching "satellite voting" measure that would allow the displaced to vote in person at polling sites located around the country.[72]

Governor Kathleen Blanco began the post-Katrina reform process by taking two decisive actions. First, she issued an executive order delaying New Orleans's primary and general municipal elections, which were to be held in February and March 2006, respectively.[73] On its face, the executive order was an honest admission that, months after Katrina hit, the city was still too devastated to conduct a fair and safe election.[74]

Second, the Governor convened two emergency sessions of the Louisiana State Legislature—one in November 2005, and one in February 2006—to consider new voting procedures for the post-disaster elections. The first session was filled with pressing legislative reforms, and in her call to convene the Governor suggested a series of election-related items for the legislature to

---

71. *See, e.g.*, Letter from Bruce S. Gordon, President & Chief Executive Officer, NAACP, to Alberto Gonzales, Attorney Gen. (Mar. 2, 2006), *available at* http://www.columbia.edu/itc/journalim/cases/katrina/NAACP/2006-03-02%20Letter%20to%20Gonzalez.pdf; Letter from Bruce S. Gordon, President & Chief Executive Officer, NAACP, to John K. Tanner, Chief of Voting Section, Civil Rights Div., U.S. Dep't of Justice (Mar. 13, 2006), *available at* http://www.columbia.edu/itc/journalism/cases/katrina/NAACP/2006-03-13%20Letter%20to%20Tanner.pdf.

72. *See infra* notes 92-99 and accompanying text.

73. The primary election was moved to April 22, 2006. The general election was postponed to May 20, 2006. *See* La. Exec. Order No. KBB 2006-2 (Jan. 24, 2006), http://www.legis.state.la.us/katrina/eoorders/06-02.pdf.

74. *Cf. id.* at 1 (justifying the delay based on the need to "minimize to whatever degree possible a person[']s exposure to danger" and to "protect the integrity of the electoral process" (quoting LA. REV. STAT. ANN. § 18:401.1 (Supp. 2006))).

Imaged with the Permission of Yale Law Journal

consider.[75] One item asked the legislature to suspend the annual voter canvass, a process mandated by state law to verify that all registered voters were still residents of their home parishes.[76] A voter who had moved outside his home parish and had, for instance, filed a change of address form with the Postal Service could be declared ineligible and removed from the voter rolls. If it remained in effect, the canvass could disqualify nearly all displaced voters who were now living outside of New Orleans.[77] A second item sought the creation of a framework statute to empower the state's chief election officer, the Secretary of State, to formulate a logistical plan for post-disaster voting.[78] Both items were modest and uncontroversial and therefore easily passed the legislature.[79]

Despite the ease with which these reforms obtained approval, another seemingly uncontroversial procedural reform—a bill introduced by a state senator to relax a state law that prohibited first-time voters from voting absentee in their first election—was defeated.[80] The legislature's rejection of this proposal raised suspicions of its unwillingness to take aggressive steps to help displaced residents participate in the elections. Preserving the first-time absentee voter rule would bar nearly 10,000 newly registered—and newly displaced—voters from participating in New Orleans's municipal elections unless they returned to the city to vote in person.[81] At a hearing concerning the

---

75. *See* La. Proclamation No. 62 KBB 2005, Convening of Legislature in Extraordinary Session (Oct. 31, 2005), http://www.legis.state.la.us/archive/051es/call.pdf.

76. *See id.*

77. *See* LA. REV. STAT. ANN. § 18:192 (2004) (requiring that the registrar mail an address confirmation card to all registered voters, but that "[i]f the card is returned and . . . if the corrected address provided [by the Postal Service] is outside the parish, the registrar then shall follow the procedure set forth in R.S. 18:193 with respect to challenge and cancellation on the ground that the registrar has reason to believe that the registrant is no longer qualified to be registered"). This law had the potential to disqualify those displaced by Katrina, given that many filed change of address forms with the Postal Service that noted their new, out-of-state addresses.

78. *Cf.* La. Proclamation No. 62 KBB 2005, *supra* note 75 (empowering the extraordinary session "[t]o legislate as to the holding of elections impaired as the result of a gubernatorially declared disaster or emergency").

79. *See* LA. REV. STAT. ANN. § 18:192; *id.* § 18:401.1.

80. Senate Bill No. 6 failed to pass by a vote of sixteen yeas to twenty nays. *See* S. 6, 33d Extraordinary Sess., at 12-13 (La. 2005), *available at* http://senate.legis.state.la.us/SessionInfo/2005/ES/Journals/11-15-2005.pdf.

81. *See* Class Action Complaint, *supra* note 6, para. 29, at 8 ("[A]pproximately 10,000 displaced Orleans Parish residents who have registered by mail to vote will be voting for the first time in the April or May 2006 primary or general elections.").

Imaged with the Permission of Yale Law Journal

pace and scope of the state's election reforms,[82] Judge Ivan Lemelle—the presiding federal judge—brought up the legislature's rejection of the relaxed absentee voter proposal "out of the blue"[83] and strongly hinted that if the legislature did not reconsider its rejection, he was prepared "to take over [the] elections."[84] Likely motivated in part by this threat of judicial intervention, the legislature adopted the absentee voting reform during the second emergency session.[85]

The legislature, however, refused to proceed with other voting reforms, including a proposal that would have allowed displaced residents to vote early at selected offices of the registrar outside of Orleans Parish. Although the reform was considered a relatively uncontroversial precursor to more far-reaching proposals preferred by some lawmakers and civil rights groups, the legislature, voting along party and racial lines, rejected the provision.[86] This rejection prompted black lawmakers to walk out of the legislature in protest, accusing the opposition of being motivated by racial animus and opportunism.[87] Following the walkout, one state senator commented that

---

82. A lawsuit, *Wallace v. Chertoff*, was originally filed in November 2005 and sought the prompt rescheduling of the 2006 municipal elections and the immediate adoption of certain procedural reforms for displaced voters. *See* Petition for Violation of the Voting Rights Act, Deprivation of the Right To Vote, Violation of the Civil Rights Act & for Declaratory & Injunctive Relief, Wallace v. Chertoff, No. 05-5519 (E.D. La. Nov. 10, 2005) [hereinafter *Wallace* Petition]. The NAACP Legal Defense Fund (LDF) later signed on to *Wallace* as counsel for the plaintiffs. *See* Press Release, NAACP-LDF, LDF Joins New Orleans Voting Case (Jan. 20, 2006), *available at* http://www.naacpldf.org/printable.aspx?article=775. This suit was later consolidated with another suit, *ACORN v. Blanco*, No. 06-611 (E.D. La. filed Feb. 9, 2006).

83. Marsha Shuler, *Courts May Take Over Election If Law Unchanged, Official Warns*, ADVOCATE (Baton Rouge), Feb. 3, 2006, at 8A (quoting Louisiana Secretary of State Al Ater).

84. *Id.*

85. Senate Bill No. 16 passed by a vote of twenty-six yeas to twelve nays. *See* S. 16, 34th Extraordinary Sess., at 13 (La. 2006), *available at* http://senate.legis.state.la.us/SessionInfo/2006/ES/Journals/02-09-2006.pdf.

86. *See* Louisiana Legislative Black Caucus, http://llbc.louisiana.gov/llbc_members.htm (last visited Jan. 29, 2006) (listing members of the Legislative Black Caucus); H. 14, 34th Extraordinary Sess., at 3-4 (La. 2006), *available at* http://house.louisiana.gov/Journals/2006_1stESJournals/061ES%20-%20HJ%200213%207.pdf (providing the final roll call); *see also* Ed Anderson, *Voting-Center Bill Gets Second Chance: Blanco Aides Say Tide Has Turned in House*, TIMES-PICAYUNE (New Orleans), Feb. 15, 2006, at A3 (noting the fifty-four votes cast against an initial proposal for in-state satellite voting stations).

87. *See, e.g.*, Anderson, *supra* note 86.

Imaged with the Permission of Yale Law Journal

"[t]here are people who still don't want [black] people to vote."[88] Marc Morial, the former Mayor of New Orleans and president of the National Urban League, called the walkout "unprecedented" and opined that "the act of the legislature is tantamount to an act of disenfranchisement. I think it's an act that borders on being a 21st century poll tax."[89]

The protest dramatically raised the stakes by highlighting the legislature's inaction. Judge Lemelle convened a conference call with state officials, warning that the legislature's intransigence could "lead to the disenfranchisement of Orleans Parish [v]oters" and could prompt him to intervene "[i]f the legislature fails to deal with this issue in a manner that complies with federal Voting Rights laws."[90] Demonstrating once again that it responded best to the threat of intervention, the legislature approved the early voting measure only two days after first rejecting it.[91]

The legislature's hard line against seemingly uncontroversial reforms chilled serious consideration of the principal voting reform sought by several lawmakers and civil rights groups—the establishment of "satellite voting" locations for displaced residents living outside the state. Instead of having voters cast their ballots through the mail, the satellite procedure would allow citizens to cast their votes in person at polling stations established in areas with substantial concentrations of Katrina evacuees.[92] The Secretary of State determined that satellite voting was logistically feasible[93]: Louisiana election officials would staff the satellite locations with traditional voting equipment and voter registration lists to reduce the potential for fraud. Satellite voting was arguably the only remedy that would not disadvantage the hundreds of thousands of minority voters living outside the state. In addition to the

88. Marsha Shuler, *Legislators OK Letting Evacuees in La. Vote: Regional Voting Centers To Be Used Outside N.O.*, ADVOCATE (Baton Rouge), Feb. 17, 2006, at 4A (quoting Louisiana Senator Charles Jones).

89. Marc Morial, President, Nat'l Urban League, Address at the National Press Club Luncheon (Feb. 14, 2006).

90. Minute Entry at 2, ACORN v. Blanco, No. 06-611 (E.D. La. Feb. 14, 2006).

91. *See* La. H.R. Journal, 34th Extraordinary Sess., at 7 (Feb. 15, 2006), http://house.louisiana.gov/Journals/2006_1stESJournals/061ES%20-%20HJ%200215%209.pdf.

92. For a defense of satellite voting as an appropriate disaster-related voting procedure, see *Developments in the Law—Voting and Democracy*, 119 HARV. L. REV. 1127, 1187-88 (2006).

93. Class Action Complaint, *supra* note 6, para. 50, at 12 ("[T]he Secretary of State has determined that it is feasible to conduct out-of-state satellite voting in the nine states that he has identified as having the highest concentrations of displaced persons.").

Imaged with the Permission of Yale Law Journal

continuing breakdowns in the Postal Service,[94] many of the displaced still relied on temporary shelters,[95] and neither the state nor the federal government could establish with exact precision the addresses of all registered voters scattered by Katrina.[96] These structural deficiencies demonstrated the inferiority of traditional mail-based voting methods relative to a satellite voting alternative. Supporters of satellite voting bolstered their argument by pointing out that it was a historically precedented voting procedure—soldiers in the Civil War relied on satellite voting booths to vote absentee from the field[97] and, more recently, Iraqi citizens living in the United States used satellite voting locations to vote in their country's first postwar elections.[98] In addition,

---

94. *See, e.g.*, Michelle Hunter, *Local Mail Delivery Is Slowly Improving: But No Magazines Go to ZIP Code 701*, TIMES-PICAYUNE (New Orleans), Feb. 5, 2006, at A1 (noting a five-month delay in mail delivery); Michelle Hunter, *Neither Rain Nor Sleet?: The Storm Has Passed, the Cleanup Is Under Way and Local Residents Want at Least One Piece of Their Normal, Pre-Katrina Lives Back: Their Mail*, TIMES-PICAYUNE (New Orleans), Nov. 23, 2005, at A1 (discussing the heavy infrastructure and personnel damage to the Postal Service that persisted months after Katrina); Michelle Hunter & Sheila Grissett, *Some Residents Find They've Got Mail: Carriers May Delay Delivery If Address Looks Unsafe, Vacant*, TIMES-PICAYUNE (New Orleans), Sept. 22, 2005, at B1 (noting initial postal delays immediately after Katrina).

95. *See, e.g.*, Shaila Dewan, *Storm Evacuees Found To Suffer Health Setbacks*, N.Y. TIMES, Apr. 18, 2006, at A1 (noting that, by April 2006, the average Katrina evacuee had moved 3.5 times). Katrina evacuees also relied on private sources of shelter that were more efficient at providing immediate help in the aftermath of the storm. *See, e.g.*, HURRICANE KATRINA RESPONSE PROJECT, *supra* note 10, at 1; Hamil R. Harris & Jacqueline L. Salmon, *Churches Still Await Katrina Aid: Bush-Clinton Fund Criticized for Delay in Allocating $20 Million*, WASH. POST., Mar. 2, 2006, at A10.

96. Locating the displaced was extraordinarily difficult for the government. The Louisiana Secretary of State relied heavily on the Federal Emergency Management Agency (FEMA) list to contact voters but had to threaten suit before getting access to the FEMA data. *See* Melinda Deslatte, *Ater Seeking Lawsuit Against FEMA for Voter Information*, HOUSTON CHRON., Dec. 21, 2005, http://www.chron.com/disp/story.mpl/nation/3539254.html. Meanwhile, candidates for office were denied access to the government's list of displaced voters and had to rely on privately created lists that were just as unreliable—if not more so—than the government's list. *See* Tidmore, *supra* note 5, at 3 (quoting one political consultant as describing these private lists as "helter-skelter-cross-your-fingers-slapped-together-let's-pray-it's-accurate mail and phone lists").

97. *See, e.g.*, JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 15-17 (1915) (discussing out-of-state satellite voting as a common option for soldiers in the Civil War); John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 500 (2003); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right To Vote*, 71 U. CIN. L. REV. 1345, 1350-51 (2003).

98. *See, e.g.*, Arlo Wagner & Amy Doolittle, *Iraqis Vote in 7 U.S. Sites*, WASH. TIMES, Dec. 14, 2005, at A1.

Imaged with the Permission of Yale Law Journal

supporters argued, relying on traditional forms of absentee balloting seemed to turn the logic of voting on its head. Normally, a voter assumes the additional administrative burden of the absentee procedure in return for the convenience of voting absentee. Katrina's displaced, by contrast, made no such rational decision. Asking them to shoulder an additional burden to participate in the elections—on top of the extraordinary and more immediate hardships they faced—seemed to violate a fundamental notion of fairness.[99]

Yet with the second emergency session dominated by the controversy over more modest voting reforms, there was no time remaining in the session to give satellite voting sustained consideration. Instead, black lawmakers attempted to introduce the provision in a subsequent legislative session in March 2006. The proposal deadlocked the Committee on Senate and Governmental Affairs and failed to reach the Louisiana Senate floor.[100] Although supportive committee members argued vigorously for satellite voting, opponents defeated the measure in part by making the legally dubious claim that, by adopting satellite voting in select cities with the largest populations of evacuees, the legislature would run afoul of the Equal Protection Clause and would issue "an invitation to litigation in every sense of the word."[101] Other opponents, such as the treasurer of the state Republican Party, summarized his opposition to satellite voting by bluntly declaring: "This is absurd; it goes too far."[102]

The legislature's refusal to permit satellite voting meant that the state's post-Katrina emergency plan was controversial for what it failed to provide.[103] Some civil rights groups—including the NAACP Legal Defense Fund—continued with litigation alleging that the state's rejection of satellite voting

---

99. Some voters openly expressed this sentiment. *See* Brian Thevenot & Leslie Williams, *2,190 Cast Early Ballots in New Orleans Elections*, TIMES-PICAYUNE (New Orleans), Apr. 11, 2006, at A1 (quoting one sixty-two-year-old retiree as saying, "I lived in New Orleans all my life. I worked in New Orleans. I paid taxes. I bought a home. I've been a good citizen. I shouldn't have to go out of my way to vote.").

100. *See* Ed Anderson, *Panel Sinks Out-of-State Vote Bill*, TIMES-PICAYUNE (New Orleans), Mar. 30, 2006, at A3.

101. *See id.* Opponents of satellite voting advanced this argument despite the fact that no civil rights group was threatening litigation if satellite voting were adopted. In fact, satellite voting was the precise remedy sought by the civil rights groups. *See Wallace* Petition, *supra* note 82, para. 81, at 30.

102. Anderson, *supra* note 100.

103. In addition to the reforms discussed above, the state's emergency plan consisted largely of a voter information campaign to notify displaced citizens of their voting rights, the provision of additional election commissioners, and the provision of additional voting equipment. *See* Class Action Complaint, *supra* note 6, paras. 36-40, at 9-10.

Imaged with the Permission of Yale Law Journal

constituted an impermissible vote denial under section 2 of the VRA[104] and an illicit burden on the right to vote under the First and Fourteenth Amendments of the Constitution.[105] But given the lack of supportive doctrine,[106] these creative legal arguments failed to convince the court that the legislature—by refusing to do more—violated statutory or constitutional authority.[107]

The basket of legislative reforms thus remained modest. Displaced voters would be exempt from first-time absentee voter rules, would avoid the direct disenfranchisement associated with the annual voter canvass, and would be permitted to vote early at selected sites within the state. In addition, the legislature authorized the Secretary of State to outline a plan to conduct a voter information campaign to reach the displaced. Yet as this Section has

---

104. Section 2's statutory mandate closely traces the Fifteenth Amendment, ensuring that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. § 1973 (2000). Despite the Act's first-generation success, minority voters were still thwarted from succeeding in the political process by institutional design reforms; Congress and the courts have thus applied this statutory mandate to questions of institutional design. The lack of minority political success is not by itself a sign of illicit state action. *See* City of Mobile v. Bolden, 446 U.S. 55, 111 n.7 (1980) (Marshall, J., dissenting); Whitcomb v. Chavis, 403 U.S. 124, 153 (1971) (noting that "cancel[ing] out" black votes constitutes a "mere euphemism for political defeat at the polls"). Instead, the confluence of specific factors, coupled with a lack of minority political success, triggers section 2's protection. *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (listing the seven factors relevant to finding a section 2 violation). The courts were instrumental in developing what became the section 2 test. *See* White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam). The "*Zimmer* factors" were largely adopted by Congress during the 1982 amendment process. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 689 (rev. 2d ed. 2002).

105. *See* Brief for Plaintiffs, Wallace v. Chertoff, No. 05-5519 (E.D. La. Feb. 21, 2006).

106. Multifactor tests designed by Congress and the Supreme Court to ferret out discrimination in redistricting cases have made section 2 a doctrine-less vehicle outside of a narrow band of circumstances. *See* ISSACHAROFF ET AL., *supra* note 104, at 689. For a discussion of how section 2 has essentially become a boutique doctrine, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1674 (2001). *See also* Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1474 (1996) ("In order to succeed [under section 2], a party must be organized, possess adequate financial resources, and acquire a large amount of historical and technical documentation . . . .").

107. *See* Minute Entry, Wallace v. Chertoff, No. 05-5519 (E.D. La. Feb. 24, 2006) (noting the court's decision to dismiss the consolidated cases without prejudice).

Imaged with the Permission of Yale Law Journal

demonstrated, many of these reforms were contested, and some were initially rejected before a combination of political pressure and threatened judicial intervention prompted the legislature to adopt them. The legislature's actions hardly demonstrated an eagerness to accommodate Katrina evacuees, and its limited emergency reforms seemed to constitute the bare minimum needed to conduct post-disaster elections. Whether these reforms would preserve minority voting power was a question for section 5 preclearance to resolve.

B. The Preclearance Paradox

With the legislative reform process completed, Louisiana sought to preclear its emergency plan with the DOJ. The DOJ had been expecting the state's submission and had even contacted state officials immediately after Katrina to promise to "expedite the review of any and all submissions of voting changes" to deal with Katrina's aftermath.[108]

The state's reforms were subjected to the static benchmarking test to ensure that its voting changes did not retrogress minority political power. When faced with Louisiana's post-Katrina emergency voting plan, however, the static benchmarking test fell apart and deprived the DOJ of the ability to make any credible threat to deny preclearance. To understand this breakdown, it is helpful to retrace the simple procedural steps that defined the static analysis. First, the static test used Louisiana's pre-Katrina voting laws (applied to the post-Katrina state of affairs) as the benchmark for comparison. It then compared the state's proposed emergency voting plan (also applied to the post-Katrina state of affairs) against this benchmark and asked whether minority voters would be better off with the reforms than without them.[109] Predictably, the test concluded that the state's voting reforms were ameliorative, implying that minority voting power would *increase* as a result of the emergency plan.[110] This conclusion is undoubtedly correct in a narrow sense: the procedural reforms, combined with the voter information campaign, would increase minority voting strength relative to an election held without the reforms.

---

108. Letter from Bradley J. Schlozman, Acting Assistant Attorney Gen., to Al Ater, La. Sec'y of State (Sept. 7, 2005), *available at* http://www.usdoj.gov/crt/voting/la_katrina.htm.

109. *See* Letter from William E. Moschella, Assistant Attorney Gen., to Rep. John Conyers, Jr., Ranking Minority Member, House Comm. on the Judiciary 3-5 (Mar. 16, 2006) (on file with author) ("[T]he sole Section 5 inquiry is whether New Orleans voters would be better off without . . . [the] provisions enacted by the State to ameliorate voting conditions for the displaced individuals.").

110. *See id.* at 2-3.

Imaged with the Permission of Yale Law Journal

Yet a closer look reveals a critical lapse in the static analysis. The pre-Katrina laws, if used for a post-Katrina election, clearly would have led to a dramatic reduction in minority voting power. For instance, residency requirements alone would have disenfranchised a substantial portion of the hundreds of thousands of displaced residents living outside the state.[111] The DOJ was nevertheless doctrinally bound to use the anachronistic pre-Katrina laws as a benchmark. The use of this benchmark essentially predetermined the outcome of the static test: compared to the pre-Katrina plan, virtually *any* post-Katrina plan would appear ameliorative, even one that led to a substantial *decrease* in minority voting power from pre-Katrina levels. This result rendered the retrogression standard a nullity and undermined the usefulness of the static test as a workable barometer of illicit reductions in minority voting power.

It was a critical assumption built into the static benchmarking procedure that preordained this result: static benchmarking presumes that a jurisdiction's existing voting laws will preserve minority voting strength.[112] In most cases, this assumption is unproblematic; as long as the circumstances in the jurisdiction do not dramatically change, existing laws will likely maintain minority influence. However, the logic of static benchmarking breaks down if the test's animating assumption is called into question by an intervening event that renders the existing voting plan unable to preserve minority voting strength.

To illustrate, imagine a jurisdiction that allows citizens to vote only by mail.[113] Under normal circumstances and under the existing laws, minority citizens in the jurisdiction consistently wield enough voting influence to elect six out of ten members of the city council. Now imagine that a disaster hits this jurisdiction and cripples the Postal Service in predominantly minority neighborhoods. As a result of the damage to this crucial election infrastructure, minority participation would predictably suffer—compared to their usual six city council seats, minority voters might, for instance, control only three. Simply stated, the predisaster plan would fail to preserve minority political power.

Static benchmarking would nevertheless use this deficient plan as a valid benchmark for comparison when a post-disaster law was submitted for preclearance. As long as the new law made voters relatively better off—for

111. *See supra* note 77 and accompanying text.

112. *See* Jeffries & Levinson, *supra* note 26, at 1214; Karlan, *supra* note 26, at 21.

113. The state of Oregon currently employs a variation of this mail-only voting system. *See* OR. REV. STAT. § 254.465(1) (2005) ("An election held on the date of the primary or general election shall be conducted by mail.").

Imaged with the Permission of Yale Law Journal

instance, by permitting alternative forms of voting—the government would deem it ameliorative and would grant preclearance. This result would occur despite the real possibility that the new law might stop short of maintaining minority control of six council seats. The new regime might instead result in minority control of only four seats—clearly an improvement over the three seats the existing laws would provide in a post-disaster election, but also fewer than the six seats that had long characterized minority political power in the jurisdiction. The precleared law could thus appear ameliorative relative to the broken benchmark but still result in an unmistakable retrogression in minority influence from its predisaster level. This wrinkle in static benchmarking's normally straightforward logic exerts a crippling effect on section 5's ability to avoid reductions in minority political power.[114]

The above scenario epitomizes a longstanding concern about static benchmarking.[115] When confronted with complex circumstances such as an unprecedented disaster, the procedure's one-dimensional analysis, often seen as its principal strength,[116] becomes a decisive weakness. Instead of preventing clearly retrogressive outcomes, static benchmarking unwittingly blesses them.

The DOJ's posture during the post-Katrina preclearance process reflected this paradox. The Justice Department admittedly held no leverage over Louisiana[117] and had no choice but to preclear any plan, no matter how uncharitable, that improved the pre-Katrina voting laws. To its credit, the DOJ used its communications with Louisiana officials to encourage the state to include particular voting procedures.[118] Yet had the state declined the DOJ's advice out of hand, it would still have received preclearance. This paradox makes section 5 a paper tiger in the aftermath of an unprecedented disaster. It gives the DOJ the veneer of coercive power without actually empowering it to withhold preclearance from anyone except the "incompetent retrogressor."[119] Also, without the threat of a preclearance denial, jurisdictions that might normally legislate "in the shadow of the law" to gain section 5 approval are

---

114. I am indebted to Robert Scott for helpful discussions on this point.

115. *See supra* notes 28-29 and accompanying text.

116. *See, e.g.*, Donahue, *supra* note 54, at 1657-58.

117. Although the DOJ rarely discloses the reasoning behind its preclearance decisions, the Assistant Attorney General for Civil Rights strongly suggested that the Department was doctrinally disarmed by section 5's static test. *See* Letter from William E. Moschella to Rep. John Conyers, Jr., *supra* note 109, at 3.

118. *See id.* at 4-5 (recounting the procedural actions the DOJ encouraged the state to take).

119. Justice Scalia coined this phrase in *Bossier Parish II*, 528 U.S. 320, 332 (2000). It refers to "a jurisdiction that has intended—but failed—to effect a retrogression" in minority political power. Donahue, *supra* note 54, at 1661.

Imaged with the Permission of Yale Law Journal

effectively freed from any substantive obligations under the provision. A jurisdiction may then choose to take only minor steps to avoid retrogression, knowing that section 5 no longer has the potential to fall like the "sword of Damocles."

III. RETROGRESSION RECONSIDERED

Having identified a troubling blind spot in section 5's administration, I now propose a doctrinal "fix" to resurrect section 5's post-disaster enforcement power. This Part presents an alternative to the static benchmarking test that is actually capable of upholding the modest retrogression principle announced by the Court in *Beer*.

A. Dynamic Benchmarking

Although static benchmarking has long defined section 5's administration, nothing in *Beer* or its progeny suggests that it is mandated. Instead, the single lodestar of section 5's administration is the retrogression standard—the promise that minority voting power will never backslide, or retrogress, as a result of new voting laws. Because static benchmarking is incapable of enforcing this retrogression standard after a disaster, I propose a more effective "dynamic benchmarking" alternative.[120]

The dynamic benchmarking model comprises two steps. The first step applies a multifactor threshold examination of existing voting laws to ensure that they are capable of preserving minority voting strength. If the existing laws cannot preserve this strength, the DOJ or district court will be barred from using them as a valid benchmark. The second step then mandates that the DOJ or district court develop a "replacement benchmark"—a model voting plan that, if used in a post-disaster election, would give minority voters a realistic opportunity to preserve their voting strength. These steps enable dynamic benchmarking to reject post-disaster voting plans that are technically

120. It is important to emphasize that the dynamic proposal I advance is limited to disaster situations. Although the proposal might seem like a nuanced alternative to the static test's blunt application, expanding its application beyond disasters—to reach situations in which, for instance, gradual changes in demographics reduce minority voting strength—would likely outstrip section 5's constitutional mandate. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 983 (1996) (plurality opinion) (cautioning that the retrogression standard is "not a license for the State to do whatever it deems necessary to ensure continued minority electoral success" (emphasis omitted)).

Imaged with the Permission of Yale Law Journal

ameliorative compared to predisaster laws yet actually result in illicit retrogression.

1. Assessing the Existing Voting Regime

The first step in dynamic benchmarking is a threshold examination of a jurisdiction's existing voting laws to determine whether they are truly capable of maintaining existing minority voting strength. The DOJ or district court should be empowered to question the workability of existing voting laws in light of an intervening event, such as a storm or terrorist attack. A logical trigger for this initial examination is a federal disaster declaration under the Stafford Act.[121] To ensure a principled review, the inquiry should be guided by clear factors including, but not limited to: (1) the extent of voter displacement, (2) damage to the infrastructure and channels of election administration, and (3) racial disparities in voting patterns that would be exacerbated by the existing plan. These factors, which are briefly discussed below, are meant to signal the kind of broad threshold inquiry sought by dynamic benchmarking. By investigating each factor, the DOJ or district court should gain an accurate sense of the extent of democratic damage caused by a disaster.

First, the extent of voter displacement—a concept that includes the number of displaced voters, their geographic locations, and the projected duration of displacement—can have a direct impact on whether existing voting laws can adapt to a post-disaster election. For instance, although a jurisdiction's strict absentee voting requirements may normally make sense as an anti-fraud mechanism, after a disaster, these once-reasonable restrictions can erect a substantial administrative barrier for displaced voters who wish to vote from afar.

Second, measuring potential damage to the infrastructure and channels of election administration can help determine whether existing laws can logistically execute a fair contest. A disaster has the potential to cause significant damage to critical infrastructure, such as the Postal Service, that voters rely upon to receive information both from the government and from candidates seeking their votes. A voting regime that relies primarily on the Postal Service to distribute voter information—and, more importantly, absentee ballots—will be hamstrung if this normally stable channel is closed or disabled after a disaster. In addition to damaging the Postal Service, disasters can also destroy the places where citizens have become accustomed to voting. The need to eliminate or consolidate polling locations can contribute to the

121. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 (2000).

Imaged with the Permission of Yale Law Journal

conclusion that existing voting plans are inadequate to maintain status quo voting power, particularly if minority voters are disproportionately affected by the damage.

Finally, a localized analysis of voting patterns, such as a racial group's preference for certain methods of voting, can illuminate the extent to which existing voting laws would be unable to maintain minority voting power. For example, if a jurisdiction's minority residents have historically disfavored absentee voting relative to the rest of the jurisdiction's voters, a voting plan's heavy reliance on absentee voting as the *only* alternative to traditional voting should be viewed skeptically. Of course, in the aftermath of a disaster, the DOJ may not be able to conclude that a jurisdiction's minority voters disfavor a particular form of voting *because* they are racial minorities. Nevertheless, the existence of racially divergent voting preferences should itself counsel caution when considering whether a voting scheme is capable of preserving minority voting strength.

This type of multifactor analysis will not be overly burdensome for the covered jurisdictions, the DOJ, or the district court. The covered jurisdictions will be charged with producing the necessary data for the analysis but will be aided by the proliferation of data-driven studies that normally follow a major disaster.[122] The DOJ or the district court will be responsible for conducting the inquiry, but both have consistently proved capable of digesting and synthesizing complex data pertaining to voting plans and voting groups.[123] In particular, the DOJ, as first among equals in enforcing section 5, has deep experience with the racial dynamics in the covered jurisdictions. It can continue to rely on its informal network of elected officials and community activists for help with the intensely localized post-disaster review that dynamic benchmarking demands.[124] Thus, although dynamic benchmarking's threshold inquiry is not costless, it also does not pose a substantial burden.

---

122. Numerous post-Katrina studies were published in the immediate aftermath of the disaster. *See, e.g.*, KEVIN MCCARTHY ET AL., RAND GULF STATES POLICY INST., THE REPOPULATION OF NEW ORLEANS AFTER HURRICANE KATRINA (2006); Logan, *supra* note 7.

123. *See, e.g.*, Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 485, 486 cmts. (Jan. 6, 1987) (codified at 28 C.F.R. pt. 51 (2006)) (asserting that the DOJ can base a section 5 determination "on the appraisal of a complex set of facts"); Donahue, *supra* note 54, at 1672 ("[E]xamination of the Department's past enforcement practices reveals a rich history of localized and nuanced review.").

124. *See* Gerken, *supra* note 65, at 725 (noting the role that local stakeholders already play in advising the DOJ during its preclearance process); Donahue, *supra* note 54, at 1675 ("The Department maintains files with names of minority contacts in particular jurisdictions and routinely reaches out to these individuals in evaluating the likely impact of a specific change.").

Imaged with the Permission of Yale Law Journal

If the threshold inquiry demonstrates that the existing voting plan is an acceptable baseline for comparison, then the DOJ or district court should proceed with the traditional static benchmarking procedure. A proposed voting change can then be safely measured against the existing voting plan to detect retrogression. However, if the threshold inquiry demonstrates that the existing voting plan is in fact incapable of preserving minority voting strength, the DOJ or district court should proceed to the second step of the dynamic benchmarking model.

2. Selecting a Replacement Benchmark

The second step in the dynamic process requires the DOJ or the district court to select a replacement benchmark—a concrete voting plan that would likely preserve minority political power in a post-disaster world. Importantly, the replacement benchmark would not be a "license for the State to do whatever it deems necessary to ensure continued electoral success."[125] Rather, the replacement benchmark would only ensure that a minority group's "*opportunity* to elect representatives of its choice not be diminished."[126] The distinction is slight, but important: the replacement benchmark is not a mandate to guarantee political spoils; it should only present minority voters with a realistic opportunity to avert retrogression. For example, if minority voters have historically used their political power to elect a minority representative, the replacement benchmark should be a voting plan that preserves a realistic opportunity to continue that success. It should not, however, stack the voting deck in order to turn that opportunity into an absolute certainty—a potential violation of the Fourteenth Amendment.[127]

If a proposed voting change improves or simply maintains minority influence relative to the replacement benchmark, it warrants preclearance. But if the proposed change falls short of the replacement benchmark—for instance, by suggesting post-disaster reforms that are too modest to preserve minority power—it should be denied preclearance. Under dynamic benchmarking, the fact that a post-disaster plan is technically ameliorative no longer guarantees

125. *Vera*, 517 U.S. at 983 (emphasis omitted).

126. *Id.*

127. Even though compliance with the VRA can be a compelling government interest, the state must still narrowly tailor its actions to withstand strict scrutiny. *See* Miller v. Johnson, 515 U.S. 900, 922 (1995) ("Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest.").

Imaged with the Permission of Yale Law Journal

preclearance. By establishing a replacement benchmark, the dynamic model only preclears voting plans that are *sufficiently* ameliorative.

How should the DOJ or district court go about choosing this replacement benchmark? One option that leaps to mind would set the benchmark at the level of minority voting strength in the last predisaster election. So, returning to an earlier example, if a jurisdiction's minority voters previously elected six out of ten city council representatives, a post-disaster voting plan would be precleared only if it provided the realistic opportunity for that level of success in a post-disaster election. Intuitively simple, this practice would present the benchmark as a general goal that the jurisdiction's procedural reforms must make possible. I nevertheless reject this option because I believe such general mandates grant undue deference to incumbent lawmakers who may have a vested interest in developing mediocre voting reforms after a disaster. A general benchmark, void of specifics, presents substantial situational ambiguity that these lawmakers can exploit. With the pressure to compromise among competing interests (not all of which are necessarily legitimate or well intentioned), incumbents may choose to present the "least best" solution to maintain minority voting strength and may scuttle better alternatives in the process. This distrust is particularly justified in the section 5 context, in which historical anxieties of potential voting discrimination still linger.

In light of this concern, I believe a more appealing and robust approach would give the DOJ or district court ultimate authority to craft a detailed replacement benchmark. Yet instead of carving a benchmark from whole cloth, my proposal would mandate that the DOJ or district court harness the expertise—and self-interest—of local stakeholders before deciding on an alternative.[128] The stakeholders may include community advocates, political parties, incumbent lawmakers, candidates for elected office, and any other organized group or individual who wishes to submit a proposal for an appropriate replacement benchmark.[129] Similar to amici in formal judicial

128. Heather Gerken has envisioned a similar role for local stakeholders in her proposal to reform section 5's administration. *See* Gerken, *supra* note 65, at 717. Though Gerken's proposal operates in a different manner from that of this Note, the role she develops for local stakeholders is both powerful and transferable to other contexts, including dynamic benchmarking review. Though the idea of involving stakeholders in voting rights administration is relatively new, involving private parties in other areas of regulation has long been an area of innovation. *See, e.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

129. The post-Katrina involvement of stakeholder groups suggests that, far from being disorganized after a disaster, these groups will be fully engaged in the legislative process.

Imaged with the Permission of Yale Law Journal

proceedings,[130] these stakeholders should be encouraged to offer concrete proposals to inform the review process. The DOJ or district court should then make those proposals available for public critique and analysis. As a formal matter, all submitted plans should be considered equally; if a covered jurisdiction wishes to submit a proposal, it should not be granted special deference. Doing so would permit jurisdictions to determine the very yardstick against which their actions would later be measured. Special deference might also discourage other stakeholders from submitting their own proposals, as it would connote a hierarchy in which they were disfavored.

Three distinct benefits would flow from openly soliciting local stakeholders' input. First, and most practically, the DOJ or district court could use the various submissions to gather practical information on voting procedures that would be feasible in the aftermath of a disaster. The stakeholders would be likely to deploy their superior local knowledge to present procedures that were more creative and workable than what the DOJ or district court could conceive from afar. And even if the DOJ or district court did not adopt a submitted plan in its entirety, input from stakeholders would still present a menu of options from which a replacement benchmark could be derived. The DOJ already consults local stakeholders informally when considering whether to preclear voting changes.[131] The stakeholder submission process would simply bring this consultation above ground.

Second, an open submission process could promote moderation among various stakeholders. Because the proposals would be publicly available for review, stakeholders with conflicting interests might be less likely to submit unnecessarily generous or stingy examples of a nonretrogressive plan. The built-in contrast would not, of course, synchronize the stakeholders' conflicting interests, but it could help blunt the edges of their proposals, lest they demonstrate bad faith in front of the DOJ or district court.

Finally, consulting local stakeholders addresses the potential criticism that dynamic benchmarking might "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts."[132] The dynamic model acknowledges superior local knowledge in election administration, which is a deeply rooted fixture of federalism. It then uses the open submission process to capitalize on that knowledge and to increase the chance that the replacement

130. *See, e.g.*, LULAC v. Perry, No. 2:03-CV-354, slip op. at 1 (E.D. Tex. Aug. 4, 2006) (remedial order) (noting the court's request for amici to submit proposed redistricting plans for consideration on remand).

131. *See* Gerken, *supra* note 65, at 726; Donahue, *supra* note 54, at 1674-75.

132. *Bossier Parish II*, 528 U.S. 320, 336 (2000) (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999)).

Imaged with the Permission of Yale Law Journal

benchmark will enjoy some measure of local "buy-in" or support.[133] Thus, the procedure strikes a compromise: it uses local consultation to guide the DOJ or district court's free hand as it crafts a replacement benchmark, but it also avoids overly constraining the discretion these federal actors need to ensure a post-disaster response that will maintain sufficient minority political strength. There is admittedly no perfect solution to the inherent suspicion that attends giving any government actor – federal or state – discretionary power. Yet by providing an opportunity for substantial collaboration between local stakeholders and the federal government, the open submission process encourages an outcome that reflects both local involvement and federal stewardship.

3. Exiting Dynamic Benchmarking: One Front Door, One Back Door

The mechanics of dynamic benchmarking ensure that it will be a temporary procedure. As a covered jurisdiction returns to normalcy, the extraordinary post-disaster voting laws will not automatically be used as a benchmark when new laws are submitted for preclearance. Dynamic benchmarking prescribes conducting the same two-step procedural review, querying whether the emergency voting laws are an accurate proxy for minority voting strength. Continuously scrutinizing the replacement benchmark is critical because it provides a procedural exit from the more exacting mandate that dynamic benchmarking establishes in the immediate aftermath of a disaster. As displaced residents decide to return home or to relocate permanently, and as the covered jurisdiction repairs its election infrastructure, extraordinary post-disaster voting procedures should give way to more ordinary procedures.[134]

To illustrate, consider a jurisdiction that responds to a disaster by automatically distributing absentee ballots to all displaced voters. Under static benchmarking, this charitable law would be enshrined as a benchmark. Any future attempt to scale it back would likely be tagged as a retrogressive change. This scenario could provide a notable disincentive to jurisdictions considering whether to adopt aggressive post-disaster voting reforms.

---

133. *See* Gerken, *supra* note 65, at 710 (discussing this potential to "generate bottom-up support for voting rights enforcement").

134. Reducing the benchmark of minority voting power is not a betrayal of the retrogression standard. Displaced residents who have taken affirmative steps to relocate (for instance, by registering to vote in other states) should not be included in the VRA's section 5 analysis. Dynamic benchmarking should not artificially attach their citizenship to communities they no longer consider home.

Imaged with the Permission of Yale Law Journal

By contrast, under dynamic benchmarking, the jurisdiction would be allowed to recalibrate its voting procedures without running headfirst into a preclearance denial. The dynamic test's threshold inquiry would examine whether the emergency law is still needed to preserve minority voting strength. If the absentee ballot distribution process is needed to maintain this strength, it should be kept as the proper benchmark for the analysis. If it is not so needed—for instance, because minority voters have largely returned home and can vote in person without sacrificing their status quo political power—a less demanding replacement benchmark should be developed to complete the inquiry. This is the "dynamic" core of the model I propose: rather than employing a stubbornly fixed benchmark, the model permits upward or downward adjustment to preserve minority voting strength.

Even though dynamic benchmarking provides for this "front door" procedural escape from the model's high post-disaster standard, an inherent limitation leaves open a "back door": a jurisdiction may avoid the procedure's heightened mandate altogether by leaving its voting laws unchanged. This alternative "exit" results from a simple truth about section 5: while the provision has long maintained the coercive power to influence a jurisdiction that is taking action, section 5 is not equipped to combat the danger of inaction.[135] In other words, section 5 cannot force a jurisdiction to pass a law; it can only grant or deny preclearance to laws that have already been enacted. The democratic process can potentially deter such recalcitrant behavior ex ante or punish it ex post, but in communities that might reward defiance, other tools in the voting rights arsenal, such as section 2 of the VRA,[136] will have to take the lead when a jurisdiction opts to leave its laws unchanged after a disaster. Though section 2 currently lacks well-developed doctrine to address this kind of tactic, a discerning court would almost certainly view such calculated inaction harshly and might be willing to declare that, without reform, the existing voting laws impermissibly diluted minority voters' ability to "participate in the political process and to elect representatives of their choice."[137] Thus, exploiting this limitation in dynamic benchmarking would be a high stakes game for a covered jurisdiction and would likely present a classic Hobson's choice: forced to decide between leaving its voting laws unchanged (a high-risk, low-payoff option) and conforming to the mandate of dynamic

---

135. I am indebted to Natalie Hershlag for helpful conversations on this point.

136. *See supra* note 104.

137. 42 U.S.C. § 1973(b) (2000). Indeed, the potential that the Louisiana State Legislature would leave its voting laws unchanged formed the basis of Judge Lemelle's repeated threats to intervene and "to take over [the] elections"—presumably by finding that Louisiana had violated section 2 of the VRA. Shuler, *supra* note 83.

Imaged with the Permission of Yale Law Journal

benchmarking, a jurisdiction would likely opt to reform its laws and obtain preclearance.

B. Support for Dynamic Benchmarking

Dynamic benchmarking is an attractive alternative because it fits easily within the firmly rooted mechanics of section 5 preclearance and makes alterations to the existing process only when needed to return section 5 to its intended strength in the aftermath of a disaster. Although the model offers an original approach to section 5 enforcement, it finds substantial support in the VRA's legislative history and in previous departures from static benchmarking. This support, in turn, would insulate the proposal from adverse judicial review if Congress embraced dynamic benchmarking as an alternative to the static test.

1. Legislative History

As discussed earlier,[138] the *Beer* Court used the VRA's legislative history to justify the retrogression standard.[139] The *Beer* majority referenced a single passage from a House of Representatives report that framed the section 5 inquiry around whether minority political power was "augmented, diminished, or not affected" by a proposed voting change.[140] Thus, the identification of a retrogressive law rested on movement in minority power. The Court relied on static benchmarking to detect this movement, later asserting that the test flowed "by definition" from the logic of retrogression.[141]

Yet the same congressional report that the *Beer* Court referenced did not endorse static benchmarking as the *only* way to detect retrogression. Indeed, the House report explicitly encouraged an inquiry that went beyond whether minority political power was augmented, diminished, or not affected by a proposed voting change. Read in full, the report specifically commands that the inquiry be conducted "in view of the political, sociological, economic, and psychological circumstances within the community proposing the change."[142]

Although omitted from the *Beer* Court's opinion, this language supports a more nuanced approach to detecting retrogression. Dynamic benchmarking

---

138. *See supra* Section I.B.

139. *See* 425 U.S. 130, 140-41 (1976).

140. *Id.* at 141 (emphasis omitted) (quoting H.R. REP. NO. 94-196, at 60 (1975)).

141. *Bossier Parish I*, 520 U.S. 471, 478 (1997).

142. H.R. REP. NO. 94-196, at 60.

Imaged with the Permission of Yale Law Journal

offers such an approach by accounting for potentially disparate circumstances before determining whether a proposed law will increase, decrease, or maintain minority voting power. Static benchmarking, by contrast, has never aspired to incorporate broad-based factors into its analysis. I offer this expanded reading of the House report not to rehash old debates about the *Beer* Court's curious treatment of a thin slice of legislative history,[143] but rather to engage the Court on its own terms. Drawing support from the same source used to validate the original retrogression standard highlights dynamic benchmarking's appeal as a justifiable addition to section 5 and encourages Congress to view the procedure as a logical extension, not a rejection, of Court precedent.

2. Previous Departures from Static Benchmarking

The adoption of the dynamic model would not be the first departure from the static benchmarking test. The static test has been notably shelved in three previous scenarios when existing voting laws failed to provide an appropriate benchmark for comparison.

First, in *Mississippi v. Smith*,[144] the district court held that an existing voting plan should not be used as a benchmark for comparison when the plan has been declared unconstitutional. Instead, the court asserted, a court-ordered plan drawn in the absence of a workable existing plan should become the proper benchmark for section 5 preclearance.[145] The use of the court-ordered plan meant that the State of Mississippi could be denied preclearance for a proposed plan that, while ameliorative compared to its existing (unconstitutional) plan, was retrogressive when compared to the court-ordered plan.[146] The court went on to state that "[i]t would be entirely inconsistent with the teaching of *Beer* to suggest that the Court must accept a statutory plan that increases black voting strength to a lesser degree than a court-ordered plan in effect."[147] The court-ordered plan in *Smith* thus resembles the dynamic

143. Jurists and commentators alike have long criticized the *Beer* Court's treatment of the VRA's legislative history. Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, in *Bossier Parish II* sharply commented that the *Beer* Court "sought to justify the imposition of a nontextual limitation [on section 5] . . . by relying on a single fragment of legislative history." 528 U.S. 320, 363 (2000) (Souter, J., concurring in part and dissenting in part). He went on to call the *Beer* Court's reliance on the House report "an act of distorting selectivity." *Id.*; *see also* Katz, *supra* note 64, at 1198.

144. 541 F. Supp. 1329 (D.D.C. 1982), *appeal dismissed*, 461 U.S. 912 (1983).

145. *See id.* at 1333.

146. *See id.*

147. *Id.*

Imaged with the Permission of Yale Law Journal

procedure's replacement benchmark, and the court's holding supports the notion that preclearance can be denied if a proposed plan appears retrogressive compared to a replacement benchmark.

Second, in *Wilkes County v. United States*,[148] the three-judge district court again departed from static benchmarking because the county's existing voting plan was malapportioned. The county, which was 47% black, sought preclearance of its plan to replace its existing single-member districts with an at-large voting scheme.[149] The district court rejected the county's argument that the change was not technically retrogressive because black voters were effectively prevented from electing candidates of their choice under the existing single-member districting plan. The court reasoned that "[s]ince the existing districts are severely malapportioned, it is appropriate, in measuring the effect of the voting changes, to compare the voting changes with options for properly apportioned single-member district plans."[150] Thus, because the existing voting plan was malapportioned, the *Wilkes County* court was willing to apply a replacement benchmark against which a proposed plan would be measured. Like *Smith*, this case demonstrates that *Beer* does not mandate that the DOJ or the district court use an existing voting plan as a benchmark if doing so would undermine the purposes of the retrogression standard.

Finally, in *City of Richmond v. United States*,[151] the Supreme Court permitted a limited departure from static benchmarking when faced with a proposed annexation. Broadly speaking, an annexation—the incorporation of new territory into a political entity—qualifies as the kind of change covered by section 5 preclearance because of its potential to cause a retrogression in minority political strength. For instance, a city may choose to annex new territory with predominately white voters to reduce the relative strength of its black voters.

City of Richmond presented a situation in which the annexation of new territory reduced Richmond's 52% black majority to a 42% black minority.[152] Under Richmond's at-large system of elections,[153] and with Richmond's citizens voting almost exclusively along racial lines, the change meant that black candidates would be unable to win elections in the post-annexation city.

---

148. 450 F. Supp. 1171 (D.D.C. 1978), *aff'd mem.*, 439 U.S. 999 (1978).

149. *See* Laughlin McDonald, *Racial Fairness—Why Shouldn't It Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 858 (1992).

150. *Wilkes County*, 450 F. Supp. at 1178.

151. 422 U.S. 358 (1975).

152. *Id.* at 363.

153. *See supra* note 44 and accompanying text.

Imaged with the Permission of Yale Law Journal

The Court recognized this potential retrogression but also acknowledged that the static benchmarking test would automatically "forbid all such annexations,"[154] even if a jurisdiction had a legitimate reason to seek new territory. The Court's desire to permit the "natural" growth associated with annexations was thus in direct tension with its duty to protect minority voting strength under section 5.

Faced with this quandary, the Court abandoned static benchmarking altogether and struck a compromise that would permit the annexation only if the city agreed to reform its at-large voting scheme and to adopt a ward system that would give black candidates the chance to win elections in majority-black districts.[155] The Court refused to use the city's existing voting plan as a benchmark because any annexation would appear retrogressive in comparison; in its place, the Court employed the compromise plan. If the city refused to adopt the single-member districts envisioned in this replacement benchmark, its proposed annexation would be denied preclearance. But if the city adopted the basket of reforms contained in the replacement benchmark, its proposed annexation would be granted preclearance.[156]

Read together, *Smith*, *Wilkes County*, and *City of Richmond* indicate a judicial willingness to depart from static benchmarking when the existing voting plan is an inappropriate basis for comparison. The dynamic benchmarking procedure that I propose shares the underlying rationale of these cases, which thereby provide it with a strong foundation of court precedent that will help it withstand judicial scrutiny.

C. Applying Dynamic Benchmarking to Post-Katrina Louisiana

How would the dynamic benchmarking test have assessed Louisiana's post-Katrina voting plan? Most indications suggest that the procedure would have led to a preclearance denial. Under the first step of the dynamic test, the DOJ (or district court) would have reviewed the existing voting laws to determine whether the laws could preserve minority voting strength after the disaster. Evidence such as the extensive voter displacement, damage to the Postal Service and polling locations, and minority voters' historic aversion to

154. *City of Richmond*, 422 U.S. at 371.

155. *See id.* at 369-70.

156. Although *City of Richmond* predates *Beer* by a year, the Court has consistently applied this flexible test when faced with section 5 annexation questions. *See, e.g.*, City of Port Arthur v. United States, 459 U.S. 159, 167 (1982); City of Rome v. United States, 446 U.S. 156, 186 (1980).

Imaged with the Permission of Yale Law Journal

traditional mail-based forms of absentee voting[157] would likely have led the DOJ to conclude that the existing voting plan was too broken to be used as a benchmark. It was beyond dispute that a post-Katrina election held under the pre-Katrina voting plan would have rendered minority voters decidedly worse off in terms of political power.

Under the second step of the dynamic test—finding an appropriate replacement for the broken benchmark—the DOJ would have solicited the input of stakeholders who had attempted to influence the Louisiana State Legislature's crafting of the emergency voting plan. By seeking their input, the DOJ would have given these stakeholders an equal voice in lawmaking, resurrecting ideas that might have been dismissed in the legislative process and freeing them from the pressure to bargain from a position of weakness.

For Louisiana, the solicitation process inevitably would have focused attention on the major flash point in the post-Katrina debate: whether out-of-state satellite voting was necessary to prevent retrogression in minority political power. Major civil rights groups had vigorously lobbied the legislature and sought to convince the public that out-of-state satellite voting should be the cornerstone of any post-Katrina voting plan. But the legislature instead opted for more conventional tactics to accommodate displaced voters.[158] Dynamic benchmarking would nevertheless have empowered the DOJ to determine whether satellite voting was a necessary plank in a post-disaster voting plan. All sides of the debate would have had the opportunity to make their case in the open submission process before the DOJ reached its decision.

---

157. *See* Thevenot & Williams, *supra* note 99 (noting pronounced post-Katrina distrust of absentee balloting among African-Americans). Before Katrina, in Orleans Parish, which includes the city of New Orleans and the majority of black voters, only 3.3% of all votes cast in the 2004 presidential election were by absentee ballot. *See* La. Sec'y of State, Election Results by Precinct-Official, Results for Election Date: 11/02/04 Presidential Electors, Orleans Parish, http://www.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmpct&rqsdta=1102040101714136 (last visited Feb. 5, 2007). This percentage is low compared to that in other states. *See* David Kimball & Martha Kropf, Early and Absentee Voting and Unrecorded Votes in the 2002 Midterm Election 23 (2004), http://www.umsl.edu/~kimballd/mpsa04kk.pdf.

158. This failure to enact out-of-state satellite voting may reflect the fact that the era of "normal politics" has not yet arrived in Louisiana. *See* Gerken, *supra* note 65, at 709 (defining "normal politics" as a world in which "racial minorities finally wield enough power in the political process to protect themselves"); *see also* Pildes, *supra* note 33, at 97 (suggesting that we have reached the "normal, pluralist interest group politics to which the VRA aspired"). Minority voters may still be "discrete and insular" participants in the political process, requiring vigilant protection under section 5 to avoid consistent defeat. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (calling for a "more searching judicial inquiry" for "discrete and insular minorities"). Alternatively, the demise of satellite voting could reflect a flaw in the proposal.

Imaged with the Permission of Yale Law Journal

Informed by the available post-Katrina data and liberated from static benchmarking's rigid constraints, the DOJ would likely have concluded that satellite voting, or an equally robust reform, was necessary to avoid retrogression.[159] With a demanding replacement benchmark in place, Louisiana would have been required to adopt further remedies to reduce the likelihood that minority influence would wane after Katrina. A proposed plan that did not meet this mandate would have been rejected out of hand.

This conclusion is supported by data from the 2006 New Orleans municipal elections. The percentage of black voters in the city's electorate dropped from 63% in the 2002 municipal elections to 57% in 2006.[160] Although at first glance this decline might not appear precipitous, it is a historically "substantial" shift for a city the size of New Orleans.[161] In addition, a more granular look at the election data reveals deeply troubling traces of retrogression.

The first disquieting trend shown in the data is that, although overall voter participation declined between 2002 and 2006, the New Orleans electorate shrunk primarily due to the nonparticipation of black voters displaced by Katrina.[162] District-level data reveal that, after Katrina, voting rates among these minority voters plummeted. For instance, in the predominately black Lower Ninth Ward, voter participation declined by nearly 40%.[163] New Orleans East, another predominantly minority neighborhood, experienced a 23% decline in participation.[164] Similar declines appeared in other predominantly minority neighborhoods with substantial populations of displaced citizens. By contrast, in majority-white neighborhoods that endured massive devastation, such as Lakeview, voter turnout was generally stable relative to 2002, declining only 6.4%, an outcome that may reflect existing

159. The DOJ's concession that Louisiana "may well have done more under the circumstances" shows its awareness that Louisiana opted against more drastic steps to preserve minority voting strength. Letter from William E. Moschella to Rep. John Conyers, Jr., *supra* note 109, at 3.

160. John R. Logan, Population Displacement and Post-Katrina Politics: The New Orleans Mayoral Race, 2006, at 1 (June 1, 2006), http://www.s4.brown.edu/katrina/ report2.pdf.

161. Brian Thevenot, *Flood-Ravaged Neighborhoods May Lose Clout*, TIMES-PICAYUNE (New Orleans), May 2, 2006, at A1 (quoting John Logan).

162. *See* Adam Nossiter, *Vote for Mayor Points to Change in New Orleans*, N.Y. TIMES, Apr. 24, 2006, at A1.

163. Logan, *supra* note 160, at 1.

164. *Id.*

Imaged with the Permission of Yale Law Journal

disparities among the displaced.[165] In majority-white neighborhoods with minimal disaster damage, such as the French Quarter, voter turnout increased by 22.5% compared to 2002.[166]

Table 1.
2006 VOTER TURNOUT IN SELECT MAJORITY-BLACK AND MAJORITY-WHITE DISTRICTS[167]

	ELECTION DATA		DISTRICT CHARACTERISTICS	
DISTRICT NAME	TOTAL VOTES 2006	% OF 2002 TOTAL	% DAMAGED	% BLACK
Majority-Black Districts				
Bywater	7435	76.7	85.4	83.4
Lower Ninth Ward	3360	62.2	92.6	95.7
Mid-City	11,826	75.8	100	82.9
New Orleans East	17,448	76.9	99.2	86.8
Majority-White Districts				
French Quarter	2106	122.5	12.2	13.3
Lakeview	9799	93.6	89.8	2.3
Uptown-Carrollton	20,691	103.8	60.9	46.6

The implications of this sharp divergence in political participation are potentially severe. John Logan, a Brown University sociologist and preeminent authority on post-Katrina demographics, concluded that "neighborhoods with the highest electoral participation have likely strengthened their hands in the battles over public investment and development planning that are sure to be a

165. John Logan posited that "extensive voter mobilization by civic groups" contributed to this "exceptional turnout" in majority-white neighborhoods. *Id.* at 15. Yet these communities were also likely to be wealthier, to be more rehabilitated, and to have displaced residents living closer to New Orleans than majority-black communities. *See supra* notes 5-8 and accompanying text.

166. Logan, *supra* note 160, at 16 tbl.9.

167. I generated this table (and a later table) with data originally analyzed by John Logan. *See id.* at 2, 9-10 (identifying his methodology). The districts included in both tables are the districts that Logan predicted would experience a relative increase or decrease in their political influence due to their voter participation rates. *See id.* at 24.

Imaged with the Permission of Yale Law Journal

major feature of local politics in the next several years."[168] Speaking to the *Times-Picayune*, Logan sounded a more dire warning:

> People have interests tied to specific territories. If you happen to be an African-American in the French Quarter, your vote doesn't have the same impact as an African-American in eastern New Orleans [where storm damage was severe]. . . . The Lower 9th Ward and New Orleans East were very under-represented in the election. . . . I firmly believe that as decisions are made about allocating resources, that the resources will follow the votes. Politicians don't usually serve the city or the public as a whole; they have to be concerned about how they're going to maintain an electoral majority.[169]

Thus, a steep decline in minority participation may preface a tremendous decline in minority voters' ability to hold sway in the political process—a factor that Justice O'Connor deemed to be directly relevant in determining the existence of retrogression.[170]

A second unsettling trend seen in the data is that minority voters attempted to avoid a reduction in their longstanding political dominance by retreating into racial camps and voting along racial lines. Indeed, it is difficult to explain the sudden shift in black voting preferences any other way. The eventual victor, the black incumbent Mayor, Ray Nagin, went from receiving less than 40% of the black vote in 2002 to being favored by 80% of black voters in 2006, when he was paired against a white challenger, Lieutenant Governor Mitch Landrieu.[171] Nagin's support among white voters, by contrast, plummeted from 84% in 2002 to 20% in 2006.[172] According to Logan, this "sea change in the composition of support for [Nagin]" was a "countervailing force" that blunted the impact of widespread minority voter displacement.[173] Rather than support the election of a progressive white mayor, black voters instead

---

168. *Id.* at 12.

169. Thevenot, *supra* note 161 (quoting Logan).

170. *See* Georgia v. Ashcroft, 539 U.S. 461, 479 (2003). Though Congress overturned *Ashcroft*'s central holding in its recent reauthorization of the VRA, it limited its abrogation of *Ashcroft* to the redistricting context. *See* S. REP. NO. 109-295, at 15 (2006) ("With regard to redistricting plans, [the reauthorized VRA] protect[s] naturally occurring districts that have a clear majority of minority voters."). Parts of *Ashcroft* arguably remain good law, including its implication that a decline in minority influence over substantive decision-making is an indication of retrogression. *See Ashcroft*, 539 U.S. at 482.

171. Tidmore, *supra* note 5.

172. *Id.*

173. Logan, *supra* note 160, at 19, 24.

Imaged with the Permission of Yale Law Journal

consolidated their votes behind a conservative black incumbent whom they had previously disfavored.[174] Although this type of racial bloc voting is not—by itself—a sign of retrogression, its reappearance represents a retreat from progress and a step backwards from the type of cross-racial understanding the Court has consistently identified as the goal of the VRA.[175]

Table 2.
NAGIN VOTE SHARE BY DISTRICT[176]

DISTRICT NAME	% OF REGISTERED VOTERS SUPPORTING NAGIN		TOTAL % OF BLACK REGISTERED VOTERS
	2002	2006	2006
Majority-Black Districts			
Bywater	42.4	65.9	78.4
Lower Ninth Ward	39.9	83.3	94.3
Mid-City	46.0	65.9	79.2
New Orleans East	54.7	71.3	86.9
Majority-White Districts			
French Quarter	70.5	25.2	27.3
Lakeview	86.7	21.5	2.1
Uptown-Carrollton	65.2	40.5	39.9

Less than six months after the 2006 municipal elections, and only one year since Katrina made landfall, it is still too early to catalogue the full extent of minority voters' post-Katrina decline in political power. I present this post-election data only to support my earlier assertion that the DOJ justifiably could have predicted that Louisiana's emergency voting plan would not provide minority voters with a realistic opportunity to avoid retrogression. Admittedly, given the extent of devastation and displacement caused by Katrina, it might have been impossible for any set of voting procedures to avoid an absolute

174. *See* Kim Cobb & Kristen Mack, *Nagin Revels in His Unconventional Win*, HOUSTON CHRON. May 22, 2006, http://www.chron.com/disp/story.mpl/front/3878784.html ("Nagin is a pro-business, conservative Democrat who has been known to support Republican candidates. Landrieu, on the other hand, is a liberal Democrat of the old school . . . .").

175. *See, e.g.*, *Ashcroft*, 539 U.S. at 490.

176. *See supra* note 167.

Imaged with the Permission of Yale Law Journal

decline in minority voting strength. Under the worst circumstances, even the most accommodating post-disaster jurisdiction might have only realistically hoped to minimize retrogression.[177] Yet two larger points remain. First, as the DOJ stated, Louisiana "may well have done more under the circumstances" to accommodate displaced citizens.[178] Second, because of static benchmarking's inability to operate effectively after a disaster, section 5 would have been powerless to prevent Louisiana from doing even less to preserve minority voting strength. Only a procedure like dynamic benchmarking could have compelled the state to adopt further reforms.

CONCLUSION

With Hurricane Katrina as a tragic backdrop, this Note has endeavored to illuminate a crucial shortcoming in section 5 of the Voting Rights Act. The cornerstone of section 5's preclearance process – the static benchmarking test – is incapable of protecting minority voting power in the aftermath of a disaster. The procedure's "sixth-grade" arithmetic proved inappropriate in a post-disaster world that demanded a more complex calculus. Section 5 is not, however, unconditionally wedded to static benchmarking; as I have shown, both its legislative history and case law support an alternative approach, such as the dynamic benchmarking test offered by this Note.

Although the Court has thus far played a dominant role in defining the scope of section 5, dynamic benchmarking is ideally a congressional innovation. Two considerations – one tactical, one normative – justify a legislative strategy. First, while a sympathetic court could read dynamic benchmarking into section 5, minority voters lack standing to prompt judicial intervention under the provision.[179] To get into court, a jurisdiction would have to opt for judicial preclearance of its post-disaster laws, a highly unlikely choice given the time and expense required by that alternative.[180]

Second, while Katrina-like disasters are inherently unpredictable and are likely to be rare, this is no excuse for inaction. Waiting until the next

---

177. The dynamic model I propose recognizes this reality by mandating only that a jurisdiction design a plan that provides minority voters with their best *opportunity* to avoid retrogression, not a plan that *guarantees* its avoidance altogether. *See supra* Subsection III.A.2. Section 5 cannot plausibly mandate that a covered jurisdiction do more without stretching the provision beyond its constitutional limitations. *See supra* note 127.

178. Letter from William E. Moschella to Rep. John Conyers, Jr., *supra* note 109, at 3.

179. *Cf.* Way, *supra* note 106, at 1443 n.17 ("[I]n contrast to actions under § 5, cases under § 2 can be initiated by private parties in addition to the Justice Department.").

180. *See supra* note 70.

Imaged with the Permission of Yale Law Journal

catastrophe to act on lessons learned from past disasters is illogical. Hoping instead that there will not be another disaster implicating section 5 is simply imprudent. In the spirit of the vigorous debate in the legal academy on emergency constitutionalism,[181] Congress should approve the dynamic model as a legitimate alternative to static benchmarking – before the next disaster strikes. Congress may choose to revisit the recently reauthorized section 5 altogether,[182] which would provide an opportunity to consider a limited innovation like dynamic benchmarking.

Ultimately, congressional action to adopt dynamic benchmarking will simply modernize – not revolutionize – section 5. The proposal admittedly weaves new doctrine into an old quilt, but this intentional modesty further justifies the proposal. It demonstrates that dynamic benchmarking is no stalking horse for a permanent expansion of section 5; instead, the model purposefully echoes the simple request made by countless Katrina survivors that their hard-fought political power not recede with the flood waters. In other words, these survivors asked for nothing more than to be protected against retrogression in their political power. That level of protection has long been section 5's central promise. Dynamic benchmarking seeks only to make it unconditional, come hell or high water.

---

181. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004).

182. The recent congressional reauthorization and carefully placed additional comments in the Senate Judiciary Committee's VRA reauthorization report have only increased speculation that section 5 may be headed toward constitutional challenge. *See* S. REP. NO. 109-295, at 25 (2006) (additional views of Sens. Cornyn and Coburn) ("[T]he record of evidence does not appear to reasonably underscore the decision to simply reauthorize the existing Section 5 coverage formula – a formula that is based on 33 to 41 year old data . . . [T]he seemingly rushed, somewhat incomplete legislative process involved in passing the legislation prevented the full consideration of numerous suggested improvements to the Act."). For background on the section 5 constitutionality debate, see Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725 (1998); Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769 (2003); and Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003).

Imaged with the Permission of Yale Law Journal