

The 2010 Census and the VRA’s Impact on Redistricting & the Electoral Process

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

IMLA Teleconference Series April 26, 2011

Benjamin E. Griffith†

“To say the least, the law of redistricting is complex, inconsistent and fact-intensive.”¹

I. INTRODUCTION

Redistricting entails more than number crunching and drawing lines on a map. The twin goals of the redistricting process are population equality and electoral equality. Population equality based on the “one person, one vote” doctrine under the Fourteenth Amendment applies at all levels of government, federal, state and local. At the core of electoral equality is protection of minority voting rights, achieved largely through enforcement of the Voting Rights Act’s key antidiscrimination provisions, Section 2 and Section 5. With a substantial body of precedent developed since 1965, the Crown Jewel of the Civil Rights Movement was designed to bar widespread systemic voting discrimination. The Voting Rights Act was passed at a watershed moment in our nation’s turbulent history of racial injustice and discrimination in voting. While the VRA imposed substantial federalism costs, the level of federal intrusion into sensitive areas of state and local policymaking was fully justified.

A. The Sword and Shield of the Formidable Arsenal

Section 2 and Section 5 are often referred to as the Justice Department’s formidable arsenal. Section 2 is nationwide in applicability and often referred to as the “sword” of the VRA.

¹ Jack Young, Foreword to *The Realist’s Guide to Redistricting* (ABA 2d ed. 2010)

It provides a cause of action for the government or private plaintiffs to challenge election laws and procedures, including redistricting plans, anywhere in the United States that have the purpose or effect of discriminating against a group based on race. As the major vehicle for vote dilution litigation, it was amended in 1982 to prohibit any election law or procedure that “results in a denial or abridgement of the right of any citizen of the United State to vote on account of race or color.”

Section 5 applies only to covered jurisdictions, largely the nine states of the former Confederate States of America as well as Arizona, parts of Michigan, New York and California. It was designed as a “shield” that applied only to prevent covered jurisdictions with a documented history of discriminating against voters of color from enacting redistricting or apportionment plans or other electoral practices and procedures that were discriminatory in purpose or effect. Although Section 5 was enacted as a temporary remedial measure in 1965, it was reenacted and extended several times over the past several decades and was scheduled to expire in 2007 in the absence of reauthorization by Congress. Reauthorization came in July 2006 when Congress enacted and President Bush signed into law H.R. 9, the “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.”

B. Focus of this Presentation

Municipal and local government attorneys should have a working knowledge of the “nuts and bolts” of redistricting, and to that end this presentation will provide insight into litigation strategies, compliance issues and doctrinal concerns that surround the redistricting process in covered jurisdictions. My colleague, Vince Fontana, will provide you with a thorough review and discussion of the essentials of voting rights litigation, the impact of the Voting Rights Act on single-member districts and at-large elections, and a very helpful perspective on how best to navigate through this complex area of the law. My goal will be to provide a complementary analysis of the requirements for drafting a local government redistricting plan, presenting and obtaining federal approval where required for covered jurisdictions, and best practices that will enable the jurisdiction to develop a defensible legislative record that will undergird that plan in the event of a legal challenge. This may come in the form of a vote dilution challenge under §2, an administrative or judicial preclearance action under §5, or a constitutional challenge based on racial gerrymandering or political gerrymandering under the 14th Amendment of the U.S. Constitution.

In this presentation, the focus will be on necessary preparations for (1) an administratively submitted redistricting plan reviewed by the Section 5 Unit of the Civil Rights Division’s Voting Section, (2) a judicially scrutinized redistricting plan that is the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia, or (3) a combination of the two, possibly coupled with a local district court in the covered jurisdiction in cases involving imminent elections, efforts to extend qualification deadlines. Whether administrative or judicial, the submission of a local government redistricting plan must satisfy the non-retrogression requirements of Section 5, for which the Justice Department has recently issued revised Guidance in light of the 2006 amendments to the Voting Rights Act. Compliance with the nuanced requirements of Section 2 must not be an afterthought, since a redistricting plan

precleared under Section 5 can nonetheless be challenged in a vote dilution action under Section 2.

Finally, we will offer practical suggestions, discuss strategic measures and outline official DOJ policy guidance and revised procedures that will facilitate the development of a defensible redistricting plan in covered jurisdictions. We will also identify best practices that jurisdictions nationwide can consider in developing redistricting plans that will have a greater likelihood of surviving a vote dilution challenge under Section 2.

C. Challenges to Section 5's Constitutionality

Bear in mind that Section 5 was initially included in the Voting Rights Act of 1965 as a temporary emergency remedy, only to be extended and reauthorized in 1970, 1975, 1982 and most recently in 2006, when it was extended for another 25 years. Some will argue that time is running out on Section 5 and that the remedy Congress devised in 1965 to overcome the historical pattern of denying blacks access to the ballot box in much of the South has long since served its purpose. The 2009 *NAMUDNO* decision may well have been the canary in the coal mine for continued viability of Section 5 and the remedial policies it embodies as the law of the land.

Eight Justices agreed that (1) the racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nationwide, (2) many of the first generation barriers to minority voter registration and voter turnout have been eliminated, and (3) the evil §5 was meant to address may no longer be concentrated in the covered jurisdictions singled out for preclearance. They also agreed that there now appears to be more similarity than difference between covered and non-covered jurisdictions in most areas of the United States, and that the justification for imposing current burdens on covered jurisdictions, differentiating between States, is waning.

When we turn to a discussion of one of the most recent challenges to Section 5's constitutionality, the Shelby County, Alabama case pending in the D.C. District Court, Chief Justice Roberts' concluding remarks in *NAMUDNO* take on a more compelling significance:

Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. ... More than 40 years ago, this Court concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. ... In part due to the success of that legislation, we are now in a very different Nation.

Our nation has turned a corner since the enactment of the Voting Rights Act of 1965. The Crown Jewel is now 46 years old. Indeed, most will agree with Georgia Congressman John Lewis that racial discrimination in voting has declined tremendously, just as much progress has

been made in race relations as a result of an increasingly accessible electoral process. Much of this progress was facilitated the VRA's subsequent revisions and extensions.

Aside from pending constitutional challenges to Section 5, we must deal with the law as it exists. Section 5 is the law for covered jurisdictions unless and until the U. S. Supreme Court or the passage of time dictate otherwise. Its requirements are stringent and must be followed. That said, let's take a good look at what covered jurisdictions must do to comply with Section 5 in the redistricting arena, and then consider how Section 2 will apply to all jurisdictions nationwide in light of the recently released 2010 Census data.

D. Terminology: Redistricting and Reapportionment

Peter S. Wattson, Senate Counsel for the Minnesota State Senate, has provided one of the clearest explanations of the difference between redistricting and reapportionment. It will be helpful to have a grasp of this terminology before going further. According to Wattson, reapportionment is "the process of reassigning a given number of seats in a legislative body to established districts, usually in accordance with an established plan or formula. The number and boundaries of the districts do not change, but the number of members per district does." Redistricting is "the process of changing district boundaries. The number of members per district does not change, but the districts' boundaries do."²

To illustrate the relationship between reapportionment and redistricting, Watson explains that the U.S. House of Representatives every ten years reapportions the 435 seats in the House among the 50 states based on the latest federal census. Based on population growth in some states which may be faster than that of other states, House seats "move from the slow-growing states to the fast-growing ones," and within each of the states entitled to more than one representative, the boundaries of the congressional districts are redrawn to make their populations equal. States are redistricted to accommodate the reapportionment of their respective Representative. In this sense, Wattson notes, reapportionment is not a partisan political process but a mathematical one.

On the other hand, redistricting can be a highly partisan process, since the draftsman who redraws district boundaries has broad discretion in deciding where the boundaries will run, and "creative drafting can give one party a significant advantage in elections."

II. Overview of 2010 Census Data: 2010 Census Redistricting Data Program

² Peter S. Wattson, *How to Draw Redistricting Plans that Will Hold Up in Court*, National Redistricting Seminar, Jan. 22, 2011, accessible online at <http://www.senate.leg.state.mn.us/departments/scr/REDIST/Draw/Draw992web.htm>

Under Public Law 94-171, the Census Bureau must provide state legislatures with the small area census population tabulations necessary for legislative redistricting. The 2010 Census Data Redistricting Program provides participating states with the opportunity to suggest census block boundaries and delineate voting districts and state legislative districts for use in the 2010 Census redistricting data tabulations. Total population tabulations were required to be transmitted to the states by April 1, 2011. Under P.L. 94-171, states participating in this voluntary program will define the small areas for which specific data tabulations are desired, including census block boundaries, voting districts, and state legislative districts, and submit these areas following timelines established by the Census Bureau.

The 2010 Census Redistricting Data Program has five phases and is designed to give states sufficient time for planning, response and participation.³

The Redistricting Data Office coordinates the tabulation and release of Census Bureau data sets of specific interest to the redistricting and elections communities, and total population tabulations are required to be transmitted to the states by April 1, 2011.⁴ The redistricting data releases include

- (1) 2010 Census Redistricting [P.L. 94-171] TIGER/Line Shapefiles, which are spatial extracts from the Census Bureau's MAF/TIGER database, containing features such as roads, railroads, rivers, as well as legal and statistical geographic areas, designed for use with geographic information system (GIS) software. The Shapefiles do not include demographic data, but they contain geographic entity codes that can be linked to the Census Bureau's demographic data.
- (2) 2010 Census Redistricting Maps, which are a comprehensive series of maps that may assist in working with the Summary Files.
- (3) 2010 Census Block Assignment Files, which contain statewide 2010 Census tabulation block listings for a series of geographies.
- (4) The Name Look-up tables provide a listing of those geographies by code and name.
- (5) 2010 Census Redistricting Data [P.L. 94-171] Summary Files, which contain the redistricting data tabulated from the 2010 Census. The Summary File's Technical Documentation is now available through the summary file page, which also contains links to the Census 2000 Public Law 94-171 Redistricting Data, Citizen Voting Age Population (CVAP) Special Tabulation From the 2005-2009 5-Year American

³The five phases include: Phase 1 - State Legislative District Project; Phase 2 - Voting District/Block Boundary Suggestion Project; Phase 3 - Delivery of the 2010 Census P.L. 94-171 Redistricting Data Files and Geographic Products; Phase 4 - Collection of Post-2010 Census Redistricting Plans; and Phase 5 - Evaluation of the 2010 Census Redistricting Data Program and Recommendations for 2020. See generally http://www.census.gov/rdo/program_phases/

⁴ See <http://www.census.gov/rdo/data/>

Community Survey, Congressional District Data, State Legislative District Data, and Voting Rights Determination Data.

III. American Community Survey Counts v. Official U.S. Census Data

A. Overview of the ACS

The American Community Survey (ACS) is a nationwide survey designed to provide communities with demographic, economic, social, and housing data every year. The survey includes a sample of about 3 million addresses including housing units and group quarters. People living at the selected addresses answer questions on topics such as education, transportation, housing value, and marital status. The information collected helps determine how billions of federal and state dollars are distributed. The ACS is conducted in every county in the United States and every municipio in Puerto Rico. Data collection takes place nearly every day of the year across the country. In Puerto Rico, the survey is called the Puerto Rico Community Survey.⁵

The U.S. Constitution requires a census every 10 years. The census is the official count of every person living in the United States. It is used to apportion seats in the House of Representatives and to determine how to distribute billions of federal and state dollars. It is also used as the primary source of population data for redistricting at the state and local government level.

Recent censuses have consisted of two questionnaires: a short questionnaire and a long questionnaire also known as the "short form" and the "long form." Decennial Census data from the Census Bureau were published every 10 years based on the short and long forms. The short form asks basic questions such as age, sex, and race. The long form asked the same questions as the short form and many more detailed questions about social, housing, and economic characteristics. The long form was sent to a small percentage of the population and gave a snapshot of communities every 10 years.

Since the decennial census is only conducted every 10 years, these data were used throughout the decade until the next census. For example, data collected in the 1990 Census were used until Census 2000 data were released in 2002 and 2003. The Census Bureau created a better way to provide more timely data by collecting data more frequently. The result is the American Community Survey (ACS).

With respect to margins of sampling error in the ACS data, data based on samples such as the American Community Survey include a range of uncertainty. Two types of error can occur: sampling error and nonsampling error. Nonsampling error can result from several things, such as errors in how the data are reported or problems in the processing of the survey questionnaire. Sampling error occurs when data are based on a sample of a population rather than the full population.⁶ Sampling error is easier to measure than nonsampling error and can be used to

⁵ http://www.census.gov/acs/www/guidance_for_data_users/e_tutorial/

⁶ http://www.census.gov/acs/www/methodology/sample_size_and_data_quality/

assess the statistical reliability of survey data. For any given area, the larger the sample and the more months included in the data, the greater the confidence in the estimate.

To help users assess the statistical reliability of each published estimate, margins of sampling error only are provided and can be used to create confidence intervals. Confidence intervals define a range of values expected to contain the value of an estimate in the full population. All ACS data are published with margins of error at the 90 percent confidence level.⁷

The American Community Survey (ACS) is committed to providing its users with measures of sampling error along with each published estimate. To accomplish this, all published ACS estimates are accompanied either by 90 percent margins of error or confidence intervals, both based on ACS direct variance estimates. Due to the complexity of the sampling design and the weighting adjustments performed on the ACS sample, unbiased design-based variance estimators do not exist. As a consequence, the direct variance estimates are computed using a replication method that repeats the estimation procedures independently several times. The variance of the full sample is then estimated by using the variability across the resulting replicate estimates. Although the variance estimates calculated using this procedure are not completely unbiased, the current method produces variances that are accurate enough for analysis of the ACS data.⁸

B. Use of ACS data in lieu of Official U.S. Census Data

The use of annual American Community Survey data (ACS data) in lieu of official Census data for redistricting purposes in a §2 suit was discussed at length in *Benavidez v. Irving Indep. Sch. Dist.*, 690 F.Supp.2d 451,454 (N.D. Tex. 2010). At issue in *Benavidez* was whether the plaintiff satisfied the first *Gingles* precondition in their §2 action, namely, that the Hispanic minority population was able to demonstrate that a geographically compact majority-minority district can be created. The plaintiff's expert sought to rely on ACS data to prove this.

According to the court in *Benavidez*, “[t]he ACS is an annual nationwide survey, conducted throughout the year by the Census Bureau, that covers many of the same topics as the old long form. The ACS samples three million households each year, a significantly smaller annual sample than the eighteen million covered by the census long form every ten years. The first ACS sample was conducted in 2005, and the first full set of data was released in 2006.”⁹

⁷ http://www.census.gov/acs/www/guidance_for_data_users/comparing_data/

⁸ http://www.census.gov/acs/www/Downloads/survey_methodology/Chapter_12_RevisedDec2010.pdf

⁹ The 2000 Census used both a "short form" survey of every U.S. household and a "long form" questionnaire sent to about 18 million U.S. households. The Census Bureau did not use the long form for the 2010 Census, but instead relied upon annual ACS data to estimate the U.S. population's characteristics. These estimates provided more detail than the basic data derived from short form census responses, which included such basic information as age, sex, race, and Hispanic origin, as compared to the long form, which included more detailed questions about citizenship, socioeconomic status and other topics.

Specifically, the plaintiff's expert sought to rely on 2007 one-year ACS data instead of the 2000 Census data to support Hispanic population projections pivotal to determining whether a majority-minority district could be formed in compliance with the first *Gingles* precondition.¹⁰

The court rejected this expert testimony as unreliable. It began its analysis by addressing the presumption of accuracy of Official U.S. Census Data, noting that "[c]ensus figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census."¹¹

This presumption hobbled the plaintiffs' case. The plaintiff showed that ACS data were produced by the U.S. Census Bureau and would replace the decennial census' long form questionnaire, thus indicating the Census Bureau found the ACS data reliable for certain purposes. The ACS Guide issued by the Census Bureau for using the ACS data, however, "clearly state[d] that, for populations under 65,000, 'the ACS samples too few households to provide reliable single-year estimates. For these communities, several years of data will be pooled together to create reliable 3-year or 5-year estimates.'" Id. at 458.

The ACS Guide also cautioned that ACS data had greater margins of error than traditional census data; moreover, the Census Bureau published margins of error for every ACS estimate so statisticians and demographers could make appropriate use of the data. According to the court, even though larger margins of error did not render the data are unreliable for *all* purposes, the margins of error had to be taken into account, and the purposes for which the data might be used had to be limited accordingly.

Finally, according to the Census Bureau, the decennial census and ACS data performed different functions, with the main function of the decennial census being to "provide counts of people for the purpose of congressional appointment and legislative redistricting," while the ACS' primary purpose was "to measure the changing social and economic characteristics of the U.S. population." The ACS accordingly did not provide official counts of the population in between censuses.

Based on the nature, purpose and reliability of the ACS data, the district court rejected the plaintiff's expert testimony, holding that the plaintiff had failed to prove that the 2007 ACS one-year data are sufficiently reliable to overcome the presumption that the 2000 Census is correct. It concluded:

[Plaintiff's expert] relies on the uncertain 2007 estimates in calculating the growth rate to project the 2008 population size, making his estimated growth rate and the 2008 population estimates correspondingly unreliable. Courts have rejected overly simplistic, 'crude' analyses that are easy and inexpensive to calculate but too inaccurate to serve as a basis for changing the basis of conducting elections." (internal citations omitted).

Id. at 459.

¹⁰ *Benavidez v. Irving Indep. Sch. Dist.*, 690 F.Supp.2d 451,457-58 (N.D. Tex. 2010)

¹¹ *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853-54 (5th Cir.1999).

IV. The Redistricting Process: General Considerations

A. Fundamentals of the Redistricting Process

As the Supreme Court has recognized, “no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”¹² Political equality and “fair and effective representation” have been the touchstones of redistricting since the U.S. Supreme Court entered the political thicket¹³ over four decades ago in *Baker v. Carr*, 369 U.S. 186 (1962). The one person, one vote principle provides meaningful protection for each citizen’s fundamental right to participate in the democratic process. It requires each state to “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”¹⁴

Beyond numerical population equality, the Supreme Court soon 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.”¹⁵

At the urging of President Lyndon B. Johnson just days after an historic civil rights march across the Edmond W. Pettus Bridge in Selma, Alabama, Congress addressed the need to open up that process to African American citizens, fully and effectively.

President Johnson asked for and Congress enacted one of the most effective pieces of social legislation, the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. §1973 et seq., landmark legislation that has seen no equal in the history of our Nation. The VRA “was designed by Congress to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century.” *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

Its goals were racial fairness, equal access to the political and electoral process, and unimpeded opportunity on the part of minority citizens to participate in that process. It sought to achieve those goals by assuring that equal voting rights and meaningful participation at the ballot box would be enjoyed by a discrete and insular minority historically shut out of the electoral process. The political landscape of America and most of the contours of modern election law developed over the past 45 years can be traced to the VRA.¹⁶ The political reality that characterizes today’s most bitter and intractable partisan disputes stems in part from case law

¹² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

¹³ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

¹⁴ *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

¹⁵ *Shaw v. Reno*, 509 U.S. 630 (1993).

¹⁶The passage of years can blur memories of the mountaintop experience that energized those who stood in the Oval Office that day in 1965 when LBJ signed the Voting Rights Act of 1965 into law. Zachary J. Sullivan, *A Proposed Standard for Amended Section 5 of the Voting Rights Act of 1965 as applied to Redistricting*, 85 Notre Dame L. Rev. 1263, 1264 (2010) (“Many minorities still did not have the right to vote nearly a hundred years after the Reconstruction Amendments guaranteed them this constitutional right and others. The Voting Rights Act of 1965 (VRA) was to the pre-1965 electoral system what the Reconstruction Amendments were to the institution of slavery.”)

interpreting and applying the key provisions of that landmark legislation.¹⁷ At the same time, the very best leaders elected at the federal, state and local level have come from the ranks of an electorate dedicated to equal electoral opportunity and unimpeded access to the political process.

B. Section 2: National Standard for Vote Dilution

A civil action brought under Section 2 that challenges a redistricting plan as dilutive of minority voting strength is a vote dilution action. Vote dilution occurs when an electoral districting body unlawfully weakens a minority group's ability to elect a chosen candidate by creating a large, majority-dominated district.

Initially, the Fifteenth Amendment and Section 2 have long served as the primary avenues for vote dilution claims. In response to public outcry following two Supreme Court holdings that required intentional discrimination to prove a violation of the Fifteenth Amendment in voting dilution cases, Congress amended Section 2 in 1982 to remove any intent requirements. In its present form, Section 2 of the VRA forbids state and local voting procedures that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race[.]" 42 U.S.C. § 1973(a).

To remedy vote dilution, a legislature or other government body may create "majority-minority" districts, where the protected minority group constitutes a numerical majority of the population within the new district.

1. Statutory requirements for Section 2 violation

Under Section 2 as amended in 1982, a voting practice or procedure denies or abridges a group's right to vote if:

Based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

2. Two-Prong Evaluation

The "totality of the circumstances" test and the judicial standard created in *Thornburg v. Gingles* serve as the two-pronged evaluation that courts currently use to determine vote dilution claims pursuant to Section 2.

¹⁷ The partisan squabble prize may go to the Democratic and Republican Parties in Texas, culminating in *LULAC v. Perry*, 548 U.S. 399, 413 (2006)(noting that an earlier redistricting plan in 1991 was a Democratic Party gerrymander that carefully constructed democratic districts 'with incredibly convoluted lines' and packed 'heavily Republican' suburban areas into just a few districts, prompting voters who considered this unfair and unlawful treatment to seek to invalidate the plan as an unconstitutional partisan gerrymander, but to no avail; moreover, this plan "realized the hopes of Democrats and the fears of Republicans with respect to the composition of the Texas congressional delegation," and ultimately led to a deadlocked legislature "unable to pass a redistricting scheme, resulting in litigation and the necessity of a court-ordered plan to comply with the Constitution's one-person, one-vote requirement.")

3. Prima facie cause of action under Section 2

In a vote dilution action brought under Section 2, a violation is shown if, "based on the totality of circumstances," members of a racial group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). To establish a § 2 violation on a vote-dilution theory, courts apply the two-part framework in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

4. The *Gingles* Preconditions

First, plaintiffs must satisfy, as a threshold matter, three preconditions. Specifically, the minority group must demonstrate that:

(1) it is sufficiently large and geographically compact to constitute a majority in a[n additional] single-member district;

(2) it is politically cohesive; and

(3) the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances--usually to defeat the minority's preferred candidates.

Failure to establish all three of these elements defeats a § 2 claim.

5. Totality of Circumstances

Second, if the *Gingles* preconditions are proved, plaintiffs must then prove that based on the totality of the circumstances, they have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

6. Senate Report factors

When it enacted the amendment to Section 2, the Senate also attached the "Senate Report" in which it recommended that courts, in place of a need for intent, use a "totality of the circumstances" test included in the Act. These factors, derived from *Zimmer* and the legislative history of the Voting Rights Act, are essential for weighing the totality of circumstances and include, but are not limited to, the following:

[1] the history of voting-related discrimination in the State or political subdivision;

[2] the extent to which voting in the elections of the State or political subdivision is racially polarized;

[3] the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;

[4] the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;

[5] the use of overt or subtle racial appeals in political campaigns;

[6] the extent to which members of the minority group have been elected to public office in the jurisdiction;

[7] evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group;

[8] evidence that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous;

[9] whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area.¹⁸

The appellate courts review *de novo* the legal standards applied by the district court to determine whether § 2 has been violated. Since § 2 vote dilution disputes are determinations peculiarly dependent upon the facts of each case that require an intensely local appraisal of the design and impact of the contested electoral mechanisms, the appellate courts review the district court's findings on the *Gingles* threshold requirements and its ultimate findings on vote dilution for clear error. *Id.*

The district court is required to explain its reasoning in VRA cases in a way suitable for appellate review, and if it fails to do so, the appellate court will remand for it to do so.¹⁹

C. *Shaw v. Reno*: Maximization and Race-Predominant Redistricting

From the earliest years of VRA enforcement, jurisdictions were encouraged to draw majority-minority election districts that followed traditional, non-racial districting principles such as geographic compactness, maintaining communities of interest, and preserving political subdivision boundaries. Later precedent held that creating majority-minority districts could be required to ensure compliance with the VRA.

The growing reliance upon majority-minority districts as the primary remedial measure in Section 2 litigation led to a dilemma. Before *Shaw v. Reno*, state and local government entities were increasingly exposed to liability under the VRA for failing to create majority-minority districts whenever racial bloc voting existed, unless those districts were configured in a way that would amount to maximization of minority voting strength. In an effort to minimize exposure to liability, state and local government entities would rely on computerized census data and maps that took race into account in determining where to draw boundary lines in redistricting plans, at times resulting in bizarrely configured districts with contorted boundaries drawn primarily to

¹⁸ *LULAC v. Perry*, 548 U.S. 399, 426, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (citing *Gingles*, 478 U.S. at 44-45, 106 S.Ct. 2752; *De Grandy*, 512 U.S. at 1000, 114 S.Ct. 2647).

¹⁹ *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1203-04 (5th Cir.1989).

boost the BVAP of a district. This data was used to avoid retrogression and impermissible fragmentation of compact and cohesive minority population concentrations, but eventually, with the DOJ's "encouragement" aided by unilateral input from civil rights organizations, the redistricting process became dysfunctional. Failure of a state or local government entity to draw the maximum number of majority-minority districts could give rise to substantial liability exposure, whether in the form of a Section 5 objection or a charge of vote dilution under Section 2, ultimately pushing jurisdictions to undertake race-based manipulation of district boundaries at the expense of dividing cities, counties, precincts or other recognized and traditional political subdivision boundaries.

1. Impermissible Racial Stereotypes & the Race-Predominant Standard

The Court in *Shaw v. Reno* entered this fray in 1993. In a landmark decision, the Court addressed the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups. Speaking through Justice Sandra Day O'Connor, the Court suggested that drawing race-conscious districting lines may widen the racial divide rather than get us beyond race.

This Court never has held that race-conscious state decision-making is impermissible in *all* circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. For the reasons that follow, we conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause. See Fed. Rule Civ. Proc. 12(b)(6).²⁰

...

Put differently, we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.²¹

Throughout the 1990's, the Supreme Court struggled to develop constitutional precedent to clarify the race-predominant standard for redistricting. While many of its decisions were held together by a five-four majority, it nonetheless provided state and local government entities with a framework through which they could tackle the daunting task of redistricting and reapportionment resulting from population and demographic changes shown by 2000 census.

²⁰ *Shaw v. Reno*, *supra* at 642.

²¹ *Shaw v. Reno*, *supra* at 647.

*Miller v. Johnson*²² brought into even sharper focus the tension that takes place when a state or local government entity simultaneously attempts to satisfy the race-conscious mandate of §2 of the Voting Rights Act, while not running afoul of the Fourteenth Amendment's prohibition against race-predominant decision-making. Constitutional precedent continued to develop in the redistricting arena when the Court in 1996 focused on the Texas and North Carolina congressional district cases of *Bush v. Vera*²³ and *Shaw v. Hunt*²⁴.

2. Justice O'Connor's Guidelines in *Bush v. Vera*

In her concurring opinion in the 1996 decision involving congressional districts in Texas, *Bush v. Vera*, Justice Sandra Day O'Connor recognized that the process of reconciling the VRA's requirements with those of the Equal Protection Clause "sometimes requires difficult exercises of judgment."³⁴ Justice O'Connor's guidance for state and local government entities was outlined in the following manner:

1. First, as long as states do not subordinate traditional criteria to race, they may intentionally create majority-minority districts without coming under strict scrutiny.
2. Second, a state may have to create majority-minority districts where the three *Gingles* preconditions (reasonable compactness, minority cohesion, and white bloc voting) are satisfied.
3. Third, the state's interest in avoiding Section 2 liability is a compelling governmental interest.
4. Fourth, a district drawn to avoid Section 2 liability is narrowly tailored so long as it does not deviate substantially, for predominantly racial reasons, from the sort of district a court would draw to remedy a Section 2 violation.
5. Fifth, districts that are bizarrely shaped and non-compact and that otherwise neglect traditional principles and deviate substantially from the sort of district a court would draw are unconstitutional, if drawn for predominantly racial reasons.

These "bright line" principles made it clear that a state or local government entity may intentionally draw majority-minority districts and that the Voting Rights Act itself may constitute a compelling governmental interest justifying such action. Further, Justice O'Connor's guidelines injected flexibility and a much-needed discretion for a state or local government entity as it seeks to draw a constitutionally and statutorily sound district, even though it may not be a perfect one, the most compact one or one as compact as a court would draw as a remedial district.

²² 515 U.S. 900 (1995).

²³ 517 U.S. 952 (1996).

²⁴ 517 U.S. 899 (1996).

3. No Prohibition on Drawing Majority-Minority Districts

In the DOJ's recently promulgated final Guidance relating to the administration of Section 5 of the Voting Rights Act, one FAQ asks if jurisdictions are "prohibited to draw majority-minority districts."²⁵

The DOJ's answer: No, drawing majority-minority districts is not prohibited. The Guidance states:

While it remains legally permissible for jurisdictions to take race into account when drawing election districts, the Supreme Court has held that the Constitution requires a strong justification if racial considerations predominate over traditional districting principles. One such justification may be the need to remedy a violation of Section 2 of the Voting Rights Act. While such a remedy may include election district boundaries that compromise traditional districting principles, such districts must be drawn where the Section 2 violation occurs and must not compromise traditional principles more than is necessary to remedy the violation.

D. Geographically compact majority-minority districts under *Bartlett v. Strickland*

1. Numerical "Majority" Required for §2 Districts

Voting rights and election law jurisprudence continually evolve. Evidence of this leaps from the docket of almost every term of the Supreme Court, most recently *Bartlett v. Strickland*, 128 S. Ct. 1648 (2009). There the Court upheld a numerical majority requirement for majority-minority districts under the geographical compactness precondition first enunciated in *Thornburgh v. Gingles*, 478 U.S. 30, 50 (1986). The starting point for this case is the principle that only if all three *Gingles* preconditions are met can a §2 violation be established based on the totality of the circumstances, and only then can majority-minority districts be required as part of the remedy.

Pender County, North Carolina challenged a 1991 legislative redistricting plan that had divided the county in order to increase a legislative district's minority voting strength. This redistricting case focused on the *Gingles* precondition that requires a hypothetical showing that a geographically compact majority-minority district can be created. Absent such a showing, a §2 suit cannot survive a motion for summary judgment.

2. The *Gingles* Preconditions: A Quick Review

²⁵ <http://www.justice.gov/crt/voting/misc/faq.php#faq08>. See 76 Fed. Reg. 7740, No. 27, Part III, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, February 9, 2011, http://www.justice.gov/crt/about/vot/sec_5/sec5guidance2011.pdf

Under §2 of the Voting Rights Act, minority plaintiffs seeking to establish vote dilution must show that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice." The first case to reach the Supreme Court after the 1982 amendments to the VRA, *Thornburgh v. Gingles*, 478 U.S. 30, 50 (1986), established three preconditions that must be satisfied before plaintiffs can proceed:

- (1) a geographically compact majority-minority district,
- (2) minority political cohesion, and
- (3) legally significant white racial bloc voting.

Bartlett v. Strickland focused on what must constitute a majority minority district. According to the county, creation of an intermediate, "crossover" district, in which the minority made up less than a majority of the voting-age population, but was large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate, nonetheless failed to satisfy the threshold *Gingles* precondition for §2 liability. This was because African-Americans were not a majority of the district's voting age population, but could get enough support from crossover majority voters to elect their preferred candidate.

When the lower court ruled that the §2 plaintiffs in *Strickland* were unable to prove the minority population in the potential election district at issue was greater than 50%, the stage was set for the U. S. Supreme Court to address whether there was a numerical majority requirement for majority-minority district under §2 of the Voting Rights Act.

3. No De Facto Majority-Minority Districts

U.S. Supreme Court held it was not enough for a district to be a "de facto" majority-minority district for purposes of §2 liability. Addressing an issue left open in earlier cases, the Court concluded that a minority group must constitute a numerical majority of the voting-age population in an area before it can satisfy the threshold *Gingles* preconditions for establishing §2 liability, and thereby to require or permit a remedy in the form of creation of a legislative district to prevent dilution of that group's votes.

While §2 can require the creation of a "majority-minority" district in which a minority group composes a numerical, working majority of the voting-age population, it does not require the creation of an "influence" district in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. Such a district was found legally insufficient in *Strickland*.

4. Trends Suggested by *Strickland*

Strickland suggests several trends in voting rights litigation that will play a significant role during f redistricting commences after the 2010 census results are reported in the Spring of 2011.

- a. **White Majority Districts:** The first trend that *Bartlett v. Strickland* suggests is that the courts will increasingly focus on white majority districts in evaluating legally significant white racial bloc voting in voting rights litigation. *Strickland* strongly reinforced the numerical majority component of the first *Gingles* precondition. Minority electoral success in white majority districts will continue to be a focal point for demographers and statisticians in evaluating legally significant white racial bloc voting, especially since minority electoral success is the antithesis of legally significant white racial bloc voting. As the lower courts further refine *Strickland*'s strong reinforcement of a numerical majority in order to prove the hypothetical existence of a §2 district, that is, a district that meets the definitional requirement for a geographically compact majority-minority district with 50% or greater minority population, proof of the second *Gingles* precondition of legally significant white racial bloc voting will call for a more nuanced inquiry into the voting patterns of a majority white district, one in which the court may have to examine whether the white district under scrutiny for racial bloc voting purposes is in fact “majority” white.

This is a particularly significant complication for what most federal judges already classify as among the most difficult and challenging of federal civil actions, a particularly startling example of which may be found in a case in which a powerful black election official routinely solicited large numbers of defective black absentee ballots, wielded his authority to ensure those ballots were counted and permitted improper assistance of black voters, all with an intent to dilute the voting power of white Democrats. That case is *United State v. Brown*, 561 F. 3d 420 (5th Cir. 2009), in which the Fifth Circuit upheld the district court's conclusion that black election officials in Noxubee County, Mississippi, a rural southern county with a 65.7% black voting age population, violated §2 by manipulating the absentee ballot process and abusing their authority over the election process in order to impede equal participation of the county's white voters in the political process and intentionally dilute white voting power.

In light of our nation's rapidly changing demographic characteristics that render decennial census results arguably outdated by mid-decade, look for the battle lines to be formed at the second *Gingles* threshold condition. Stated differently, satisfying the numerical majority requirement while establishing a hypothetical majority-minority district for purposes of the first *Gingles* precondition of geographical compactness may not necessarily lead to victory for plaintiffs in a vote dilution suit. This is true since the same type of evidence – a numerical majority *vel non* – may not be available to establish the existence of a majority white district in which minority candidates usually suffer defeat despite some degree of white crossover voting. Therefore, unless numerical majority status can be established for the white district under scrutiny, a plaintiff may be unable to satisfy the second *Gingles* precondition of legally significant white racial bloc voting. Attempting to satisfy that numerical majority requirement with anything less, like a functional white majority or *de facto* white majority district, could

doom a plaintiff's §2 case based on the absence of legally significant white racial bloc voting and spell victory for the defense.

- b. **Safe Harbor:** *Strickland's* adoption of a numerical majority requirement will likely provide a safe harbor for the redistricting process in appropriate cases. Before *Strickland*, there was no bright line rule in this area of the law. *Strickland* now provides a clear and objective 50% rule that should give state and local government legislative bodies some measure of relief in not having to defend every redistricting plan in court whenever they are faced with plaintiff's competing redistricting plans containing "opportunity" districts, and thus not having to devote scarce public funds to finance the defense of such plans.

Contrary to outgoing Justice Souter's dissent in *Strickland*, race will become less and less of a determinant in state and local government redistricting decisions where plaintiffs are unable to satisfy the numerical majority requirement. Under the bright line rule established in *Strickland*, absent satisfaction of the first *Gingles* precondition, minority voters like all other voters have no entitlement to constitutional protection from defeat at the polls. Nor do minority voters any more than other voters have a constitutionally or statutorily protected right to form coalitions with non-minority voters, absent satisfaction of the first *Gingles* precondition.

Of course, they can form such coalitions and should do so. They can and should pull, haul and trade, to borrow our departing Justice Souter's words in *DeGrandy*, and compete for votes and electoral support in the marketplace of political ideas. But absent satisfaction of the first *Gingles* precondition, §2 should not be applied post-*Strickland* to permit minority voters to benefit from special treatment.

- c. **No Opportunity Districts:** *Strickland* will likely hasten the demise of "opportunity districts" by striking a class of potential §2 claims from §2 coverage. Before *Strickland*, opponents of the numerical majority or "bright line" rule felt that the first *Gingles* precondition of geographical compactness could be satisfied by establishing the existence hypothetically of a district in which minority voters could be shown by reconstructed electoral data to have an "opportunity to elect" their preferred candidate. Use of an "opportunity district," however, would have armed Article III courts with a subjective standard and unbridled discretion to decide whether there are enough disparate racial minorities in a given district to support a finding that they have a "potential" to elect a representative of choice.

Further, in determining a racial minority's ability to vote by analyzing historical voter turnout differentials in a particular district, there may not be any remaining relevance to the question whether a less-than-50% minority group has an opportunity to elect. In the same sense, such a minority group's effectiveness among minority voters will likely not be given any consideration in determining

any of the *Gingles* preconditions, although it may have some limited relevance with respect to one or more of the Senate Report factors.

- d. **CVAP only:** Under *Strickland*'s 50% rule as a numerical population standard, lower courts will likely have to determine whether non-citizen undocumented aliens or only the citizen voting age population (CVAP) can or should be counted in determining that 50%. The greater weight of authority indicates that CVAP only will be counted. The 50% rule is one that rests on a numerical population standard, but 50% of what? *Strickland* did not specifically address whether citizen voters only (citizen voting age population or CVAP) or non-citizen undocumented aliens would be counted. Nor did the Court address who should be counted as "African-American" under the 50% rule, an especially difficult question in light of the creation of the multiracial category first used in the 2000 Census and in light of the somewhat ambiguous questions on race and ethnicity used to determine who counts as African-American. Some have taken the position that the 50% rule can create the risk of skewing the percentages of racial groups who are actually eligible to vote.

Their argument is that a racial minority group in a district where they do not constitute 50% of the population, but nonetheless are able to elect their preferred representatives, should have access to §2's protections against vote dilution. Absent a 50% population in any hypothetical geographically compact district, a minority group should not be able to argue post-*Strickland* that because one of the purposes of §2 is to give minority groups more voting power, that group should be given more voting power than it would otherwise have. That argument is precluded now under *Strickland* and was already in doubt under earlier circuit authority.

- e. **No Packing or Fragmentation:** *Strickland* should not encourage jurisdictions to engage in packing, cracking and fragmentation of minority voters, a fear suggested by critics of the decision. Prior to *Strickland*, opponents of the numerical majority requirement raised the spectre of jurisdictions rushing to pack as many minority voters as possible into districts in order to prevent them from electing candidates of their choice in surrounding districts, or to fragment or "crack" an otherwise compact minority population into multiple districts to dilute their vote.

This cynical argument belongs to a bygone era and does nothing to minimize the role of race in politics. It puts race in the forefront by taking it into account more than necessary or factually justified, even to the point of trumping legitimate, racially neutral redistricting objectives. It exacerbates the risk of creating an even greater racial divide and eliminating the desire or foundation of trust essential to forming coalitions. It posits race as the predominant determinant of redistricting decisions. It ignores the political landscape of a Nation that has largely moved

past race by electing its first African-American President and by electing and re-electing minority-preferred candidates throughout the Deep South. Such an argument does nothing to encourage multiracial and multiethnic coalitions, nor does it discourage racial divisions. Finally, such a threadbare argument dooms racially polarized factions to retreat into majority-minority districts based on a quintessentially race-conscious calculus.

5. Rejection of a complex, racially-derived substitute

A thoughtful analysis of *Bartlett* and the potential negative consequences of expanding § 2 to crossover districts can be found in an article by Jacob Whitted, *Bartlett v. Strickland: The Crossover of Race & Politics*, 87 Denv. U. L. Rev. 581, 590-91 (2010). The author argues that *Bartlett* properly reflected the shrinking role of race in our Nation's electoral politics, and emphasizes that the Court correctly refused to replace a workable standard with "a complex, racially-derived substitute." After a thorough overview of the history of vote dilution and relevant case law, the author provides a concise summary of the facts, procedural history and multiple opinions in *Bartlett*, then concludes with a cogent analysis of race's shrinking role in electoral politics in this nation:

The plurality opinion in *Bartlett* properly limits claims of vote dilution to majority-minority districts. By narrowly interpreting the first *Gingles* requirement and not extending § 2 claims to crossover districts, the Court rightly refused to extend the Voting Rights Act's mandate of equal opportunity for minority voters into statutory permission for partisan preferences and minority spoils.

Had the Court extended § 2 to mandate the creation of crossover districts, three damaging consequences would have resulted.

First, the Court would have created a new right for groups to form winning coalitions that only benefit protected minorities, which was not part of the Voting Rights Act's equal protection guarantee.

Second, the Court would have broadened political gerrymandering by replacing a workable standard with a complex, racially-derived substitute.

Third, the Court would have reversed the current trend away from identity politics and racial polarization by requiring racial inquiries in all districting questions and propagating a spoils system.

6. The Long Shadow of *Shaw v. Reno* over *Bartlett*

One writer has noted that the posture of Pender County, North Carolina in *Bartlett v. Strickland* was similar in some respects to the racial gerrymandering cases the Supreme Court

entertained throughout the 1990s, beginning with another case that originated in North Carolina, *Shaw v. Reno*.²⁶

This same writer advances the novel argument that the *Shaw* racial gerrymander cases are “factually but not analytically distinguishable from the excess use of race imposed by the Pender County court's numerosity requirement.” While not alone in his criticism of *Bartlett*²⁷, his line of reasoning provides this thought-provoking comparison of race and the insistence on a Section 2 plaintiff's satisfaction of the *Gingles* precondition for a geographically compact majority-minority district:

In each case, states allegedly created majority-minority congressional districts primarily on the basis of race and defended them by citing sections 2 and 5 of the Voting Rights Act of 1965. North Carolina's burden of proof in Pender County was measured against section 2 and the state constitution's prohibition on splitting counties. The *Shaw* cases implicated vote dilution under section 2 and non-retrogression under section 5, requiring states to demonstrate that these provisions necessitated the drawing of irregular lines to create majority-minority districts. The *Shaw* cases, however, centered on the states' alleged overuse of race--their proverbial segregation of the races in redistricting. Pender County, on the contrary, asked whether states could provide a remedy at all, if that remedy was something less than a majority-minority district.

The essence of a claim under *Shaw v. Reno* is that a state, without compelling justification, has permitted race to predominate in its redistricting decisions by subordinating traditional districting criteria. If the Fourteenth Amendment constrains states' use of race in redistricting, *Shaw* clashes with a requirement under section 2 that states create nothing less than a majority-voting-age-minority district where a lesser number might suffice. Coalition formation is a bedrock principle of politics in general and districting in particular. Because North Carolina had demonstrated that racially polarized voting could be sufficiently contained to permit a limited coalition between blacks and certain white voters, the Pender County court's insistence on a majority-black district subordinated a

²⁶ Terry Smith, *Disappearing Districts: Minority Vote Dilution Doctrine as Politics*, 93 Minn. L. Rev. 1680, 1688-91 (2009).

²⁷ See, e.g., Brandon Roseman, *Equal Opportunities Do Not Always Equate to Equal Representation: How Bartlett v. Strickland is a Regression in the Face of the Ongoing Civil Rights Movement*, 32 N.C. Cent. L. Rev. 102, 103, 109-11 (2009) (“At the heart of the matter is the Supreme Court's disregard for the protection of minority influence in the electoral process. The *Bartlett* holding does not further Congress's goal in enacting the V.R.A. The Supreme Court should have used *Bartlett* to clarify and modify *Gingles*, by holding § 2 to require the creation and protection of minority crossover and influence districts. Certainly, the V.R.A. should not be interpreted to guarantee outcomes. Minority populations should not be given more influence than their representative population would otherwise call for. However, the one person one vote and equal voting opportunity arguments enunciated in *Bartlett* do not take into consideration equal representation on a societal scale. Prior to this decision, the Supreme Court had not applied *Gingles* to mechanically foreclose § 2 protection to minority crossover and influence districts who asserted claims of dilution.”)

traditional districting criterion to race. In essence, the court eliminated the opportunity for black voters to participate in normal politics merely because they could not constitute a racial majority in a putative district.

In addition to creating constitutional concerns under *Shaw*, the North Carolina court's interpretation pits section 2 against itself. Section 2 not only ensures that minorities have an equal opportunity "to elect representatives of their choice," but also that they can equally "participate in the political process." Although section 2 does not define "opportunity . . . to participate in the political process," the term cannot be read as redundant of electoral opportunity and includes the panoply of activities for achieving political goals, including dialogue, lobbying and coalition-building. The formation of coalitions, where they are not otherwise unfeasible because of racially polarized voting, certainly constitutes protected participation in the political process. The North Carolina court interprets section 2's protection of minorities' equal opportunity to elect at the expense of derogating their equal opportunity to participate in the political process. . . .

Shaw and its progeny are predicated on the broader harms caused by the overuse of race in districting, namely, racial stereotyping. If a state may inflict this harm by adjoining what the Supreme Court concluded were unrelated communities of color for purposes of maximizing the number of black congressional districts, it is difficult to see why a racial group is not similarly harmed when it is over-aggregated into a single district. Pender County requires this type of packing, regardless of whether it is needed to nullify the effects of racially polarized voting.

The *Shaw* cases are factually but not analytically distinguishable from the excess use of race imposed by the Pender County court's numerosity requirement. North Carolina abrogated a state constitutional requirement of not dividing counties in order to comply with section 2 of the Voting Rights Act, a provision which the United States Supreme Court has assumed without deciding would be a compelling state interest in its racial gerrymandering cases. The Supreme Court has admonished, however, that states' efforts to comply with section 2 will abridge the Equal Protection Clause if race is used gratuitously. In *Bush v. Vera*, the Court rejected Texas's attempt to invoke section 2 as a defense to a claim that certain of its congressional districts had been drawn principally on grounds of race. According to the Court, nothing in section 2 required the drawing of irregular district lines connecting dispersed minority populations. Like Pender County, the focus of *Bush* was the first *Gingles* precondition that a minority group be sufficiently large and geographically compact to constitute a majority in a single-member district. Unlike Pender County, however, the *Bush* Court's focus was on geographic compactness rather than numerosity. Bush's insistence on geographic compactness complemented, and was purportedly integral to, its vigilance of the gratuitous use of race. The North Carolina Supreme Court's numerosity requirement, on the other hand, did not advance that constitutional interest, and indeed augmented the role of race for its own sake.

E. Post-Bartlett: *Reyes v. City of Farmers Branch, Texas* and CVAP

In one of the first appellate decisions after *Bartlett v. Strickland*, the Fifth Circuit was confronted with the argument that *Bartlett* had held that only voting-age population matters under the first *Gingles* preconditions. Minority Plaintiffs argued that *Bartlett* had implicitly overruled Fifth Circuit precedent requiring a minority citizen voting-age population in a district proposed under §2 to exceed 50% of its total citizen voting-age population. The Fifth Circuit in this case was confronted with a §2 vote dilution challenge filed by Hispanic Plaintiffs in which they claimed that the City's numbered at-large system of electing its five city council members diluted minority voting strength of the Hispanic minority.

As part of their threshold burden under *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), the plaintiffs were required to show that Hispanics would comprise a majority of the citizen voting-age population. Under the City's at-large electoral system, all voters were permitted to vote for all five council positions, and there was no requirement that a voter be a resident of any particular district.

Plaintiffs argued that if the City were required to convert to single member residential districts that one "demonstration district" with 78% TPOP and 75% VAP, such a district would contain a sufficient number of Hispanics to satisfy the first precondition under *Gingles*. Since Plaintiffs had failed to make the threshold showing that the Hispanic citizen voting-age population exceeded the non-Hispanic citizen voting-age population, and no actual data was available to reflect the actual number of Hispanic citizens of voting age living in the demonstration district, the Fifth Circuit held that the district court properly rejected Plaintiffs' claim for failure to show Hispanics would comprise a majority of the citizen voting-age population.

The Fifth Circuit also rejected Plaintiffs' argument that under *Bartlett*, only voting age population matters when evaluating the first *Gingles* precondition, not citizen voting-age population, and that the district court had erroneously applied too stringent a test when it rejected Plaintiffs' claim.

The Court rejected the argument that *Bartlett* had implicitly overruled Fifth Circuit precedent requiring a minority citizen voting-age population in a district proposed under §2 to exceed 50% of its total citizen voting-age population. Its conclusion was based on four key grounds:

(1) The question of citizenship was not before the Court in *Bartlett*, but the question there was quantitative, how many, and not qualitative, what kind of people. The Court was focused on the question of whether a minority population in a demonstration district comprised less than 50% of the possible voters could nonetheless meet the first *Gingles* precondition by showing it can win elections with the help of a reliable crossover vote.

(2) Only voting-age citizens can be "voters" who could form a majority, and the plurality opinion in *Bartlett v. Strickland* evidenced the vitality of the citizenship requirement, particularly when Justice Kennedy concluded that "only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met." *Bartlett v. Strickland*, 129 S.Ct. at 1249.

(3) “[T]he jurisprudential backdrop belies the notion that the Court would hold that citizenship is irrelevant under Section 2 of the VRA, particularly where several sister Circuits joined the Fifth in requiring voting rights plaintiffs to prove that the minority citizen voting-age population comprises a majority.

(4) The Court issued no binding opinion in *Bartlett v. Strickland*, only a judgment. There were only three justices who joined in the plurality opinion, and two others joined the judgment affirming that no voting rights violation existed while flatly denying that any voter dilution claim could be made under §2 of the VRA. “[T]hree justices a rule do not make.”

F. Mid-Census Redistricting

*LULAC v. Perry*²⁸ made it clear that mid-census redistricting is not off limits for a state legislature intent on adjusting the political boundaries of electoral districts before the next decennial census. *Perry* recognized that redistricting may be necessitated by the political decision of the covered jurisdiction before the results of the next decennial census are ascertained. For that reason and many more, a significant number of covered jurisdictions did not wait for the release of the 2010 Census data to begin making advance preparations for what a Section 5 submission, and began laying the groundwork months ago for organizing and accumulating data, engaging planners, performing preliminary modeling, and conducting community participation surveys. They also began to evaluate existing district plans for compliance with the one person, one vote doctrine under the 14th Amendment while also undertaking a preliminary analysis of electoral data for evidence of racial polarization, racial bloc voting, minority political cohesion and other factors relevant to compliance with the Voting Rights Act.

V. Procedures For the Administration of Section 5 of the Voting Rights Act

The Attorney General's Procedures for the Administration of Section 5 are published at 28 C.F.R. Part 51 and provide detailed information about the administrative review process, also known as the preclearance process.

Recently revised effective April 15, 2011,²⁹ the procedures identify covered jurisdictions, provide examples of the types of voting-related practices and procedures that require Section 5 review, describe the steps in making Section 5 administrative submissions, and explain the process by which submissions are reviewed and the factors considered in making Section 5 determinations. Voting Section's Minority Language Guidelines are separately codified as Part 55 of Title 28 of the Code of Federal Regulations. The Voting Section reprints copies of the Voting Rights Act, the Section 5 Procedures, and the Minority Language Guidelines in booklet form, and will mail copies upon request to covered jurisdictions and interested persons. [A Detailed Index](#) to the Section 5 Administrative Procedures is also available at

²⁸ 126 S. Ct. 2594 (2006).

²⁹ Revision of Voting Rights Procedures, 28 CFR Parts 0 and 52, AG Order No. 3262-2011, 76 Fed. Reg. No. 73 (April 15, 2011).

http://www.justice.gov/crt/about/vot/28cfr/51/index_51.php

Following the anthrax threat in the months following 9/11, the Voting Section discontinued using its postal address (P.O. Box 66128, Washington DC 20035), and that address is no longer in effect.

The Department has established a single address for the receipt of all United States Postal Service mail including certified mail and express mail. All mail to the Voting Section must be addressed as follows:

Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

New procedures for the delivery of mail and overnight express parcels to the Civil Rights Division have been instituted. Deliveries by overnight express services such as Airborne, DHL, Federal Express or UPS should be addressed to:

Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

If a covered jurisdiction is sending a Section 5 submission, it is instructed to make sure that the front of the envelope identifies it as a submission under Section 5 and your return address is clearly indicated.

A. Section 5 Administrative Guidelines and Procedures Online

The Section 5 Administrative Guidelines are organized into Subparts A through H, for which the current hyperlinks are provided below:

► Subpart A -- General Provisions:

http://www.justice.gov/crt/about/vot/28cfr/51/subpart_a.php

51.1 Purpose.

51.2 Definitions.

51.3 Delegation of authority.

- 51.4 Date used to determine coverage; list of covered jurisdictions.
- 51.5 Termination of coverage (bailout).
- 51.6 Political subunits.
- 51.7 Political parties.
- 51.8 Section 3 coverage.
- 51.9 Computation of time.
- 51.10 Requirement of action for declaratory judgment or submission to Attorney General.
- 51.11 Right to bring suit
- 51.12 Scope of requirement.
- 51.13 Examples of changes.
- 51.14 Recurrent practices.
- 51.15 Enabling legislation and contingent or nonuniform requirements.
- 51.16 Distinction between changes in procedure and changes in substance.
- 51.17 Special elections.
- 51.18 Court-ordered changes.
- 51.19 Request for notification concerning voting litigation.

► Subpart B -- [Procedures for Submission to Attorney General:](http://www.justice.gov/crt/about/vot/28cfr/51/subpart_b.php)

http://www.justice.gov/crt/about/vot/28cfr/51/subpart_b.php

- 51.20 Form of submissions.
- 51.21 Time of submissions.
- 51.22 Premature submissions.
- 51.23 Party and jurisdiction responsible for making submissions
- 51.24 Address for submissions.

51.25 Withdrawal of submissions.

► Subpart C -- Contents of Submissions:

http://www.justice.gov/crt/about/vot/28cfr/51/subpart_c.php

51.26 General.

51.27 Required contents.

51.28 Supplemental contents

► Subpart D -- Communications From Individuals and Groups:

http://www.justice.gov/crt/about/vot/28cfr/51/subpart_d.php

51.29 Communications concerning voting changes.

51.30 Action on communications from individuals or groups.

51.31 Communications concerning voting suits.

51.32 Establishment and maintenance of registry of interested individuals and groups.

► Subpart E -- Processing of Submissions:

http://www.justice.gov/crt/about/vot/28cfr/51/subpart_e.php

51.33 Notice to registrants concerning submissions.

51.34 Expedited consideration.

51.35 Disposition of inappropriate submissions.

51.36 Release of information concerning submissions.

51.37 Obtaining information from the submitting authority.

51.38 Obtaining information from others.

51.39 Supplementary submissions.

51.40 Failure to complete submissions.

51.41 Notification of decision not to object.

51.42 Failure of the Attorney General to respond.

51.43 Reexamination of decision not to object.

51.44 Notification of decision to object.

51.45 Request for reconsideration.

51.46 Reconsideration of objection at the instance of the Attorney General.

51.47 Conference.

51.48 Decision after reconsideration.

51.49 Absence of judicial review.

51.50 Records concerning submissions.

► Subpart F -- **Determinations by the Attorney General:**

http://www.justice.gov/crt/about/vot/28cfr/51/subpart_f.php

51.51 Purpose of the subpart.

51.52 Basic standard.

51.53 Information considered.

51.54 Discriminatory effect.

51.55 Consistency with constitutional and statutory requirements.

51.56 Guidance from the courts.

51.57 Relevant factors.

51.58 Representation.

51.59 Redistrictings.

51.60 Changes in electoral systems.

51.61 Annexations.

► Subpart G -- **Sanctions:** http://www.justice.gov/crt/about/vot/28cfr/51/subpart_g.php

51.62 Enforcement by the Attorney General.

51.63 Enforcement by private parties.

51.64 Bar to termination of coverage (bailout).

▶ Subpart H -- **Petition to Change Procedures:**

http://www.justice.gov/crt/about/vot/28cfr/51/subpart_h.php

51.65 Who may petition.

51.66 Form of petition.

51.67 Disposition of petition.

▶ Appendix to Part 51 -- **Covered Jurisdictions:**

http://www.justice.gov/crt/about/vot/28cfr/51/apdx_txt.php

▶ Copies of the full set of Guidelines are posted at html and pdf files at the following sites:

▶ **All Section 5 Administrative Procedures (HTML)(112K):**

<http://www.justice.gov/crt/about/vot/28cfr/51/28cfr51.php>

▶ **All Section 5 Administrative Procedures (PDF)(116K):**

<http://www.justice.gov/crt/about/vot/28cfr/51/28cfr51.pdf>

B. Final Revision of Voting Rights Provisions adopted April 15, 2011

In the April 15, 2011 Final Revision of these Procedures, the first revision since January 6, 1987, the Attorney General deemed it necessary to issue further revisions in light of developments that included voting changes over the past 24 years, important decisions involving Section 5 and the 2006 amendments to the Voting Rights Act. These are the highlights of the most recent revision.

1. Benchmark

Section 51.2 clarifies the practice of the Voting Section to compare a proposed standard, practice or procedure with the benchmark, defined consistent with *Riley v. Kennedy*, 553 U.S. 406 (2008), as the standard, practice or procedure that has been unchanged since the jurisdiction's coverage date or if changed since that date, found to comply with Section 5 and in force and effect. Specifically, a standard, practice or procedure that has been reviewed and precleared under

Section 5 is considered in force and effect “even if the jurisdiction never implements the change because the change is effective as a matter of federal law and was available for use.”

2. Voting Related Changes

Section 51.13 clarifies that a change in the voting-related authority of an official or governmental entity alters election law and changes rules governing voting, thus meeting the test of voting relatedness at the core of *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), and that any change affecting the right or ability of persons to participate in pre-election activity, such as political campaigns, is subject to §5 review, as are such practices as dissolution or merger of voting districts, de facto elimination of an elected office, and reallocation of authority to adopt or administer voting practices.

3. Court-Ordered Changes

Section 51.18 deals with changes affecting voting for which approval by a federal court is required, or that are ordered by a federal court. Such changes are exempt from §5 review “only where the federal court prepared the change and the change has not been subsequently adopted or modified by the relevant governmental body.”³⁰ This revision clarifies coverage of court-ordered changes that are not initially subject to §5 but become covered through subsequent actions taken by the affected jurisdiction, and provides that interim use of a covered change before it is established should be ordered by a court only in emergency circumstances. It also includes the clarification with respect to subsequent changes, as where a federal court-ordered change is not itself subject to §5 preclearance but subsequent changes necessitated by the order must be decided upon by the jurisdiction. Such subsequent changes are subject to §5 review and include “voting precinct and polling changes made necessary by a court-ordered redistricting plan.”

4. Basic Standard for Evaluation of Purpose and Effect

Section 51.52 clarifies the basic substantive standard for the Attorney General to evaluate Section 5 submissions, providing that “in those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of both the prohibited discriminatory purpose and effect, the Attorney General will interpose an objection.”

Section 51.27 revises the provisions relating to required contents for §5 submissions and requires the e-mail address for the person making the submission to be provided where available.

Section 51.54 revises the standard for the Attorney General’s evaluation of whether a change affecting voting has a discriminatory purpose or effect, and clarifies that “purpose” in §5 includes any discriminatory purpose. The evaluation of discriminatory purpose under §5 is guided by the multi-factor analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

³⁰ See *McDaniel v. Sanchez*, 452 U.S. 130 (1981).

5. Relevant Factors Considered in Making §5 Determination

Section 51.57 contains a revised list of relevant factors considered by the Attorney General in making determinations with respect to submitted changes affecting voting, including

- (a) The extent to which a reasonable and legitimate justification for the change exists;
- (b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;
- (c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;
- (d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change; and
- (e) The factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977):
 - (1) Whether the impact of the official action bears more heavily on one race than another;
 - (2) The historical background of the decision;
 - (3) The specific sequence of events leading up to the decision;
 - (4) Whether there are departures from the normal procedural sequence;
 - (5) Whether there are substantive departures from the normal factors considered; and
 - (6) The legislative or administrative history, including contemporaneous statements made by the decision makers.

6. Background Factors

Section 51.58(b) clarifies the important background factors that the Attorney General will consider in making §5 determinations, including:

- (1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.
- (2) The extent to which voting in the jurisdiction is racially polarized and election-related activities are racially segregated.

(3) The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

7. Additional Factors Considered in Evaluating Redistricting Plans

Section 51.59 clarifies the additional factors that the Attorney General will consider in making §5 determinations with respect to redistricting plans, including but not necessarily limited to the following:

- (1) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens;
- (2) The extent to which minority voting strength is reduced by the proposed redistricting;
- (3) The extent to which minority concentrations are fragmented among different districts;
- (4) The extent to which minorities are over concentrated in one or more districts;
- (5) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered;
- (6) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and
- (7) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

8. Failure to Maximize Majority-Minority Districts

Section 51.59 clarifies the principle with reference to discriminatory purpose that “a jurisdiction's failure to adopt the maximum possible number of majority minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose.”

VI. Guidance Concerning Redistricting Under Section 5 of the Voting Rights, 76 F.R. 7470 (effective Feb. 9, 2011)

Under Section 5, covered jurisdictions cannot enforce voting changes unless and until they obtain approval ("preclearance") either from the federal district court in Washington, D.C. or from the Attorney General. If the jurisdiction chooses to obtain preclearance from the Attorney General, it has 60 days after receiving all the necessary information to decide whether a governmental entity has shown that a proposed voting change is not discriminatory in purpose or effect.

In enforcing Section 5's preclearance provisions, DOJ through the Civil Rights Division has used internal departmental guidelines that have been revised from time to time since the initial ones were promulgated decades ago. The administrative guidelines and administrative procedures online, summarized above with hyperlinks, are supplemented by DOJ's Guidance. The most recent revision of the Guidance took place in June 2010 in order to reflect the Voting Rights Act Reauthorization Amendments of 2006. Several months after the comment period had ended, the Justice Department formally issued its new "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act" and formally published it and posted it online in the Federal Register, effective February 9, 2011.³¹

This new Guidance will be politically consequential. Considering the context and time in which it has been promulgated, Section 5 and this accompanying Guidance have been strengthened at a time of waning racism and decreasing need for protecting minority candidates from white competition. As a consequence, one can readily conclude that race-conscious districts will continue to be an important priority of legislative-redistricting committees. If they ignore the regulations governing the enforcement of section 5, they risk litigation and a consequent delay in their ability to hold elections.

A. Submissions under Section 5

The Justice Department investigates submissions carefully by studying documents, interviewing people in the affected community, and getting to know the facts. If the Attorney General decides that a proposed change was designed to discriminate against minority voters, or that, regardless of intent, it makes minority voters worse off than before, s/he will "object" to the change in a letter to the jurisdiction. If that happens, the change is legally unenforceable and cannot be put into effect, just as if the federal court had issued a ruling against the proposed change. If the jurisdiction disagrees with the Attorney General's objection, it can still take the matter to the federal court in Washington, D.C., where it will have to prove that its proposed change is not discriminatory either in purpose or in effect. If the Attorney General does not object, the change can be implemented. However, the Justice Department or a private party can still go to court under Section 2 of the Voting Rights Act and challenge the change as a racially discriminatory voting procedure.³²

B. Highlights of 2011 Guidance

On June 11, 2010, the Attorney General published a notice in the Federal Register concerning proposed revisions to the Procedures for the Administration of Section 5 of the

³¹ 76 Fed. Reg. 7740, No. 27, Part III, Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, February 9, 2011, http://www.justice.gov/crt/about/vot/sec_5/sec5guidance2011.pdf

³² <http://www.justice.gov/crt/voting/misc/faq.php#faq08>

Voting Rights Act of 1965, 28 C.F.R. Part 51. It invited interested persons to participate in the consideration of these amendments during the comment period that ended on August 10, 2010.³³

On February 9, 2011, the final Guidance was issued. Its stated purpose was to clarify the scope of section 5 review based on the 2006 amendments to section 5 and to provide covered jurisdictions and minority citizens with appropriate “guidance” concerning current Justice Department practices.³⁴

The following is a summary of the 2011 Guidance³⁵

- a. **SCOPE OF REVIEW:** The guidance seeks to clarify the scope of section 5 review based on recent amendments to section 5, make certain technical clarifications and updates, and provide better guidance to covered jurisdictions and citizens.
- b. **LONGSTANDING PRACTICES OF AG:** In many instances, the guidance describes long-standing practices of the Attorney General in the review of section 5 submissions. It should aid in ensuring that all covered changes affecting voting are promptly submitted for review and minimize the potential for litigation.
- c. **DELEGATION OF AUTHORITY OVER SECTION 5 AND 3(c) SUBMISSIONS:** The guidance clarifies that the Attorney General’s delegation of authority to the Assistant Attorney General for Civil rights over submissions under section 5 of the Voting Rights Act also includes authority over submissions under section 3(c) of the Voting Rights Act (§ 0.50(h)).
- d. **BENCHMARK STANDARD:** The guidance also clarifies the stated authority for the Part 51 procedures to reflect the 2006 statutory amendments to the Voting Rights Act; revise language to conform to the substantive section 5 standard in the 2006 amendments (§ 51.1); clarifies the definition of the Voting rights Act to reflect the enactment of the 2006 amendments; clarify the definition of the benchmark standard, practice, or procedure (§ 51.2); makes technical corrections to the delegation of authority from the Attorney General to the Assistant Attorney General, and from the Chief of the Voting Section to supervisory attorneys within the Voting Section (§ 51.3); makes technical corrections to reflect the new expiration date for section 5 coverage contained in the 2006 amendments; clarifies that jurisdictions may seek earlier termination of coverage through a bailout action (§ 51.5); and incorporates the Supreme Court’s holding in *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504 (2009), that any jurisdiction required to comply with section 5 may seek to terminate that

³³ 28 CFR Parts 0 and 51 [CRT Docket No. 109; AG Order No. 3161–2010] Revision of the Procedures for the Administration of Section 5 of the Voting Rights Act.

³⁴ http://www.justice.gov/crt/voting/sec_5/fedregs_draft.pdf

³⁵ http://www.justice.gov/crt/voting/sec_5/fedregs_draft.pdf

obligation pursuant to the procedures that implement section 4(a) of the Act (§§ 51.5 and 51.6).

- e. **REVIEW PERIOD:** The guidance clarifies that the review period commences only when a submission is received by the Department officials responsible for conducting section 5 reviews and clarifies the date of the response (§ 51.9); revises language to conform to the substantive section 5 standard in the 2006 amendments (§ 51.10, § 51.11); clarifies that, in determining whether a change is covered, any inquiry into whether the change has the potential for discrimination is focused on the generic category of changes to which the specific change belongs (§ 51.12); clarifies that a voting change is covered regardless of the manner or mode by which a covered jurisdiction acts to adopt it (§ 51.12); and clarifies that dissolution or merger of voting districts, *de facto* elimination of an elected office, and relocations of authority to adopt or administer voting practices or procedures are all subject to section 5 review (§ 51.13).
- f. **COURT-ORDERED CHANGES:** The guidance also clarifies that section 5 review ordinarily should precede court review, that a court-ordered change that initially is not covered by section 5 may become covered through actions taken by the affected jurisdiction, and that the interim use of an unprecleared change should be ordered by a court only in emergency circumstances (§ 51.18); makes a conforming change updating the address for the Voting Section (§ 51.19); makes technical changes in the format in which information may be submitted to the Attorney General to reflect changes in information technology (§ 51.20); and clarifies those circumstances in which the Attorney General will not review a submission (§§ 51.21, 51.22).
- g. **ELECTRONIC SUBMISSIONS:** In addition, the guidance clarifies the authority authorized to make section 5 submissions (§ 51.23); makes technical amendments to the addresses to which submissions can be delivered to reflect changes in the location of the Voting Section and its mail-handling procedures, to note the availability of electronic submissions and fax submissions, and to note to the availability of e-mail as a means of submitting additional information on pending submissions (§ 51.24); clarifies the addresses and methods by which jurisdictions may deliver notices of withdrawal of submissions (§ 51.25); clarifies the language used in describing the required contents of submissions (§ 51.27); and makes technical changes to the format in which information may be submitted to the Attorney General (§ 51.28).
- h. **WRITTEN COMMENTS:** The guidance also clarifies the addresses and methods by which persons may provide written comments on submissions and clarify the circumstances in which the Department may withhold the identity of those providing comments on submissions (§ 51.29); clarifies the circumstances under which the Attorney General may conclude that a decision on the merits is not appropriate and the circumstances under which consideration of the change may be reopened (§ 51.35); clarifies the procedures for the Attorney General to make

written and oral requests for additional information regarding a submission (§ 51.37); makes technical revisions to the section that provides for recommending the 60-day period where a jurisdiction voluntarily provides material supplemental information, or where a related submission is received (§ 51.39); and clarifies the language regarding the failure of the Attorney General to respond to a submission (§ 51.42).

- i. **RECONSIDERATION OF DECISION NOT TO OBJECT:** The guidance clarifies the procedures when the Attorney General decides to reexamine a decision not to object (§ 51.43); revises language to conform to the substantive section 5 standard in the 2006 amendments (§ 51.44); clarifies that the Attorney General can reconsider an objection in cases of misinterpretation of fact or mistake of law, consistent with existing § 51.64(b) (§ 51.46); clarifies the manner in which the 60-day requirement applies to reconsideration requests and revise language to conform to the substantive section 5 standard in the 2006 amendments (§ 51.48); and clarifies the procedures regarding access to section 5 records (§ 51.50).
- j. **DISCRIMINATORY PURPOSE:** The guidance clarifies the substantive standard to reflect the 2006 amendments to the Act and the manner in which the Attorney General will evaluate issues of discriminatory purpose under section 5 (§ 51.52, § 51.54, § 51.55, § 51.57, § 51.59); clarifies the application of section 5 to deannexations (§ 51.61); and clarifies the Appendix to include reference to a list of bailouts by political subdivisions subject to section 5.

The guidance clarifies the substantive standard to reflect the 2006 amendments to the Act and the manner in which the Attorney General will evaluate issues of discriminatory purpose under section 5 (§ 51.52, § 51.54, § 51.55, § 51.57, § 51.59); clarifies the application of section 5 to deannexations (§ 51.61); and clarifies the Appendix to include reference to a list of bailouts by political subdivisions subject to section 5.

C. Nuts and Bolts of the 2011 Guidance: Devil in the Details

The 2011 Guidance was expressly drafted for the purpose of reverting to the legal standards that had been suspended following the U.S. Supreme Court’s 1999 decision in *Reno v. Bossier Parish (Bossier II)*³⁶ and its 2003 decision in *Georgia v. Ashcroft*.³⁷ Both decisions were

³⁶ *Reno v. Bossier Parish Sch. Bd.*, 528 U.S.320 (1999) held that a redistricting plan that was enacted with a discriminatory purpose would not violate Section 5 so long as it was not retrogressive in purpose or effect. This meant that a proposed change must still be precleared under Section 5 so long as it improves or maintains the status quo with respect to the electoral influence of voters of color in the jurisdiction, despite evidence that it was enacted with an intent to discriminate.

³⁷ *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003) held that Section 5 did not prohibit covered jurisdictions from reducing the proportions of a minority voting age population in some majority-minority districts “even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.”

rejected and legislatively overturned by the VRARA of 2006. With the 2011 Guidance now providing a redefinition of intentional and purposeful discrimination, substantial “meat” was put on the bones of the VRARA of 2006. The Justice Department drew heavily upon *Arlington Heights v. Metropolitan Housing Development Corp.* for a broad and far-reaching definition of discriminatory intent and incorporated this analytical standard into the Guidance.

a. *Arlington Heights* and Discriminatory Intent

The 2011 Guidance states that when the Justice Department is evaluating a submitted plan to determine if there is sufficient circumstantial evidence that the jurisdiction has not carried its burden of proving a negative, that is, that the jurisdiction has not shown “the absence of the prohibited discriminatory purpose,” the Voting Section attorney examining the plan will follow the illustrative, non-exclusive list of “subjects for proper inquiry” enumerated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), to determine whether discriminatory intent existed. The sensitive inquiry prescribed by *Arlington Heights* calls for several areas to be reviewed in making such determination. The 2011 Guidance makes it explicitly clear that Voting Section attorneys examining Section 5 Submissions of redistricting plans from covered local government entities will be evaluating the *Arlington Heights* factors, which include

- (1) whether the impact of the official action bears more heavily on one race than another,
- (2) the historical background of the decision,
- (3) the legislative or administrative history,
- (4) the specific sequence of events leading up to the submitted change,
- (5) whether there are departures from the normal procedural sequence, and
- (6) whether there are substantive departures from the normal factors considered.³⁸

But there is more. According to the 2011 Guidance, other relevant factors that the Justice Department will consider in a Section 5 Preclearance Submission include:

- The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.
- The extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated.
- The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

³⁸ *Arlington Heights*, supra at 266-68

- The extent to which minority voting strength is reduced by the proposed redistricting;
- The extent to which minority concentrations are fragmented among different districts;
- The extent to which minorities are over-concentrated in one or more districts;
- The extent to which available alternative plans satisfying the jurisdiction’s legitimate governmental interests were considered;
- The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and
- The extent to which the plan is inconsistent with the jurisdiction’s stated redistricting standards.

b. Failure to Maximize not Discriminatory Purpose *per se*

In addition to the above, the 2011 Guidance provides that a “determination that a jurisdiction has failed to establish that the adoption was not motivated by a discriminatory purpose may not be based solely on a jurisdiction’s failure to adopt the maximum possible number of majority minority districts.” Stated differently, the failure “to adopt the maximum possible number of majority minority districts” may be weighed heavily in the preclearance process, but the decision to accept or reject a proposed change in election procedure cannot rest on the maximum-number question alone.

Where does this leave local governments seeking to draw acceptable redistricting plans that will pass muster when submitted for preclearance under Section 5? *Arlington Heights* does not draw a clear distinction between discriminatory purpose and impact, and the language of the 2011 Guidance has left many critical terms undefined. When a municipality, county or other local government entity is immersed in the politically challenging negotiations over a redistricting plan that it has attempted to draw with proper emphasis on traditional districting principles and a good faith belief that the plan does not run afoul of retrogression, it may nonetheless find itself adrift at sea and in somewhat of a guessing game when trying to finalize district boundary lines that comply with Section 5 in the judgment of the Voting Section attorney assigned to review the submission.

D. Section 5 Benchmark

When a covered jurisdiction’s proposed redistricting plan is submitted and subjected to review under Section 5, the plan is compared to the “benchmark” plan to determine whether the use of the new plan would result in a retrogressive effect. The “benchmark” against which a new plan is compared is the last legally enforceable redistricting plan in force or effect. *Riley v. Kennedy*, 553 U.S. 406 (2008); 28 CFR 51.54(b)(1).

Generally, the most recent plan to have received Section 5 preclearance or to have been drawn by a Federal court is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a Federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. *McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Texas v. United States*, 785 F. Supp. 201 (D.D.C. 1992); *Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982), appeal dismissed, 461 U.S. 912 (1983).

A plan found to be unconstitutional by a Federal court under the principles of *Shaw v. Reno* and its progeny cannot serve as the Section 5 benchmark, *Abrams v. Johnson*, 521 U.S. 74 (1997), and in such circumstances, the benchmark for Section 5 purposes will be the last legally enforceable plan predating the unconstitutional plan.

Absent such a finding of unconstitutionality under *Shaw* by a Federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review. Therefore, the question of whether the benchmark plan is constitutional will not be considered during the Justice Department's Section 5 review.

E. Scope of Section 5 Review: *Riley v. Kennedy*³⁹

After the State of Alabama passed a law adopting a new election practice, obtained the preclearance required by §5, and held an election, the law under which the election took place was invalidated by the State's highest court on the ground that it violated a controlling provision of the State's Constitution. The U.S. Supreme Court held in *Riley v. Kennedy* that the State was not required to obtain fresh preclearance in order to reinstate the election practice prevailing before enactment of the law struck down by the State's Supreme Court, and that, for §5 purposes, the invalidated law never gained "force or effect."

Speaking for the Court, Justice Ginsburg explained why the State's reversion to its prior practice did not rank as a "change" requiring preclearance.

It is undisputed that a "change" from election to appointment is a change "with respect to voting" and thus covered by §5. See *Allen*, 393 U. S., at 569–570; *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502–503 (1992). We have also stated that the preclearance requirement encompasses "voting changes mandated by order of a state court." *Branch v. Smith*, 538 U.S. 254, 262 (2003) The question is whether, given the circumstances here presented, any "change" within the meaning of §5 occurred in this case.

In order to determine whether an election practice constitutes a "change" as that term is defined in our §5 precedents, we compare the practice with the covered jurisdiction's "baseline." We have defined the baseline as the most recent practice that was both precleared and "in force or effect"—or, absent any change since the jurisdiction's

³⁹128 S. Ct 1970 (2008)

coverage date, the practice that was “in force or effect” on that date. See *Young*, 520 U. S., at 282–283. See also *Presley*, 502 U. S., at 495. The question is “whether a State has ‘enact[ed]’ or is ‘seek[ing] to administer’ a ‘practice or procedure’ that is ‘different’ enough” from the baseline to qualify as a change. *Young*, 520 U. S., at 281

For the reasons that follow, we conclude that the 1985 Act was never “in force or effect” within the meaning of §5. At all relevant times, therefore, the baseline practice for filling midterm vacancies on the Commission was the pre-1985 practice of gubernatorial appointment. The State’s reinstatement of that practice thus did not constitute a change requiring preclearance. ...

The realities of election litigation are such that lower state courts often allow elections to proceed based on erroneous interpretations of state law later corrected on appeal. ... We decline to adopt a rigid interpretation of “in force or effect” that would deny state supreme courts the opportunity to correct similar errors in the future.

Although our reasoning and the particular facts of this case should make the narrow scope of our holding apparent, we conclude with some cautionary observations. First, the presence of a judgment by Alabama’s highest court declaring the 1985 Act invalid under the State Constitution is critical to our decision. We do not suggest the outcome would be the same if a potentially unlawful practice had simply been abandoned by state officials after initial use in an election. Cf. *Perkins*, 400 U. S., at 395. Second, the 1985 Act was challenged the first time it was invoked and struck down shortly thereafter. The same result would not necessarily follow if a practice were invalidated only after enforcement without challenge in several previous elections. Cf. *Young*, 520 U. S., at 283 (“[T]he simple fact that a voting practice is unlawful under state law does not show, entirely by itself, that the practice was never ‘in force or effect.’ ... A State, after all, might maintain in effect for many years a plan that technically ... violated some provision of state law.”). Finally, the consequence of the Alabama Supreme Court’s decision in *Stokes* was to reinstate a practice—gubernatorial appointment—identical to the State’s §5 baseline. Preclearance might well have been required had the court instead ordered the State to adopt a novel practice.

VII. Practical Tips for Drawing a Defensible Redistricting Plan for 2011-2012

A. General Considerations

How does a local government body go about the process of developing a redistricting plan that can survive a DOJ objection or a challenge in federal court? Legislative history will be a

particularly critical component when a state or local government entity is called upon to evaluate changes reflected in a new redistricting plan adopted in light of population shifts and changes following the 2010 Census. Compliance with the one person, one vote requirement under the Fourteenth Amendment and with the requirements of Section 2 and Section 5 of the Voting Rights Act will be the focal point of that legislative history.

A covered jurisdiction will want to develop a defensible legislative history and a factually support legislative record, both key factors in protecting and undergirding the legal efficacy of a redistricting plan. An excellent overview of the nuts and bolts of drawing a redistricting plan that will meet applicable statutory, constitutional and regulatory requirements has been prepared by Peter S. Wattson, Senate Counsel for the State Senate of Minnesota, published by the National Conference of State Legislatures in conjunction with the January 22, 2011 National Redistricting Seminar.⁴⁰ Wattson's "*How To Draw Redistricting Plans That Will Stand Up In Court*" provides a detailed review of the requirements of population equality and practical application of the one person, one vote principle under the 14th Amendment of the U.S. Constitution, followed by a thorough analysis of the nondiscrimination provisions of Section 2 and Section 5 of the Voting Rights Act, then a pragmatic discussion of racial gerrymandering and partisan gerrymandering.

At a minimum, when the legislative process is undertaken at the local government level, where grass-roots constituencies and local political concerns have a concrete significance, the legislative history should be developed with extraordinary transparency. It should be constructed with all of the diligence and care that can be invested in process by those to whom the public trust has been committed. Remember, the entire legislative history may become "Exhibit A" in the event a subsequent racial gerrymandering challenge is mounted, a vote dilution action is filed under §2, or a preclearance objection is interposed under §5 of the Voting Rights Act.

B. Compliance with §5 Guidance & Revised Procedures

The basic requirements set forth in the February 9, 2011 Guidance for the Administration of §5 and the April 15, 2011 Revision of Voting Rights Procedures have been discussed earlier. For covered jurisdictions, bear in mind that a submission of a local government body's redistricting plan for preclearance under §5 will be reviewed in light of additional and more exacting criteria, including a multiplicity of factors that will guide the DOJ as it engages in a searching, practical evaluation of the proposed plan. As a direct result of the 2006 Amendments embodied in the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, purposeful discrimination even in the absence of retrogression will likely draw an objection. Deviations from established procedure or unexplained departures from a jurisdiction's generally accepted, traditional redistricting principles may likewise doom a submission.

Favorable consideration of a redistricting plan submission will be more likely if the covered jurisdiction provides a clear and consistent legislative record that evidences meaningful public participation, sensitivity and awareness of the political and electoral needs and concerns of minority citizens, technical completeness and substantial compliance with the DOJ's

⁴⁰ <http://www.senate.leg.state.mn.us/departments/scr/REDIST/Draw/Draw992web.htm>.

administrative criteria, standards and factors that guide the review process. So let's turn to the process itself and see what that legislative history should reveal in a reasonably thorough submission.

Consider at the outset what relevant legislative evidence should be included in the legislative history, particularly in light of the proposed §5 regulations, and in light of constitutional and statutory precedent formulated since the U.S. Supreme Court decided *Thornburg v. Gingles*, *Grove v. Emison*, *Shaw v. Reno*, *U.S. v. Hays*, *Miller v. Johnson*, *Bush v. Vera*, *Cromartie v. Hunt*, *LULAC v. Perry*, *Bartlett v. Strickland*, and the score of landmark decisions that form the backbone of VRA litigation.

In addition to the specific criteria and factors noted above, the following nonexclusive list is suggested for consideration and possible inclusion in the legislative history of the redistricting process. With a hefty dose of common sense and political reality, a government body can develop a defensible legislative record when it undertakes to make necessary and desirable changes to the electoral district configuration and political boundaries of a state or local government entity, be it county, municipal, school or other special district:

1. Narrative statements, exhibits or evidentiary materials submitted to the Section 5 Unit of the Civil Rights Division of the Justice Department, for covered jurisdictions, over the past decade, including documentation that

(a) illustrates the specific sequence of events leading up to adoption or enactment of the change,

(b) reveals the historical background of the covered jurisdiction's decision to develop and adopt the voting change, and

(c) shows the covered jurisdiction followed a normal procedural sequence of events and official actions or explained in detail the reasons and justification for any departures from the normal procedural sequence

2. Correspondence to and from the Attorney General of the United States and the Voting Section attorneys during that same relevant time period, including informal telephone memoranda and summaries of contacts;

3. Express, clear, consistent and unambiguous references to traditional race-neutral criteria, guidelines and standards established and adopted by the covered jurisdiction, such as compactness, contiguity, incumbency protection, partisan political interests, respect for political subdivision boundaries, and preservation of non-racial communities of interest in the redistricting process.

4. Relevant newspaper articles, television interviews, Kindle, I-Pad, Xoom or other digital news stories, and other forms of recorded media coverage accessible online or in hardcopy form, that identify or describe

(a) the covered jurisdiction's goals and objectives relative to the redistricting process,

(b) the use of race along with other non-racial factors in making boundary line changes,

(c) other public expressions by elected or appointed officials or staff of legislative purpose underlying the drawing of boundaries of a given electoral district,

(d) documentation or records that reveal the extent to which the covered jurisdiction gave minority group members a fair opportunity to participate in the decision-making and political process leading to development and adoption of the voting change,

(e) documentation or records that show how and in what manner the covered jurisdiction took into account the interests and concerns of minority group members in developing the voting change,

(f) documentation or records that demonstrate the extent to which the covered jurisdiction adhered to objective criteria such as pre-established statutory procedures and showed due regard for natural or artificial boundaries and other relevant criteria that may shed light on the purpose,

(g) documentation or records that reveal through objective evidence the absence of any retrogressive effect or retrogressive purpose in the submitted voting change, and

(h) documentation or records that show clearly that the submitted voting change is not likely to dilute the voting power of minorities

5. Documentation of the electoral history of all relevant elections in the jurisdiction for at least the past decade, including all endogenous and exogenous elections. It is suggested that for each election there be created an individual digital file containing a certified and self-authenticating copy of the election return, and as many of the following facts and circumstances as are available or capable of identification:

(a) candidate by name, age, gender and race;

(b) office or position;

(c) date of election;

(d) type of election, i.e., primary, runoff, general, special;

(e) relative qualifications of each candidate;

(f) newspaper articles and press releases pertaining to the pre-election activities, platform announcements, speeches, debates, and issues analysis;

(g) policies and written platforms of each candidate;

(h) experience of each candidate in the political and electoral process;

(i) abilities of each candidate as a speaker and public figure;

(j) track records of each candidate in their respective communities;

(k) name recognition of each candidate;

(l) financial support of or received by each candidate, including identification of any discrete groups or organizations providing financial support or in-kind support; personalities of each candidate;

(m) identity of supporters and attractors of each candidate;

(n) financial report forms, campaign contribution reports and similar public documents filed with the Secretary of State and/or election commission;

(o) political party affiliation and campaign activities of each candidate.

6. As suggested by NCSL, an expanded view of compactness must be taken into account by demographers and cartographers when drawing district lines, particularly when comparing post-2010 redistricting maps with pre-2010 maps in an effort to make sure that retrogression has not occurred with respect to the minority population's effective exercise of the right to vote and participate in the electoral process. In short, "compact" has now been broadened in its meaning to take into account cultural similarity as well as geography.

Line drawers cannot draw a district that dilutes voting strength for a group of voters with rights under Section 2 and compensate for that dilution by drawing another minority district for voters who would not have a Section 2 claim. Mere geographical compactness and a mathematical majority of minority voters in a district may not be sufficient if a redistricting plan relocates a minority district. Newly located minority districts must take into consideration communities of interest within the new district, perhaps separate and apart from race.⁴¹

B. Role of Courts and Parties in VRA Cases

A succinct description of the role of the courts and the parties in a Section 2 vote dilution case was provided by the 10th Circuit in *Sanchez v. Colorado*, 97 F. 3d 1303, 1322 (10th Cir. 1996), where the Court explained:

⁴¹NCSL, *Redistricting Law 2010* at 113.

Plaintiffs are not required to rebut all of the evidence of non-dilution to establish vote dilution. ‘Rather, [Section 2] requires the court’s overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is ... ‘minimized or cancelled out.’ 1982 U.S.C.C.A.N. at 27 n. 118. ‘[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.’ (internal citations omitted)

B. Traditional Districting Principles

Population equality has long been the primary consideration when analyzing redistricting plans for purposes of compliance with the one person, one vote doctrine. A more complex set of factors and principles is involved when the issue is compliance with the Voting Rights Act.

If a redistricting plan’s boundaries and configuration can only be explained on the basis of race, that is, if race was the predominant motive in the drawing of the district lines and boundaries of a plan, then the plan will be subject to strict judicial scrutiny under the 14th Amendment, often the kiss of death from a constitutional standpoint. If, however, a state or local government entity relies upon traditional race-neutral districting principles, as its primary basis for the creation of the district at issue, even though race is one of the considerations, the redistricting plan will not be subject to strict scrutiny.

Since the Supreme Court decided *Shaw v. Reno*⁴² in 1993, the courts in Section 2 vote dilution litigation have recognized a number of goals or policies, some of which are geographical or natural and others political and legal, that fall under the heading “traditional districting principles.” These include, but are not limited to, the following:

- (1) compactness,
- (2) contiguity,
- (3) preservation of political subdivision boundaries of cities and counties,
- (4) preservation of communities of interest (or communities defined by actual shared interests),
- (5) preservation of cores of prior districts,
- (6) incumbent protection, and
- (7) compliance with Section 2 of the Voting Rights Act.⁴³

D. “Compactness” in Minority Vote Dilution visavis Gerrymandering Cases

In the National Conference of State Legislatures’ *Redistricting Law 2010*, a chapter is devoted to traditional districting principles and includes helpful summaries of districting principles used by each state during the 2000 round of redistricting. The NCSL also notes that compactness has been used differently when analyzing minority vote dilution as opposed to racial or political gerrymandering.

⁴² 509 U.S. 630 (1993).

⁴³ *Shaw v. Reno*, 509 U.S. 630, 651 (1993). These principles were further articulated in the post-*Shaw* cases of *Miller v. Johnson*, 515 U.S. 900, 919-20(1995); *Abrams v. Johnson*, 521 U.S. 74 (1997); and *Shaw v. Hunt(II)*, 517 U.S. 899, 915 (1996).

In other words, depending on context of the case and the kind of analysis in which the court is engaged, the traditional districting principle of compactness may refer to geographical compactness as a substantive requirement in a vote dilution case for creating a legally effective redistricting plan with viable minority districts, where the concept of compactness is considered critical to the advancement of §2's ultimate purposes, namely, to ensure that a minority group has an equal opportunity to participate in the political process and elect representatives of their choice. Compactness, in this sense, is central to the Supreme Court's analysis of minority vote dilution claims.

In *LULAC v. Perry*, 548 U.S. 399 (2006), for example, the state legislature initiated mid-decade redistricting and modified state legislative district 23 to include a Latino majority of VAP, or voting age population, but not of CVAP, or citizen voting age population. The legislative plan, in order to avoid retrogression under Section 5 of the Voting Rights Act, created legislative district 25 containing a Latino CVAP, by linking together two distant Latino communities, one near Austin in central Texas and the other on Texas' southern border with Mexico. The trial court conducted a compactness inquiry on district 25 when it evaluated the LULAC plaintiffs' racial gerrymandering claims, concluding that there was insufficient evidence that district 25's lines had been drawn predominantly on the basis of race, and that there was no minority vote dilution insofar as the district was effectively a Latino opportunity district.

On appeal, the U.S. Supreme Court disagreed with this analysis and conclusion, and held that the proper analytical framework was to evaluate the legislative district in light of the three *Gingles* preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). The first *Gingles* precondition, of course, is whether the minority population is sufficiently large and compact to constitute a majority in a single-member district. The trial court's compactness analysis was distinguished by the Supreme Court, which concluded:

The (lower) court's conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite because the (lower) court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. Under §2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations. The first *Gingles* precondition refers to the compactness of the minority population, not to the compactness of the contested district.

E. Problematic Population Groups

i. College students: *Fairley v. Hattiesburg*

States and other political subdivisions are not required to include transients, short-term residents or temporary residents in the apportionment base upon which their voting districts or wards are based. *Burns v. Richardson*, 384 U.S. 73, 91-92 (1966). What about college students?

Inclusion of college and university students in the population count for purpose of a municipal redistricting plan was upheld in *Fairley v. City of Hattiesburg*, 584 F.3d 660, 672 (5th Cir. 2009). There the plaintiffs sought judicial approval of their illustrative *Gingles* plan by "removing the dormitory students, whether legal residents or not, from districting calculations

would reduce the ideal number of officially-counted residents per district.” As the Fifth Circuit noted, “[b]ecause the excluded students are mostly white, that would have made it easier to create a third majority black ward.”

In other words, the plaintiffs wished the district court to order the City to redistrict based on fictional population data, namely the pretense that a number of City residents were not there. Although resident students would still have been actually present, and therefore able to vote, the plaintiffs evidently assumed that lower voter turnout among the students, R. 354, 365-66, would have protected the electoral power of the inflated black majorities. Nothing in Cooper's testimony or report suggests how to avoid excluding resident students.

Though "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime" may be excluded for voter apportionment purposes, *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); see also *Boddie v. City of Cleveland*, 297 F.Supp.2d 901, 905-06 (N.D.Miss.2004), bona fide City residents certainly may not be.

The Fifth Circuit found that no authority supported or permitted the solution the plaintiffs proposed, concluding that “[b]ecause they did not explain how the unconstitutional exclusion of residents in the course of implementing their desired redistricting plan could be avoided, the district court was correct in rejecting it.”

It should be noted in passing that in *Fairley v. Patterson*, 493 F.2d 598, 602 (5th Cir.1974), an earlier VRA case concerning the City of Hattiesburg, the 5th Circuit examined a redistricting plan that would have excluded all USM and WCU students living in dormitories or fraternity houses. The court never reached the merits of the plan, however, deciding the case instead on standing. *Id.* at 603- 04.

Boddie v. City of Cleveland, 2010 U.S. Dist. LEXIS 3075 (N.D. Miss. 2010) (*Boddie II*), earlier proceedings, 297 F.Supp.2d 901, 905-06 (N.D.Miss.2004) (*Boddie I*), reached a different result based on a standing analysis. There the plaintiff in a §2 action argued that the inclusion of the non-resident student population residing at Delta State University (DSU) into the apportionment base was impermissible. The district court agreed and held that the non-resident student population who resided in dormitories at the university should not be included in the apportionment base for the City's aldermanic wards. The court reasoned that states and other political subdivisions are not required to include transients, short-term residents or temporary residents in the apportionment base upon which their voting districts or wards are based, citing *Burns v. Richardson*, 384 U.S. 73, 91-92, 86 S.Ct. 1286, 1296-97, 16 L.Ed.2d 376 (1966). The court also noted that in *Fairley v. Patterson*, *supra* at 602, the Fifth Circuit had upheld a Forrest County, Mississippi, supervisory redistricting plan which omitted from the reapportionment calculations all non-resident students at the county's two colleges who were unmarried and resided in dormitories or fraternity houses on campus; this totaled some 3,077 students. Non-resident students residing off campus were included in the Forrest County apportionment base; only those residing in dormitories were excluded.⁴⁴

⁴⁴*Fairley*, 493 F.2d at 602-603.

The court then addressed the City's argument that excluding the students would violate their rights under the equal protection clause and the one person, one vote doctrine, but found that this was the same argument raised in *Fairley*⁴⁵ on behalf of the Forrest County students at the University of Southern Mississippi and William Carey College who were excluded from the apportionment base. Rejecting the City's argument, the district court concluded that such claims could only be asserted by the students themselves, and that no other person or entity had standing to assert those rights on behalf of the students, holding at 906:

Here, some 1,057 non-resident students reside in the 12 student dormitories at DSU. In accordance with the above-cited authorities, these students shall be excluded from the City's apportionment base for its aldermanic wards. Thus, the City's population apportionment base shall consist of 12,784 residents, who shall be apportioned into one of six aldermanic wards.⁴⁶

2. Efforts to Bar Same Day Voting for College Students

Several dozen voting-related measures have recently been introduced in state legislatures to address a perceived need to protect state voting systems against fraud. State legislators are arguing that uniformed college students are a threat to democracy.⁴⁷ The Brennan Center for Justice at New York University reports that proposed legislation is pending in at least 32 states to require voters to show ID or other proof of citizenship at the polls. While the rights of students to vote where they live have been affirmed by many courts, opponents of these legislative measures argue that such efforts are motivated by a desire to diminish the power of two core Democratic voting blocs: minorities and young people.⁴⁸

⁴⁵ 493 F.2d at 604.

⁴⁶ The Court in *Boddie II* concluded at *11-12 “[t]he Fifth Circuit's decision in *Fairley* arguably casts some doubt upon *Boddie I*, but it is also possible that *Boddie I* will serve as a basis for distinguishing this case from *Fairley*. Judge Davidson specifically ordered the exclusion of non-resident Delta State students for the purpose of apportioning aldermanic wards, and this court is interested in hearing testimony regarding how this ruling has been implemented and whether it might serve as a basis for a similar resolution of this case. There is some indication in the record that other local governmental entities in Bolivar County have used Judge Davidson's ruling as a model for their own apportionment plans. In his initial report, Cooper wrote as follows: In 2006, the Bolivar County Board of Supervisors adopted an election plan that is consistent with Judge Davidson's 2004 ruling. For the five-district plan, 1,002 non-resident students living in Delta State dorms in census blocks 3007 and 3015 were removed from the county's base population for apportionment purposes. (An additional fifty students living in the dorms who were not residents of the City of Cleveland were determined to be residents of Bolivar County). The Fifth Circuit found in *Fairley* that the plaintiffs had failed to demonstrate a workable plan for excluding only non-resident USM students, but it is at least possible that the existence (and enforcement) of Judge Davidson's prior ruling will allow the plaintiffs to succeed in this case where the plaintiffs in *Fairley* failed. Specifically, the plaintiffs should present proof of how this court might ascertain which Delta State dormitory residents are also city residents and which are not, so that the court can ensure that the former are not disenfranchised.”

⁴⁷ Maria Hayes, *Student Voters Should be Educated, Not Repressed*, The Bona Venture, March 11, 2011, accessible online at <http://media.www.thebv.org/media/storage/paper1111/news/2011/03/11/Opinion/Student.Voters.Should.Be.Educated.Not.Repressed-3984945.shtml>

⁴⁸ *N.H. GOP Seeks to Curb College Voters*, *StateNet Capitol Journal News & Views from the 50 States*, Vol. XIX, No. 8 (Mar. 7, 2011), accessible online at http://www.statenet.com/capitol_journal/03-07-2011/html at pp. 10-11.

Opponents of these various state measures are mounting a campaign to oppose what they see as efforts to turn a 21st Century voting system back to the 19th Century. In response to claims by Republican Gregory Sorg, the bill's lead sponsor, that this proposed legislation is "a reasonable classification to account for one demographic group that is unlike any other and threatens to overwhelm the legitimate residents of a town or city," others with college town experience have expressed sharply opposing views. During legislative committee hearings, for example, several local election officials spoke of the pleasure with which they added college students to the checklist, noting that students are part of civic life and are tallied in the census counts that decide how many lawmakers cities get to send to the state legislature, while others have more pointedly charged that H.B. 176 is unconstitutional under the New Hampshire constitution and the U.S. Constitution.⁴⁹

Last month an online editorial pointed out that if H.B. 176 became law, "anyone who moved to New Hampshire for to attend school, regardless of whether they were 18 or 80, would have to vote where they lived prior to moving to the state."⁵⁰ Under current state law, students in New Hampshire are allowed to vote in their communities regardless of how long they have resided there or whether or not they intend to remain. While proponents of this legislation argue that such lax standards risk the legitimacy of elections, especially in local races, the New Hampshire Secretary of State has come out against it and predicted that if it should pass, the Governor would almost certainly veto it.⁵¹

According to some election experts, this controversy over voter reform is more about partisanship than anything else. For example, voter reform efforts in New Hampshire have recently focused on same day voting by college students. H.B. 223 was introduced in the New Hampshire House of Representatives to eliminate Election Day registration, which sends swarms of college students to polling places and create the potential for fraud. Another bill, H.B. 176, would allow college students to vote in their college town only if they or their parents are permanent residents there, leaving all other to vote in their home towns or states. Such efforts are seen by some as reactionary efforts to curb college voters.⁵²

According to N.H. Rep. Gregory Sorg (R), sponsor of both measures, the votes of average taxpayers in college towns are being "diluted or entirely canceled by those of a huge, largely monolithic demographic group...composed of people with a dearth of experience and a plethora of the easy self-confidence that only ignorance and inexperience can produce." The New Hampshire Speaker of the House put it more diplomatically, stating

⁴⁹ Josh Rogers, *Bill to Limit Student Voting Draws Crowd*, N.H.P.R. News, Feb. 25, 2011, <http://www.nhpr.org/bill-limit-student-voting-draws-crowd>

⁵⁰ Id.

⁵¹ Id. ; Tom Fahey, State House Bureau Chief, *Voting Bills Draw Public Protest*, Union Leader.com, Feb. 25, 2011, accessible online at <http://www.unionleader.com/article.aspx?headline=Voting+bills+draw+public+protests&articleId=d0a964bb-ea11-4fbc-a4ab-acc77f63c5f0>

⁵² Id. at 11-12.

New Hampshire, unlike most states, allows for same day registration of voters. This coupled with a lax definition of residency creates an environment in which people may be claiming residency in multiple locations,” the statement said. “This is not an idea targeting any particular political party or ideology — it’s simply about getting back to the basic principles of ensuring residency and protecting integrity of our ballot system.”⁵³

Doug Chapin, Director of Election Initiatives at the Pew Center on the States recently observed that “[e]lection policy debates like photo ID and same-day registration have become so fierce around the country because they are founded more on passionate belief than proven fact,” and that “[o]ne side is convinced fraud is rampant; the other believes that disenfranchisement is widespread. Neither can point to much in the way of evidence to support their position, so they simply turn up the volume.”⁵⁴

Alabama election law appears to have wisely steered clear of this debate. Students in Alabama must be held to the same eligibility requirements as any other voter in the jurisdiction, and if a student has fulfilled all of the registration requirements, i.e., Voter ID, age, citizenship and residency durational requirements, and has registered on time for the election, he or she should be permitted to vote and should lodge an immediate protest with a precinct election official if told otherwise. A college students like any other qualified voter may cast an absentee ballot if he or she expects to be prevented from going to the polls on Election Day because he or she is a registered Alabama voter living outside the county.⁵⁵

3. Prisoners & Prison gerrymandering claims

Prison-based gerrymandering is the result of the Census Bureau's practice of counting incarcerated persons where they are imprisoned, rather than in the community of their legal residence.⁵⁶ In states, counties and other local jurisdictions that have large regional correctional centers, penitentiaries, jails and prison populations, those jurisdictions receive enhanced representation, that is, they are eligible for greater representation in government "on the backs" of people who have no voting rights in the prison community and are not treated or considered as legal residents of the prison district for any purpose.

This practice has an uncomfortable resemblance to the 3/5 clause of the original U.S. Constitution that counted slaves as 3/5 of a person for apportionment purposes. During the period before the Civil War, southern members of Congress did not consider slaves as their

⁵³ Id.

⁵⁴ NH GOP Seeks to Curb College Voters, StateNet Capitol Journal News & Views from the 50 States, Vol. XIX, No. 8 (Mar. 7, 2011), accessible online at http://www.statenet.com/capitol_journal/03-07-2011/html at pp. 12-13.

⁵⁵ Alabama Election Information, <http://www.866ourvote.org/state?id=0033>; Alabama Voter Guide 2010, <http://www.sos.state.al.us/downloads/election/2010/vg2010.pdf> (Absentee vote may be cast by a registered Alabama voter living outside the county, including students at an educational institution located outside their county of residence.)

⁵⁶ <http://www.prisonersofthecensus.org/news/2011/02/23/preventing/>

political constituents, but counting non-voting slaves as part of the population base enhanced the South's influence in Congress - at the expense of other parts of the country in choosing the President and Vice-President.⁵⁷

Consider the fact that more people live in U.S. Prisons than in our 3 least populous states combined. Consider also that the Census Bureau's practice was developed 200 years ago, when prison populations were relatively small and not large enough to distort the democratic process. Finally, consider the fact that the Census Bureau's antiquated practice results in districts that dilute the voting power of communities that are mostly urban and comprised of persons of color, while rural, suburban and overwhelmingly white districts where large prisons and large prison populations are located are over-represented.⁵⁸

Opponents of prison-based gerrymandering say this is vote dilution. And it is even more extreme and larger in the districts with the highest incarceration rates. The biggest victims and losers when it comes to prison-based gerrymandering are the communities that bear the most direct costs of crime.

One can point to particularly extreme examples in:

(1) Illinois, where 60% of the state's prisoners are from Cook County, but 99% of them are counted as residents outside the county;

(2) Texas, where on rural legislative district's population is almost 12% prisoners, so that 88 residents from that district have the same representation in the state House of Representatives as 100 residents from urban Houston or Dallas;

(3) New York, where prison-based gerrymandering helped the state Senate add an extra district in the upstate region after the 2000 census. 44,000 persons from New York City, mostly African-American and Latinos, were counted as residents of predominantly white upstate counties. Seven upstate senate districts would have to be redrawn, causing district line changes throughout the state, if they had not used prison population as "padding."

Rural areas are also hurt when inaccurate census counts of prison populations distort local representation. When you consider the relatively small populations of these cities and towns, you can quickly see that placing a single prison in these areas can have a significant impact on the population.

For example, a candidate for City Council in Anamosa, Iowa won election with a total of two votes - from his wife and a neighbor - because 1300 of the 1400 total persons in his city council district were inmates of the state's largest penitentiary. The city council districts has equal population on paper, but in reality only 58 people were eligible to vote in the prison district. Those 58 people had the same representation as each 1400 people in the rest of the city.

⁵⁷ <http://www.miller-mccune.com/politics/prison-based-gerrymandering-dilutes-blacks-voting-power-16880>

⁵⁸ Id.; Peter Wagner, *Using the Census Bureau's Advanced Group Quarters Table*, Prison Policy Initiative, February 14, 2011, accessible online at <http://www.prisonersofthecensus.org/technicalsolutions.html>

Until the Census Bureau changes this practice and starts counting incarcerated persons as residents of the community where they resided prior to incarceration and to which they almost always return upon their release - which appears to be what Ford's H.B. 94 is designed to accomplish, we will continue to count 2 million people in the wrong location.

To address the prison-based gerrymandering problem states can correct the census data by collecting home addresses of people in prison in the state and then adjusting the U.S. Census counts prior to redistricting. Along with H.B. 94 in Illinois, the states of New York, Florida, and Maryland are now considering legislation to accomplish this same objective.⁵⁹

Another ameliorative approach that states and counties can take is to remove prison populations prior to redistricting. While this does not put the prisoners back into their rightful residential communities, it does eliminate the large and unjustifiable vote enhancement created by crediting their numbers to prison districts. Wisconsin's legislature is considering a bill that would exclude incarcerated prisons from the census count for apportionment purposes. About 100 counties throughout the U.S. are already doing this for their districts. State laws currently in effect in Colorado, Virginia and New Jersey, as well as a Mississippi Attorney General's official opinion, already require or encourage the removal of prison populations for local redistricting.⁶⁰

Finally, for the first time, the Census Bureau has decided to publish the Advanced Group Quarters Data in early May 2011. The Advanced Group Quarters Table will include the block level counts of correctional facilities and other group quarters and will eventually be published as Table P42 in Summary File 1 in June, July and August 2011. This data will not be in a particularly convenient format, and state and local redistricting bodies will need build their timelines around having this data in early May. Technically, the data will be published in a text file on the Bureau's FTP site, and in addition to the block counts, the Census Bureau will provide state totals, state-county totals, state-county-census tract totals, and totals for various kinds of voting districts and subtotals of some of the group quarters types. It has been estimated that this will be a text file with 13 million rows and 10 columns of counts, quite a large amount of data to process in order to locate the approximately 5,000 correctional facilities in this nation, of which only 1,500 are state and federal prisons.⁶¹

F. Political or partisan gerrymandering post-*Vieth*: constitutional limits

Partisan gerrymandering, also known as political gerrymandering, is the practice of drawing district lines in a way that benefits one political party and disadvantages another. It has

⁵⁹ Peter Wagner, *Using the Census Bureau's Advanced Group Quarters Table*, Prison Policy Initiative, February 14, 2011, accessible online at <http://www.prisonersofthecensus.org/technicalsolutions.html>

⁶⁰ Id.

⁶¹ Peter Wagner, *Using the Census Bureau's Advanced Group Quarters Table*, The Prison Policy Initiative, February 14, 2011, <http://www.prisonersofthecensus.org/technicalsolutions.html> (“The Census Bureau’s decision to release an Advanced Group Quarters table is a huge step forward that will give communities more choices about how to draw their districts. [T]he Advanced Group Quarters table has its limitations, but with advance planning we can minimize the impact of those limitations, and draw better districts to minimize the effect of prison-based gerrymandering in this round of redistricting.”)

given rise to such zealous line-drawing practices as cracking and packing, by which safe districts are created for incumbents by either cracking an opponent's concentration of favorable partisan support or packing a district with supporters of the incumbent's party.

Although the issue seemed fairly settled in 1986, the Supreme Court in recent years has wavered on whether political gerrymandering claims are even justiciable⁶². The Court in 2004 came close to declaring that no justiciable standard could be devised for such claims. In *Vieth v. Jubelir*, 541 U.S. 267 (2004), a plurality led by Justice Scalia declared that *Davis v. Bandemer* should be overruled and all such claims should be declared nonjusticiable.⁶³

G. Bailout after NAMUDNO

When the U.S. Supreme Court played the ultimate game of dodge ball in *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009), it avoided resolving a clear challenge to the constitutionality of §5, as it was renewed and extended for another 25 years under the VRARA of 2006. It also breathed new life into a Section 4(a), little-noticed provision of the Voting Rights Act that allows covered jurisdictions under certain prescribed conditions to bail out of coverage.

The bailout provision of the Voting Rights Act, according to the Court, must be interpreted to permit all political subdivisions, including the utility district in question, to seek to bail out from the preclearance requirements of §5. It was undisputed that the utility district was a "political subdivision" in the ordinary sense, according to the Court, but the Voting Rights Act also provided a narrower definition in §14(c)(2):

" '[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

Some observers said the Court's ruling in *NAMUDNO* meant the subject utility district - and implicitly other political units as well — should have less difficulty applying for and obtaining bailout from § 5 preclearance provisions. Others bemoaned the limited success of bailout, noting that while over 12,000 jurisdictions are covered by §5, as of 2009 only 17 jurisdictions had succeeded in bailing out of the Voting Rights Act since it was inserted in the 1982 Amendments. In expanding the availability of bailout, however, the majority in *NAMUDNO* reasoned that it was "unlikely that Congress intended the provision to have such limited effect." Time will tell whether bailout will indeed provide broader relief to more covered jurisdictions.

H. Unsettled and Problematic Legal Issues

⁶² *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (holding that political gerrymandering claims could be adjudicated by the courts if both discriminatory intent and discriminatory effect could be shown, that is, the districts at issue were deliberately or intentionally drawn to disadvantage a party, and the electoral system was arranged in a manner that would "consistently degrade a voter's or a group of voters' influence on the political process as a whole.")

⁶³ Justice Anthony Kennedy's concurrence in the outcome of *Vieth* suggested that a justiciable standard might emerge in the future, possibly based on the First Amendment, and refused to close the door altogether on such claims.

As we wind down this blitzkrieg through the maze of the redistricting process and potential litigation that awaits some covered jurisdictions in this great state and her sister states in the South, bear in mind that there are still open questions about the application, meaning, interpretation and effect of key provisions of the Voting Rights Act. The following are just a few of the unsettled and problematic legal issues.

1. Can a presumptively unconstitutional racial gerrymander be justified? Probably not. This question arises in the context of post-*Shaw v. Reno* redistricting efforts, where race is shown to have predominated over traditional race-neutral principles in drawing the boundary lines for a particular district, rendering district presumptively unconstitutional. One authority suggests that it may be possible to overcome that presumption of unconstitutionality under limited circumstances.⁶⁴ In light of the fact that the Supreme Court has never had occasion to uphold a redistricting plan in which race was the predominant factor, even where the jurisdiction drew those lines to comply with Section 2 or 5, or in an effort to remedy past discrimination in the face of a strong basis in evidence of pervasive racial bloc voting, the answer to this question is probably no. A covered jurisdiction would be tilting with the wind if it attempted to justify race-predominant redistricting by arguing that it was attempting in good faith to comply with the Voting Rights Act.

2. Can a presumptively constitutional partisan gerrymander violate the Equal Protection Clause? Probably not, unless Justice Kennedy can garner four more justices to adopt his view expressed in his *Vieth* concurrence that a justiciable standard for political gerrymandering might someday be discovered. This question arises in the context of post-*Vieth*⁶⁵ partisan-motivated line-drawing. It has been suggested that if district lines were drawn for obvious political reasons, as in *Easley v. Cromartie*, 532 U.S. 234, 248 (2001), or if district lines correlated with race because they were drawn based on political affiliation, as in *Bush v. Vera*, 517 U.S. 952, 968 (1996), or if district lines were the result of political gerrymandering as egregious as that engaged in by the Texas legislature in *LULAC v. Perry*, 548 U. S. 399 (2006), even in disregard of traditional districting principles, the plan could survive constitutional attack. See generally Daniel H. Lowenstein, *Vieth's Gap: Has the Supreme Court Gone From Bad to Worse on Partisan Gerrymandering?* 14 Cornell J.L. & Pub. Pol'y 367 (2005).

3. Is districting based on CVAP instead of TPOP constitutional? Probably yes, as a political question to which the courts would defer. This question arises in the context of the Ninth Circuit's initial holding in *Garza v. County of Los Angeles*, 918 F. 2d 763 (9th Cir 1990) that CVAP-based districting could be unconstitutional, that is, a redistricting plan based on CVAP instead of TPOP would have violated the Equal Protection Clause. *Burns v. Richardson*, 384 U.S. 73 (1966) has been interpreted as authority for holding that the Equal Protection Clause does not require states to use TPOP figures to achieve compliance with the one person, one vote

⁶⁴ J. Gerald Herbert, Paul M. Smith, Martina E. Vandenberg and Michael B. DeSanctis, [The Realist's Guide to Redistricting: Avoiding the Legal Pitfalls](#) 79-81 (ABA Section of Administrative Law and Regulatory Practice 2010) ("Realist's Guide")

⁶⁵ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

doctrine. The Fourth⁶⁶ and Fifth⁶⁷ Circuits agree that states and local governments should be deferred to in making decisions on which population figures to use. One of the most recent decisions on point held “[w]hile traditional districting principles typically require the use of total population in drawing district boundaries, in determining whether the minority group at issue has a sufficient majority in an illustrative district to satisfy the first *Gingles* precondition, courts look to the VAP, and in particular to the CVAP, as the relevant population in the district.” *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010), citing *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 378 n.38 (S.D.N.Y. 2004) (three-judge panel); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); and *France v. Pataki*, 71 F. Supp. 2d 317, 326 (S.D.N.Y. 1999).

4. Are prison-based gerrymandering claims justiciable? Possibly if a clearer nexus with minority vote dilution can be established; otherwise, this appears to be an issue entrusted to state legislative responsibility in collaboration with the U.S. Bureau of the Census, as it is already underway with early release of group quarters data, state legislative efforts to extract prison population from official state population counts, and other ameliorative measures discussed earlier. An indirect claim of disparate impact vote dilution or a similar legal theory of disproportionate impact upon minority citizens without sufficient specificity and proof of minority citizen impact may not be justiciable, despite cogent arguments to the contrary. See Emily Badger, *Prison-Based Gerrymandering Dilutes Blacks’ Voting Power*, Miller-McCune.com, June 3, 2010, at <http://www.miller-mccune.com/politics/prison-based-gerrymandering-dilutes-blacks-voting-power-16880>

5. Are reasons for and causes of racial polarization relevant under Section 2? [*Charleston County, Solomon, Nipper, Clarke, LULAC, Uno, Goosby, Babylon*]. Probably yes, if the jurisdiction can present systematic proof of partisanship causation under the totality of circumstances analysis, rather than during the inquiry into the third *Gingles* threshold precondition which precludes an inquiry into why voters are racially polarized. The Fifth Circuit’s decision in *LULAC*, 999 F.2d at 891-92 found the third *Gingles* precondition unsatisfied because “partisan affiliation, not race, caused the defeat of the minority-preferred candidate”. The Fourth Circuit has rejected the approach that would address causation during the third *Gingles* precondition inquiry in *Alamance County*, 99 F.3d at 615-16 n. 12, *Charleston County*, 365 F. 3d 341 (4th Cir. 2004), *Goosby v. Town Bd.*, 180 F.3d 476, 493 (2d Cir.1999) (treating causation under the totality of circumstances analysis rather than the third *Gingles* precondition), *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 1199 (7th Cir.1997); *Sanchez v. Colorado*, 97 F.3d 1303, 1313 (10th Cir.1996); *Uno*, 72 F.3d at 980-81; and *Nipper v. Smith*, 39 F.3d 1494, 1524-25 & n. 60 (11th Cir.1994) (en banc). The Fourth, Fifth and Eleventh Circuits appear to agree that evidence of the reason for polarized voting is a critical factor in the totality analysis, but in the one case in which it squarely addressed the issue, it deferred to the trial court’s findings of fact rather than assess the evidentiary basis for the challenge to polarized voting as a result of political partisanship, while recognizing that the trial

⁶⁶ *Daly v. Hunt*, 93 F. 3d 1212, 1227-28 (4th Cir. 1996).

⁶⁷ *Chen v. City of Houston*, 206 F 3d 502,523 (5th Cir. 2000). Accord, *Lepak v. City of Irving* , Case No. 3:10-cv-00277-P(N.D. Tex. Dallas Div., Feb. 11, 2011) (with regard to selection of TPOP as population baseline instead of CVAP, court concluded “this eminently political question has been left to the political process.”), discussed in <http://www.redistrictingonline.org/nblepakdecision021511.html>

court struggled with partisanship vs. race as the cause of polarized voting, noting “Charleston County has presented evidence of partisanship. For instance, since 1995 (African-American) Timothy Scott has repeatedly been elected as a minority Republican (Scott recently finished his term as Chairman of the Council), with overwhelming support from white voters and only minimal support from minority voters. Although Scott is the Council's only minority member in the last decade, the County claims that Scott's success shows minorities can win election to the Council, so long as they share the political philosophy that prevails among the majority of Charleston County's residents. In addition, two white Council members, Dr. Charles Wallace and Charlie Lybrand, ran as minority-preferred Democrats and lost, only to switch parties and win as Republicans with little minority support. According to the County, all of this demonstrates that minority-preferred candidates have suffered electoral defeat on account of partisan politics, not race or color.” The Fourth Circuit found that there was “no systematic proof” to support the jurisdiction’s claim that partisanship rather than race drives its racially polarized voting patterns.

6. To what extent can exogenous elections be considered in a racial polarization analysis?

To a lesser extent than endogenous elections, but it should be evaluated through a flexible approach to such evidence as is available, even though it may be less probative and of limited relevance compared to clear evidence based on endogenous elections. As one authority observes, “[w]hether exogenous elections should be considered will likely become a hotly disputed issue during the upcoming redistricting cycle as parties dispute the significance of, and the data regarding, the election of President Obama.⁶⁸ Courts conducting an inquiry into the legal significance of white racial bloc voting and the extent of racially polarized voting should focus their evaluation on election results from races for the office at issue, namely, endogenous elections, but the courts should also consider election results from other elections, especially when those elections present a clear choice between minority and non-minority candidates. While some courts have refused to consider exogenous elections in Section 2 vote dilution cases, *City of Carrollton Branch of NAACP*, 829 F.2d 1547, 1560, others have assigned such electoral evidence minimal or lesser probative weight *visavis* the ability of minority candidates to elected their minority-preferred candidates, *Smith v. Clinton*, 687 F. Supp. 1310, 1317 (E.D. Ark. 1988), *NAACP v. Fordice*, 252 F. 3d 361, 370 (5th Cir. 2001) (exogenous character of electoral evidence does not render them nonprobative), *Citizens for a Better Gretna v. City of Gretna*, 834 F. 2d 496 (5th Cir. 1987), *Rural West Tennessee*, 209 F. 3d 835, 841 (6th Cir.), *Clark v. Calhoun County*, 88 F. 3d 1393, 1397 (5th Cir. 1996)(exogenous electoral evidence less probative and of limited relevance)

7. Is proportionality measured statewide or regionally? [*DeGrandy*, *LULAC*] If the plaintiffs frame their vote dilution claim in statewide rather than regional terms, as was the case in *LULAC v. Perry*, 548 U.S. 399, 436 (2006), proportionality should be considered statewide, although considering proportionality statewide does not automatically dictate that the state can satisfy Section 2 by showing rough proportionality regardless of where majority-minority districts are locate and how those districts are drawn. *DeGrandy* held that it was proper to measure proportionality regionally where it analyzed the proportion of Hispanics in the population in relation to Dade County’s population instead of at the state level, and both the district court and parties at trial never framed their vote dilution claim in statewide terms.

⁶⁸ Realist’s Guide at 55.

Still other issues remain to be resolved in Voting Rights Act jurisprudence. For example, will the development and use of independent redistricting commissions continue to grow? Will Section 5 withstand the latest constitutional challenges in the event the U.S. Supreme Court agrees to hear *Shelby County*?⁶⁹ Can a multiracial, multiethnic coalition satisfy the 1st *Gingles* precondition in light of *Strickland*? Can a Local Government entity use redistricting to enhance minority voting strength, in the absence of a judicial determination of prior voting discrimination or strong evidence of a past history of voting discrimination? Can a Local Government entity develop a strategy to anticipate the *Rooker- Feldman* doctrine in redistricting litigation that takes place in parallel state and federal forums⁷⁰ and invoke federalism-based defenses?⁷¹ And finally, what will the role of GIS technology and computer modeling be in 2011-2012 redistricting litigation?

CONCLUSION

The Voting Rights Act of 1965 was landmark legislation. It is now 46 years old. Racial discrimination in voting has declined significantly, and good progress has been made in race relations as a result of an increasingly accessible electoral process in part attributable to redistricting plans hammered out at the local government level, where grassroots democracy must thrive.

Much of this progress was facilitated the Act's subsequent revisions and extensions, coupled with the conscientious, principled and collaborative efforts of state, local and federal officials, minority voters, and organizations like the ACLU, NAACP LEDF, MALDEF, and LULAC. If Section 5 survives the latest constitutional challenges, it will have a significant effect on the American political landscape for decades to come.

⁶⁹ *Shelby County, Alabama* filed a declaratory judgment action in the U.S. District Court for the District of Columbia in April 2010, seeking a declaration that Section 5 of the Voting Rights Act as amended in 2006 is unconstitutional based on Congress' lack of constitutional authority to reauthorize Section 5 for another 25 years. *Shelby County, Alabama v. Holder*, No. 1:10-cv-00651 (D.D.C.). Oral argument before the District Court took place on February 2, 2011.

⁷⁰ *Johnson v. DeGrandy*, 512 U.S. 997 (1994) (U.S. not barred by *Rooker-Feldman* doctrine or by res judicata from bringing a Section 2 challenge in federal court, where it was not a party to a prior state court action challenging the State of Florida's legislative plan and the parties in the state court proceedings had not had a full and fair opportunity to litigate that res judicata requires.).

⁷¹ *Growe v. Emison*, 507 U.S. 25, 34-37 (1993)(Federal district court erred in not deferring to the state court, despite the admonition that reapportionment is primarily the duty and responsibility of the state through its legislature or other body, rather than of a federal court; the federal court in this instance "raced to beat the state court to the finish line, even tripping along the way," NCSL, *Redistricting Law 2010* at 130, rather than coming to the rescue of the state's electoral process. The state court had been willing and able to adopt a congressional plan in time for the elections, and its plan was ultimately allowed to become effective for the upcoming elections.); *Branch v. Smith*, 538 U.S. 254 (2003)(suggesting that a state court action in a covered jurisdiction to draw new districts could be enjoined if a federal court plaintiff could plausibly argue that Section 5 preclearance timelines could affect candidates qualifying for the primary election).

In a time when many see signs of waning racism and mounting evidence that the need to protect minority candidates from white competition is no longer manifest, at least to the extent that there was such a need 1965, local governments must now satisfy the demands of a strengthened Section 5 in submitting redistricting plans for preclearance.

Does this mean that local government will be compelled to continue creating race-conscious districts and that redistricting efforts by cities and counties will be forced to make race-conscious districting a priority, on pain of litigation and resulting delay in their ability to conduct elections if they disregard the regulations, recommended procedures and most recent 2011 Guidance for enforcement of Section 5? Covered jurisdictions must answer these questions without delay.

This much is clear. The racial progress in our nation is palpable. The organized bar will continue to play a significant role in promoting legislation and improvements in all aspects of the electoral process, from voter education and ballot access to constructive improvements in the voter registration process. Even to the gloomiest of observers, the glass of equal electoral and political opportunity is now more than half full. We have learned how to pull, haul and trade in the marketplace of political competition. We have witnessed the transformation of *E Pluribus Unum* from a nice sounding phrase to a political reality.

†Ben Griffith is Chair of the American Bar Association Standing Committee on Election Law, a member of the House of Delegates and past-chair of the Section of State & Local Government Law. His federal civil litigation practice with the Cleveland, Mississippi firm of Griffith & Griffith focuses on election law and voting rights litigation on behalf of cities and counties. Throughout the past three decades he has served as lead counsel in Section 2 vote dilution actions and Section 5 preclearance proceedings in several states, including South Carolina, Maryland, Texas and his home state of Mississippi. Ben earned his *Juris Doctor* at the University of Mississippi School of Law in 1975 and since 1994 has been board certified in Civil Trial Advocacy by the ABA-accredited National Board of Trial Advocacy. He is an IMLA Local Government Fellow, IMLA International Committee Chair, and has served as Chair of IMLA's Counties and Special Districts Department. He is editor and chapter author of *America Votes! A Guide to Modern Election Law & Voting Rights* (ABA 2008, e-Supp. 2009), and is spearheading the second edition scheduled for publication in early 2012. For the past six years he has been selected by his peers for inclusion in *Best Lawyers in America*® (municipal law) and named to *Mid-South SuperLawyers*. Ben is married to the former Kathy Lee Orr of Batesville, Mississippi, and they have two children, Clark and Julie.