PROBLEMATIC REDISTRICTING ISSUES FOLLOWING THE 2010 CENSUS: STATISTICAL ESTIMATES, INCLUSION OF COLLEGE STUDENTS AND PRISONERS, AND "SAFE" DISTRICTS

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Introduction

The twin goals of redistricting - population equality and representational equality - have proven to be as elusive, complex and nuanced as the changes in our nation's demographic snapshot every ten years. As these goals have continued to surface during the 2010 redistricting cycle, political parties appear to have switched sides from a decade ago and plunged our nation into unprecedented partisan gridlock as the line-drawing and power-allocation ritual proceeds apace. In this politically charged, partisanship-saturated atmosphere governmental bodies, experts and the courts continue to grapple with equal electoral opportunity assured by the Voting Rights Act. They do so while keenly aware of potential efforts to hobble the electoral system and stifle competitiveness by divvying up electoral districts on the basis of race or on the basis of political party preference that serves as a proxy for race. Guaranteeing equal electoral opportunity is indeed a worthwhile goal, but as our Chief Justice noted in <u>NAMUDNO v. Holder</u>, divvying up electoral seats through manipulation of district lines based on race is a sordid undertaking that distorts the election process. A seasoned litigator with firsthand knowledge of these extremes aptly described the redistricting process as "one of the most political and unpredictable components of our democracy."[1]

This chapter will attempt to bring some coherency to the redistricting process by addressing how, which and why votes and voters are counted. These are three hot issues to watch during the 2010 redistricting cycle. Each presents unique, problematic challenges in the redistricting process.

♦HOW: The first issue centers on statistical estimates and how the experts and courts count relevant population groups when forming or altering electoral districts.

♦WHICH: The second issue addresses the ramifications of census inclusion of college students, prisoners and other nontraditional population groups in constructing electoral districts that must comply with the one person, one vote principle under the 14th Amendment and the VRA.

♦WHY: The third issue focuses on "safe districts", sometimes referred to as majority-minority control districts, and the extent to which racial concentrations should play a role in election districts for jurisdictions that contain a significant number of minority group members, particularly when those jurisdictions have a consistent electoral history of significant white crossover voting and electoral success enjoyed by minority-preferred candidates elected from coalition, influence or functional majority districts.

Recent precedent and practical federal litigation experience suggest that these issues are likely to be among the major questions that arise during the post-2010 Census round of redistricting at the state and local government level. Each is an integral part of constitutional and Voting Rights Act jurisprudence surrounding the effective counting of votes and the meaningful inclusion of voters from all walks of life, and each will likely play a key role in the allocation of political power in the coming decade. Let us see how these issues have arisen and how the courts will likely address them in post-2010 redistricting litigation and in the coming decade.

The Redistricting Process

To understand these issues of how, which and why votes and voters are counted, we start with the fundamental premise that redistricting is about allocation of political power. Tools employed in that process are the one person, one vote principle under the Fourteenth Amendment, established in the "reapportionment revolution" half a century ago,[2] the non-retrogression command of Section 5 of the Voting Rights Act for covered jurisdictions, and vote dilution litigation under Section 2 of the Voting Rights Act. When the Supreme Court entered the "political thicket" of drawing district boundaries for states, cities, counties and other local government jurisdictions, it set aside initial concerns over judicially unmanageable standards and embraced population equality as a fundamental means of preserving the right to vote in our democratic society.[3] As enacted in 1965,[4] the Voting Rights Act guaranteed electoral equality to minority citizens previously subjected to widespread systemic voting discrimination. Its two key sections that became known as the sword and shield of the U.S. Department of Justice's formidable arsenal against voting discrimination were Section 5 preclearance, enacted as a temporary remedial measure applicable only to covered jurisdictions with a history of discriminating against minority voters, and Section 2, which applied nationwide to eradicate election procedures that diminished the ability of minority voters to elect representatives of their choice. As Chief Justice John Roberts would say 44 years after passage of the VRA, "[w]e are now a very different nation" due in part to the VRA's success."[5]

Section 5 Preclearance

Section 5 was the "shield" that applied to prevent covered jurisdictions from enacting redistricting plans that fragmented minority population concentrations, packed minority voters into election districts in order to "bleach" adjacent non-minority districts, or used various mechanisms such as anti-single shot voting, unusually large election districts, runoff requirements, or exclusionary candidate slating processes to deny minority voters equal electoral access and equal participation in the political process.[6] Its core purpose was to prevent voting-related changes "that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[7] Retrogression in this context meant reduction in the realistic opportunity of minority voters to elect minority-preferred candidates,[8] and as applied to redistricting plans prepared and submitted by covered

jurisdictions, the nonretrogression standard meant that a new plan could not have the purpose or effect of providing minority voters with less opportunity to elect candidates of choice, or minority-preferred candidates, than did the previous plan.[9] Following a brief interregnum when <u>Georgia v. Ashcroft</u> scaled back this interpretation of retrogression under Section 5 to cover only backsliding even in the face of a discriminatory purpose,[10] Congress, as it had done in 1970, 1975, and 1982, reauthorized and extended Section 5, this time for another 25 years, with enactment in July 2006 of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.

Section 2 Vote Dilution

Known as the "sword" of the VRA, Section 2 applies nationwide and was enacted to provide a vehicle for the Justice Department or private plaintiffs to challenge election laws or procedures, including redistricting plans, that had the purpose or effect of discriminating against any citizen on account of race. Its reach was expanded significantly in 1982 to prohibit any election law or procedure that "results in a denial or abridgement of the right of any citizen to vote on account of race or color,[11] and in its present form, Section 2 is violated if "under the totality of circumstances, it is shown that the political processes leading to nomination or election…are not equally open to participation by members of a class of citizens."[12]

Significance of Racially Polarized Voting

Assuming compliance with the one person, one vote principle, a redistricting plan adopted by a covered jurisdiction must comply with Section 5's preclearance requirement, administratively or judicially, and may also be challenged under Section 2 as dilutive of minority voting strength under the "results test," a showing that plaintiffs can make by demonstrating that the challenged plan "results in minorities being denied equal access to the political process."[13] As one commentator put it, "[v]irtually the entire *raison d'etre* of the modern-day Voting Rights Act stems from racially polarized voting,"[14] and without it "there would be no need to engage in race-based districting to secure diversity in legislative bodies" nor would "legislators…need to be fixated on the racial percentages of their districts."[15] We turn to how racially polarized voting is measured and evaluated.

Statistical Estimates

We will first look at statistical estimates of racially polarized voting in litigation under Sections 2 and 5 of the Voting Rights Act of 1965, examining how and through what methodology one can arrive at reliable conclusions regarding racially polarized voting - legally significant white racial bloc voting that usually defeats minority-preferred candidates - the linchpin of many redistricting cases.

Under the evidentiary framework established for Section 2 vote dilution challenges, a Section 2 plaintiff must first establish three preconditions, without which the action cannot proceed.[16] Taking their

name after the 1986 case that provided the Supreme Court with its first opportunity to construe the 1982 amendment to Section 2, the Gingles preconditions are as follows:

[1] Geographically compact single-member district: "The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. …"

[2] Minority political cohesion: "[T]he minority group must be able to show that it is politically cohesive. …"

[3] Legally significant white racial bloc voting: "[T]he minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate."[17]

If and only if all three Gingles preconditions are established, then the court must examine the "totality of circumstances" by focusing on a nonexhaustive set of factors listed in Senate Report No. 97-417 that accompanied enactment of the 1982 amendments to Section 2. One of the most important of the Senate Report factors is "the extent to which voting in the elections of the state or political subdivision is racially polarized." While the Senate Report factors are not prerequisites themselves and do not constitute exclusive inquiries, they are regularly employed by the courts as the first lines of inquiry in the assessment of the totality of circumstances surrounding the voting practice or pattern at issue in the relevant jurisdiction.[18]

Two additional factors recognized by the courts in cases decided following the 1982 Amendments to Section 2 are also potentially probative of the existence of vote dilution:

1. Proportionality: This compares the number of existing majority-minority districts to the minority population percentage, and unlike Senate Report factor number 7, which looks to the "political or electoral" success of minority candidates, looks to the political or electoral power of minority voters.[19]

2. Racial separation: "[O]ngoing racial separation… - socially, economically, religiously, in housing and business patterns – makes it especially difficult for [minority] candidates seeking county-wide office to reach out to and communicate with the predominately white electorate from whom they must obtain substantial support to win…at-large elections.[20] The racial separation factor differs from the 5th Senate Report factor in that racial separation serves as a barrier to minority candidates while socioeconomic disparities serve as a barrier to minority voters.[21]

Equal Opportunity to Elect Representatives of Choice

The ultimate question to be decided under the Section 2 evidentiary framework is whether members of the minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." It bears repeating that Section 2's mandate is not that minorities must be given "equal opportunity to elect minority candidates." They must be given "equal opportunity to elect representatives of their choice."[22] Section 2 requires an electoral process that is "equally open" to all, not one that "favors one group over another."[23] In LULAC v. Perry,[24] the Supreme Court emphasized that "the Voting Rights Act protects the rights of individual voters, not the rights of groups."[25] Professor Samuel Issacharoff has placed racially polarized voting, or racial bloc voting, at "the undisputed and unchallenged center of the Voting Rights Act,"[26] in deciding the ultimate question of vote dilution under Section 2. As the third Gingles precondition and one of the most important Senate Report factors, racial bloc voting and racially polarized voting are generally shown through the medium of statistical estimates.

The Brennan Analysis: Ecological Regression and Extreme Case

The third Gingles precondition requires a Section 2 plaintiff to prove that white racial bloc voting usually operates to defeat minority-preferred candidates. In his plurality opinion in Gingles, Justice Brennan discussed necessary evidence on racial bloc voting and observed that the plaintiffs' expert had employed the extreme case or homogenous precincts analysis and ecological regression analysis. In doing so, he appeared to rely exclusively upon two analytical methods to prove racial bloc voting in Section 2 litigation – ecological regression and extreme case (homogenous precincts) analysis. Relying on the numerical percentages of black voter support (which was high) and white voter support (which was low) for black candidates, percentages that were calculated on the basis of these two forms of statistical estimates, Justice Brennan's analysis was broadly interpreted by the lower courts and by many statistical and demographic experts as an exclusive endorsement of these two statistical methods. Unfortunately, this meant that other statistical methods and other evidentiary approaches to the complex and extraordinarily fact-intensive issue of racially polarized voting and legally significant white racial bloc voting in Section 2 vote dilution litigation were largely ignored.

As a consequence, during most of the first decade following Gingles, the lower courts evaluated evidence of racial bloc voting, determined the demarcation line between voting that was racially polarized and voting that was not, and engaged in racially polarized voting analyses, while avoiding any numerically defined threshold for determining what level of white crossover support for minority-preferred candidates could disprove or refute the existence of racial bloc voting.

First Cracks in the Armor: Improvement on Ecological Regression

Some experts took a different approach to analyzing voting that was racially polarized and voting that was not, as did some courts.[27] Less than a decade after Justice Brennan's analysis in Gingles gained

traction with most experts and courts, other lower courts began to question obvious flaws and at times statistically impossible results that flowed from the statistical methods used in Gingles, and ultimately some courts began to limit their exclusive reliance upon the statistical estimation methods of ecological regression as the means of proving or refuting legally significant white racial bloc voting. One of the first cracks in the armor came in Mallory v. Ohio, 38 F.Supp.2d 525 (S.D.Ohio 1997), where the district court heard and accepted expert testimony on racial bloc voting from Dr. Gary King, Dr. King, a Professor of Government at Harvard University and Director of the Harvard Data Center, trained in both political science and statistics. Dr. King specialized in statistical analysis of social issues including the quantitative review of voting trends to decide whether racially polarized voting is present, had published extensively and was credited with developing methods and application of quantitative methods to redistricting. In Mallory, the district court found that his regression methodology (known as King's EI, or ecological inference[28]) differed from and was actually an improvement upon Goodman's regression, the ecological regression methodology used by Dr. Grofman that was cited by Justice Brennan in his Gingles concurrence. Concluding that this was "the best method currently available to measure racial bloc voting," the court in Mallory stated:

> Dr. King's method is a type of "regression analysis" that involves a combination of a number of scientifically and legally accepted methods, including bivariate ecological regression and homogeneous precinct analysis. Tr. at 1468-70. Dr. King's methodology constitutes an improvement upon the "Goodman's regression" method of analysis that was used by the experts in Gingles and ultimately relied upon by the United States Supreme Court. Def.Ex. A at 10-11; Tr. at 1367-68, 1382. Dr. King's methodology does not yield statistically impossible results as does "Goodman's regression."

A further cautionary note about the use of bivariate regression analysis was issued in 1989 by the 5th Circuit in Overton v. City of Austin, where the court cautioned that "[bivariate ecological regression analysis] assumes that the voters in most precincts voted according to their ethnicity" and that the "trial court should not ignore the imperfections of the data used nor the limitations of [bivariate ecological regression] analysis."[29]

King's EI as an improved methodology was given a resounding stamp of approval in the Ohio redistricting litigation, where the court in Parker v. Ohio, 263 F.Supp.2d 1100 (S.D.Ohio 2003) noted that his analysis as an expert for the defendants "has received high praise and peer acceptance and use." Based on Dr. King's expert testimony, the court concluded that the defendants had provided persuasive evidence showing that the state had little racially polarized voting in relevant elections, which in turn led to an ultimate finding that minorities were not denied an equal opportunity to meaningfully participate. Deficiencies in the statistical methods that had been given such high marks in Gingles were further emphasized when the court observed that Dr. King

developed a regression analysis improving on the long-utilized "Goodman's Regression." Goodman's regression often gives incorrect results. Dr. King's analysis starts with Goodman's regression and improves it by correcting for information known to be true.

Other courts have recognized King's Ecological Inference as a reliable improvement on bivariate ecological regression analysis (BERA). Rodriguez v. Pataki, 308 F.Supp.2d 346, 387–88 (S.D.N.Y.2004) (citing Georgia v. Ashcroft, 195 F.Supp.2d 25, 69 (D.D.C.2002), vacated on other grounds, 539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003)) (recognizing King's ecological inference as having the "prospect of improving on ecological regression" despite its recency in voting rights litigation); United States v. Alamosa County, Colo., 306 F.Supp.2d 1016, 1023 (D.Colo.2004) (noting use of King's EI by experts Ron Weber and Richard Engstrom). Other experts have noted that King's EI improves upon traditional methods of estimating voting behavior by about 16%, but does not solve the inherent aggregation bias problem, one that arises from the attempt to infer individual voting behavior from aggregate-level behavior, that is, looking at a precinct's demographic characteristics and voter turn-out data to predict how voters of different races voted in an election.[30]

Balanced Assessment: Count Winners and Losers

Another crack in the armor came in Clarke v. City of Cincinnati, a 6th Circuit decision that centered on the third Gingles precondition. Clarke provided the 6th Circuit with a vehicle to clarify how best to measure racially polarized voting or white racial bloc voting, using as a yardstick the difference between the percentage of whites who voted for a given candidate and the percentage of blacks who voted for that same candidate. This case turned in part on a balanced assessment of electoral outcomes by minority-preferred candidates and in part on the Dole Compromise, a provision that was critically important to Congress' passage of the 1982 amendment to Section 2: "Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[31]

Numerical Threshold for Polarized Voting

In Clarke, the 6th Circuit found that a 47% minority electoral success rate was "no reason to find that blacks' preferred black candidates have 'usually' been defeated.[32] In reaching this conclusion, the 6th Circuit appeared to focus on a numerical threshold to identify the demarcation line between polarized and nono-polarized voting and candidates who were minority-preferred and those who were not. In doing so, it declined to follow a narrower analysis employed by the 4th Circuit in Collins v. City of Norfolk, Va., (Collins I)[33]. In Collins I, a majority of the 4th Circuit panel had found legally significant racial bloc voting and a § 2 violation based on evidence that 54% of blacks' preferred black candidates had been elected in the ten city council elections studied, but despite such success, black voters had never been able to elect more than one of their preferred candidates of any race during any single election. The Collins I

panel reasoned that such electoral evidence indicated that "the white majority normally voted sufficiently as a bloc" to frustrate black voters' efforts "to elect a second black councilman."

Rejecting this singular emphasis on elections lost by minority-preferred candidates, the 6th Circuit said the reasoning of the <u>Collins</u> I majority "appeared flawed" by ignoring the extent to which minority-preferred candidates were successful. The 6th Circuit in <u>Clarke</u> warned that such an approach

> has no stopping point short of guaranteed proportional representation for racial minorities. The <u>Collins</u> approach ignores the extent to which a racial group's preferred candidates are successful, and considers only the elections in which those candidates lose. Since this approach normally would yield a finding of white bloc voting, it likewise would lead courts to find a § 2 violation in virtually every case brought under that section. The handful of exceptional cases would be those in which defendants demonstrate that plaintiffs have enjoyed "persistent proportional representation," <u>Gingles</u>, 478 U.S. at 77, 106 S.Ct. at 2780, which, the Supreme Court has instructed, is presumptively inconsistent with the existence of a § 2 violation. Id.; see also id. at 102, 106 S.Ct. at 2793 (O'Connor, J., concurring in the judgment). Thus, the <u>Collins</u> approach effectively would delete from § 2 [the Dole Compromise,]the language that was so critical to its approval by Congress. … We therefore decline to follow <u>Collins</u>.

In his concurring opinion in <u>Clarke</u>, Judge Boggs went one step further and emphasized that if a court limited its racial bloc voting analysis to only elections in which minority-preferred candidates lost, such an approach would

> lead[] to a finding of racial bloc voting everywhere. A losing candidate who wins a majority of one portion of the electorate necessarily must receive only a minority of the remainder of the electorate. Thus, the approach properly rejected by the court invariably would yield a finding of white bloc voting.[34]

Based on the Supreme Court's recently announced bright-line rule for the first <u>Gingles</u> precondition in <u>Bartlett v. Strickland</u>,[35] requiring a Section 2 plaintiff to show that "the minority population in the potential election district is greater than 50%," it has been suggested that the Court "appeared to signal an inclination to deem racial bloc voting absent if the percentage of white voters supporting minority-preferred candidates exceeded certain numerical thresholds."[36]

According to Professor James Greiner, the Court could be laying the foundation for the adoption of a rule of thumb or numerical threshold "specifying that, for example, a 40% white crossover rate (perhaps some kind of "average" rate…) forecloses a finding of racial bloc voting, and/or that a greater-than-20% minority crossover rate has the same consequence."[37]

<u>Stark and Persistent Polarization</u>

Echoing the 5th Circuit's cautionary remarks in <u>Overton v. City of Austin</u> that courts should not ignore limitations on regression analysis or the imperfection of the data it generates, Judge Boggs took issue with flawed application of statistical estimates in proving racial bloc voting, where at most there

was a difference in racial voting patterns but not necessarily racial bloc voting sufficient to satisfy the third Gingles precondition:

> Bloc voting is not the same as simply differential voting or identifiable voting. Even though a political scientist could no doubt identify mostly black and mostly white precincts in every city in America, there is not a Section 2 violation every time there is any perceptible difference in racial voting patterns. There must be the kind of stark and persistent polarization that prevents a minority from having an opportunity to win, not a guarantee of winning.[38]

<u>No Particular Statistical Methodology Required</u>

Other courts also began to signal a retreat from exclusive reliance on these two statistical methods, finding limitations and deficiencies in their application that went to the heart of their reliability and accuracy,[39] and more recently one court has declared that "no particular statistical methodology is required to be used, nor is a particular statistical outcome required before the court may conclude that racial bloc voting exists."[40]

<u>Determining Minority-Preferred Candidate Status</u>

Determining the status of a candidate as minority-preferred is an integral part of the third Gingles precondition, which requires a showing that "the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." That determination can be made without reliance upon statistical estimates. No statistical yardstick is required to determine that a minority-preferred candidate is one who receives a majority of the minority vote and is the first choice among minority voters. While many would agree that minority and majority voters often select members of their own race as their preferred representatives, however, it would be inappropriate to assume that this is always so. Moreover, when multi-seat elections are examined in a racial bloc voting inquiry, the court must determine whether a preferred candidate of minority voters has been successful, and if she has, the court must determine whether that candidate was first choice among the minority voters or whether other candidates were preferred to the successful candidate.

<u>The Alamance Approach to Multiseat Elections: Non-statistical Evidence</u>

In <u>Lewis v. Alamance County</u>,[41] the 4th Circuit adopted a practical analysis for identifying minority-preferred candidates, emphasizing that it is "'the status of the candidate as the chosen representative of a particular racial group,' not the race of the candidate,' which is relevant in determining whether Gingles' third precondition is satisfied."[42] The Court had before it a multi-seat election in which voters were permitted to cast as many votes as there were seats. A successful minority-preferred candidate of choice received more than 50% of the minority vote. In considering the second and third place finishers behind the successful minority-preferred candidate, the court found that the candidate receiving less than

50% of the minority vote could be presumed minority-preferred candidates under appropriate circumstances, using a two-step inquiry.

Under this two-step approach, a candidate who receives less support from minority voters than an unsuccessful first choice may still be deemed a minority-preferred candidate in the multi-seat election. First, if the unsuccessful candidate who was the first choice among minority voters did not receive a "significantly higher percentage" of the minority community's support than did other candidates who also received a majority among minority voters, then the latter should also be viewed by the district court as minority-preferred candidates. Second, if the level of support received by the unsuccessful first-place finisher among black voters was "significantly higher" than the support given the second- and third-place finishers by those same voters, then successful candidates who finished behind the unsuccessful first choice are "presumed not to be the minority's preferred candidates or representatives of choice." Even so, the district court must still review "[e]ach situation . . . individually to determine whether the elected candidates can be fairly considered as representatives of the minority community."[43]

The 4th Circuit followed the Alamance approach in Levy v. Lexington County, SC,[44] in which it held that if an unsuccessful candidate who was the first choice of minority voters failed to receive a "substantially higher percentage of the minority community's support than did other candidates, the latter should be viewed as minority-preferred candidates." Of course, depending on the number of candidates on the ballot and the number of seats that are to be filled in a given election, the level of support that may properly be deemed "substantial" will vary.[45]

<div align="center">Anecdotal Evidence and other Non-Statistical Evidence</div>

As with racial bloc voting, the inquiry into the Gingles precondition of minority political cohesion similarly "does not stop with bare statistics." Whitfield v. Democratic Party of Ark., 890 F.2d 1423, 1428 (8th Cir.1989). As the 10th Circuit noted in 1989, "The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive. This testimony would seem to be required if the court is to identify the presence or absence of distinctive minority group interests." Sanchez v. Bond, 875 F.2d 1488, 1494 (10th Cir.1989). Similarly, the 5th Circuit in 1993 found that evidence that "a specified group of voters share common beliefs, ideals, principles, agendas, concerns, and the like such that they generally unite behind or coalesce around particular candidates and issues," demonstrates cohesion. League of United Latin American Citizens, Council No. 4434 v. Clements, 986 F.2d 728, 744 (5th Cir.1993). See also Bone Shirt v. Hazeltine, 336 F.Supp.2d 976 (D.S.D. 2004) (noting precedent in which both empirical and anecdotal evidence demonstrated cohesion).

<div align="center">Evidence Contrary to Existence of Racial Bloc Voting</div>

The Supreme Court's first major departure from exclusive reliance on extreme case and ecological regression analyses in analyzing racial bloc voting came in Abrams v. Johnson.[46] There the Court concluded that evidence contrary to the existence of racial bloc voting was embodied in the District Court's finding of a 22% to 38% average percentage of white crossover votes for black candidates across the state and a 20% to 23% average percentage of black crossover votes for white candidates.[47]

Similar arguments predicated on a numerically defined threshold for racial bloc voting were asserted by the City of Euclid and addressed by the District Court in United States v. City of Euclid,[48] In that case the court emphasized that "no particular statistical methodology is required to be used, nor is a particular statistical outcome required before the court may conclude that racial bloc voting exist."[49]

<div align="center">Estimated Actual Voters Analysis and Reconstituted Election Analysis</div>

The Court in City of Euclid declined to adopt an "estimated actual voters" analysis proposed by the defendant, which it considered to be an effectiveness measure, noting that "no court has ever employed it." [50] Further, the Court found that reconstituted election analysis proposed by the Section 2 plaintiff's expert, Dr. Lisa Handley, was an accepted method of analyzing the effectiveness of districts used by other courts and "takes the actual precinct results for previous elections and re-tabulates the elections to the new districts in order to determine if the minority-preferred choice would prevail."[51] The Court's acceptance of reconstituted election analysis was consistent with precedent recognizing that it is a "relatively simple method that extracts election results from a variety of statewide and local races that subsumes the area being analyze and determines precinct-by-precinct with the new district, the racial composition of the vote and the "winner" within the new district."[52]

<div align="center">Probit Analysis</div>

Novel statistical methodologies do surface, and they are at times given consideration by the courts in evaluating racial bloc voting. One new technique for identifying the point of equal opportunity is probit analysis, a standard statistical method for determining the likelihood that an African-American candidate of choice will win. This statistical technique was advanced by Dr. David Epstein, an expert for the South Carolina Governor in Colleton County Council v. McConnell.[53] At issue in this vote dilution case was the appropriate measure that the court must use when considering whether a hypothetical Section 2 district, one that was a geographically compact district in which the minority population could form a majority, had an equal opportunity to elect a minority-preferred candidate. Id. at 642. The experts did not agree on what constituted an equal opportunity in this context.

> Using a new technique called "probit analysis" (which he professes to have pioneered), Dr. Epstein testified that the point of equal opportunity for the state as a whole occurs at just over 47.11% BVAP. By region, Dr. Epstein opined that the Upstate's point of equal opportunity is 44.61%, the Midlands' is 47.45%, the Pee Dee's is 48.19%, and the Low Country's is 45.58% Dr.

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Epstein also testified that once a district exceeds approximately 40% BVAP, the addition of more black votes does not alter the particular representative's voting patterns; Democrats of both races support the minority-favored position in General Assembly votes. This is because, according to Dr. Epstein, blacks now turn out in numbers roughly equivalent to whites, there is white cross-over voting at about 20%, and a black's tendency to vote against a minority candidate is only about 2%. For these reasons, Epstein testified, redistricting plans drawn to lower BVAP levels, by allowing for the draw of influence districts, will better advance the substantive representation of the black community in South Carolina.[54]

The three-judge court in Colleton County Council v. McConnell concluded that "a majority-minority or very near a majority-minority black voting age population in each district" remained a minimum requirement in order to give minority voters an equal opportunity to elect minority-preferred candidates; however, it did not reject or criticize the "probit analysis," and actually considered all of the expert testimony presented by the various parties in this litigation.[55]

Probit analysis was also used by Dr. Epstein in the Section 5 declaratory judgment trial in Georgia v. Ashcroft,[56] involving a challenge to Georgia's State House, State Senate and U.S. Congressional redistricting plans. Dr. Epstein relied on probit analysis as the single methodology for addressing the limited question of what percentage of BVAP would produce a 50% chance that an African-American candidate of choice would win election. His analysis of whether the plans at issue would retrogress consisted of comparing the number of majority BVAP districts under the benchmark and proposed plans, and comparing the number of districts under the benchmark and proposed plans that had BVAPs greater than 44.3%, which he found to be the "point of equal opportunity" based on an analysis of 158 open seat elections, which meant that there was a 50-50 chance of electing a candidate of choice in a district with an open seat and with a 44.3% BVAP, a result he explained by noting that over 90% of African American voters supported Democrats while over 60% of white voters supported Republicans.[57] Applying this point of equal opportunity, an African American supported candidate would usually be able to win a primary with a 44% BVAP district because African Americans would form the majority of Democratic voters, receiving enough crossover votes from white Democratic votes to win the district overall.[58]

Given the Supreme Court's recent willingness to consider the possibility that 20% white crossover voting may be inconsistent with racial bloc voting, perhaps the stage is being set for the Court to formally abandon exclusive reliance on the two statistical methods employed in Gingles in 1986 and adopt a more pragmatic statistical benchmark for determining legally significant racial bloc voting, one that incorporates a rule of thumb that an average 30 to 40% white crossover vote can constitute a rebuttable presumption against a finding of racial bloc voting.[59] , Further, given the limited ability of statistics to predict the future is limited, perhaps the best approach to presenting complex statistical estimates of polarization or lack thereof is not to rely

on one or two methods, but utilize a variety of other empirical methods, such as King's EI, BERA, extreme case analysis, reconstituted election analysis, and probit analysis, as well as anecdotal data and a functional analysis of election results from exogenous as well as endogenous elections. The ultimate conclusions in most litigated redistricting cases will ultimately depend on the totality of evidence: what candidates will be offered to the voters, how candidate qualifications, experience, incumbency, community and socioeconomic ties, and a plethora of other non-statistical factors might affect their voting patterns, turnout, cohesiveness and electoral success. In light of the frank acknowledgement by later courts that the statistical methods used in Gingles and for decades treated as holy writ were perhaps deficient, maybe suffering from a little intellectual hardening of the arteries, and perhaps capable of providing impossible results that no expert could rationally justify, it may be that the best of statistical methods should be used in conjunction with but not to the exclusion of other empirical data, as well as non-statistical evidence and anecdotal data.

Turning from the issue of what statistical evidence should be used in counting and measuring the voting patterns of relevant population groups in forming or changing electoral districts, we now address the issue of determining who should be included in those population groups for voting and other electoral purposes, focusing on two different groups, college students and prisoners.

<u>College Students and Prisoners: The Usual Residence Rule</u>

What are the ramifications of census inclusion of college students, prisoner and other problematic population groups in constructing electoral districts that must comply with the one person, one vote principle under the 14th Amendment and the VRA? In this context one must consider current applications of the usual residence rule and the extent to which the total population included in a given redistricting plan should encompass college students, prisoners and other non-traditional groups, based on the presumptively correct decennial census that is the source of population data on which redistricting plans are based. This issue may well have a decisive impact on how the courts will ultimately deal with the politically polarizing problem of non-citizen voter registration and voting by undocumented aliens and immigrants lacking citizen status, a key part of the national debate over immigration reform and a problem that has been growing since the 1990's, recently surfacing in the federal district courts.[60]

Inclusion or exclusion of college and university students in a local government body's population count for the purpose of a redistricting plan should usually be determined by the "usual residence rule." Indeed, applying the usual residence rule to college students would not be expected to "spur much debate these days" as Professor Persily has noted.[61]

In <u>Borough of Bethel Park v. Stans</u>,[62] a college town, The Borough of Bethel Park, argued that the Census Bureau erred in enumerating college students as residents of the town, and that it should instead consider (1) whether each student has a particular attachment to the state of his or her parental residence, and (2) whether each student was registered to vote in the state of his or her parental residence. The Third Circuit in <u>Bethel Park</u> rejected these arguments and gave great deference to the Census Bureau, reasoning that once a student has left his parental home to pursue studies at a college in another state, normally for several years, it can reasonably be concluded that "his usual place of abode ceases to be that of his parents. Such students usually eat, sleep, and work in the state where their college is located."[63]

As Professor Persily notes in an informative discussion of the how the usual residence can have a dramatic effect when applied to college students, particularly when redistricting a small area political subdivision, "[t]he population of some college towns doubles in September when the students arrive [and for] county commissions or city councils, the decision to count students in the college towns can have a dramatic political effect."[64]

<u>Apportionment Base Upon Which Voting Districts Are Based</u>

Generally, a person is considered a "resident" of the place where he or she usually lives, and the U.S. Census Bureau in the same sense counts people at their "usual place of abode." States and other political subdivisions are not required, however, to include transients, short-term residents or temporary residents in the apportionment base upon which their voting districts or wards are based.[65]

The 5th Circuit declined to apply this general rule and instead held that it was proper to include college and university students in the population count for purposes of a municipal redistricting plan in <u>Fairley v. Hattiesburg</u>.[66] In <u>Fairley</u>, Section 2 plaintiffs sought judicial approval of their illustrative <u>Gingles</u> plan by "removing the dormitory students, whether legal residents or not, from districting calculations [which] would reduce the ideal number of officially-counted residents per districts. As the 5th Circuit noted, "because the excluded students are mostly white, that would have made it easier to create a third majority black ward." In other words, the Section 2 plaintiffs in <u>Fairley</u> 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 students would have protected the electoral power of the inflated black majorities. Since bona fide city residents may not be excluded for voter apportionment purposes, the 5th Circuit held that it was proper for the trial court to reject this solution proposed by the Section 2 plaintiff "because they did not explain how the unconstitutional exclusion of residents in the course of implementing their desired redistricting plan could be avoided.

A contrary result was reached in <u>Boddie v. City of Cleveland</u>,[67] where a Section 2 plaintiff argued that inclusion of the non-resident student population residing at a university into the apportionment base for a municipal redistricting plan was impermissible. The District Court held that the non-resident student population residing in dormitories at the university should not be included in the apportionment base for the City's aldermanic wards, reasoning 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 ward are based, citing <u>Burns v. Richardson</u>.[68] The Court also noted that in <u>Fairley v. Patterson</u>,[69] the 5th Circuit had examined a redistricting plan that would have excluded all college students living in dormitories or fraternity houses but never reached the merits of the plan, deciding the case instead on standing. The supervisor redistricting plan in <u>Fairley v. Patterson</u> had 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, and non-resident students residing off campus were included in the apportionment base.[70]

Subsequent decisions have indicated a desire on the part of the courts for a more systematic means of ascertaining which college students are also residents of a local government jurisdiction involved in redistricting and which are not, in order to provide more assurance that the former are not disenfranchised.[71] An even more challenging population group that one might consider problematic, particularly with respect to determining who should be counted and included in election districts for redistricting purposes, is found in prison populations, now numbering over one million persons behind bars throughout the nation.

<div align="center">Census Inclusion of Prisoners: Prison-Based Gerrymandering</div>

Citizens convicted of a felony lose their right to vote, at least temporarily, in 48 of the 50 states.[72] 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.[73] 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.

More people live in U.S. prisons than in our 3 least populous states combined.[74] 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. This practice results in districts that arguably 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.[75]

Opponents of prison-based gerrymandering assert that it leads to vote dilution and is more extreme in districts with the highest incarceration rates. Unfortunately, the communities that bear the most direct costs of crime are the biggest victims and loser when it comes to prison-based gerrymandering. Rural areas are hurt when inaccurate census counts of prison populations distort local representation. Considering the relatively small populations of cities and towns in these areas, one can quickly see that placing a single prison in these areas can have a significant impact on the population.

States can address the prison-based gerrymandering problem by correcting the census data through collection of home addresses of people in prison in the state and then adjusting the U.S. Census counts prior to redistricting. New York enacted legislation[76] in 2010 to ban prison gerrymandering by requiring that prison inmates be counted at their homes to which they will eventually return, and the states of Florida[77] and Maryland have similar legislation under consideration.[78] The New York law was immediately heralded as a potential model for states throughout the nation, upholding the one person, one vote principle for the benefit of citizens throughout the state and bringing to an end "the cynical practice of counting prison inmates as "residents" to pad the size of legislative districts." [79] Based on the New York-based Prison Policy Initiative, "seven New York State Senate districts could now have trouble meeting federal population requirements, which means that those districts will have to be drawn along different lines."[80]

By removing prison populations prior to redistricting, states and counties taking this ameliorative approach would not be putting prisoners back into their rightful residential communities, but would eliminate the large 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.[81]

Finally, the Census Bureau published the Advanced Group Quarters Data in early May 2011, including block level counts of correctional facilities and other group quarters that will eventually be published as Table P42 in Summary File 1. 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. This will call for a tremendous amount of data to be processed in order to locate the approximately 5,000 correctional facilities in this nation, of which only 1,500 are state and federal prisons,[82] but it is at least a start in the right direction. One commentator has described prison-based gerrymandering as a distortion of representation that "disproportionally harms urban, minority communities as it benefits rural, white communities." While new prisons are routinely built far from

heavily populated cities, "largely in rural, white communities, which consequently gain representative power," those communities that lose their representative power "are generally urban communities of color."[83]

In <u>Hayden v. Pataki</u>,[84] the 2nd Circuit noted the impact of the Census Bureau's methodology of counting prisoners on voting rights when it raised concerns over the use of prison population data for legislative reapportionment. The Court specifically questioned whether minority citizens in New York City could assert a cognizable claim under the Voting Rights Act of 1965 that the use of the erroneous census data diluted their representation in state and local government. One commentator has made a strong argument that the Census Bureau's practice of applying the usual residence rule to count prisoners may violate the one-person one-vote principle and, under certain circumstances, could be challenged as vote dilution.[85] The prospect of a vote dilution challenge should not be dismissed as unlikely, speculative or without legal support, but should be considered circumspectly. This is because (1) electoral districts are based on population size and subject to the one person, one vote principle of the 14th Amendment, (2) such districts may be Congressional, state legislative, county, municipal or special governmental districts, (3) regardless of the type of district, each contains a number of people within a given geographical region, and (4) an extreme example of prison-based gerrymandering can conceivably result in the drawing of district boundaries that effectively reapportion large parts of what would otherwise have been urban population to rural counties.

Some of these issues are already being raised in litigation pending in <u>Little v. New York State Task Force on Demographic Research and Reapportionment</u>, a challenge to New York's 2010 legislation banning prison gerrymandering, in which a broad array of civil rights organizations have intervened. With 98% of the prisons in the state of New York located in largely white Senate districts, how and where incarcerated people are counted can have "tremendous implications for how African-American and Latino populations are reflected in the census, and, consequently, how these communities are impacted through redistricting."[86] The <u>Little</u> case has just entered the judicial system and may take years to reach a conclusion, but one can reasonably expect it to explore the political incentives for shifting disenfranchised urban populations to rural communities and the resulting potential for vote dilution.

The impact and extent of utilization of the Census Bureau's revised approach to counting prison populations will not be manifest until the 2020 census, but jurisdictions with significant levels of this problematic population group now have legislative models for guidance and will have more effective tools at their disposal to minimize the risks and potentially dilutive effect of prison gerrymandering. That incentive may be heightened as cases like <u>Little v. New York State Task Force on Demographic Research and Reapportionment</u> are ultimately decided.

Having seen how the selection of a certain statistical methodology or other evidentiary approach to counting relevant population plays such a vital role in constructing or altering electoral districts in the redistricting process, and having considered how certain problematic population groups are included or not included in the official count for redistricting purposes, we now turn to the most difficult issue of safe districts and how the courts and all stakeholders should address the role and continued existence of majority or super-majority concentrations of minority voters in the massively changed political landscape that has developed in the United States since 1965.

<center>"Safe" Districts</center>

A "safe" district refers to a majority-minority control district[87], which is a district in which minority voters can constitute a majority of the actual electorate. What continued protection should be given safe districts in 2011, 2012 and subsequent years as jurisdictions, courts, private plaintiffs and the DOJ confront districts containing significant numbers of minority group members and attempt to promote racial fairness while addressing the need for redistricting in light of demographic and population changes revealed by the most recent decennial census? As we turn to an issue that needs to be addressed in this the 47th year after passage of the Crown Jewel of the Civil Rights Movement, consider whether courts should continue to use "safe" districts[88] as essential components of redistricting plans. Such use of safe districts or supermajority-minority districts is a sensitive issue enshrouded in decades of jurisprudential assumptions and shifting ideologies amongst the nine Justices who sit on the United States Supreme Court about minority voting strength.

These assumptions may have had legitimacy during the early years of the Voting Rights Act but which may have lost their relevance and necessity in light of the growing efficacy of minority influence districts. Indeed, the issue of the continued need for "safe" districts is timely, since the Supreme Court has now underscored the growing role of crossover voting that empowers minority-preferred candidates, assures them of equal electoral opportunity and provides them with a meaningful place at democracy's table. "Safe" districts served an essential purpose during the early decades of the VRA. Sometimes referred to as super majority districts, they were based on a rule of thumb in the redistricting process and in the remedial stage of Section 2 vote dilution litigation that a black-majority single-member district could only be deemed viable if it was at least 65 percent black on a total population basis. The rule of thumb morphed into a guideline and ultimately into a standard given wide acceptance by Article III courts in voting rights litigation. Some of the sages of early VRA jurisprudence have suggested that the origin of this 65% rule was a telephone conversation with an unnamed Justice Department official who suggested that 65% would probably constitute a sufficient majority of black population in an electoral district for blacks to have a realistic opportunity to elect their representative of choice.[89] Now that the Voting Rights Act has been in effect for over 46 years, one must ask whether there is any realistic need for the judicial

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branch to exercise equity power under Section 2 of the VRA, or the Justice Department to exercise its administrative authority under Section 5 of the VRA, to fashion relief in the form of "safe" districts for the purpose of remedying the effects of vote dilution or retrogression and to give minority voters something more than an equal opportunity to participate equally in the electoral process. Even the most dedicated civil rights experts and litigators agree that we are moving towards a more open and equal Democratic process.[90] The lions of our nation's Civil Rights Movement have acknowledged that the political landscape in this country has changed and that there now exists a political culture almost unimaginable when the Voting Rights Act was first enacted.[91] Now that minority voters freely participate in elections and actively play a meaningful role in the day-to-day governance of this Nation,[92] now that racial stereotypes are continuing "to wane in the political sphere" as "new generations, unencumbered by the prejudices of previous ones, are exercising their right to vote with an increasingly post-racial outlook,"[93] and now that warriors of the Civil Rights Movement such as U.S. Congressman John Lewis have acknowledged these changes and agree today that it is not "just in Georgia, but in the American South, I think people are preparing to lay down the burden of race,"[94] it just may be that "safe" districts have outlived their usefulness and are at risk of becoming an endangered species. But the issue of continued viability of and need for supermajority or "safe" single-member districts is not so easily resolved, even in a time that has witnessed the election of the first African-American to the Presidency.

<center>Competitive Elections and Competitive Districts</center>

The concept of "safe" districts begs the question, "safe from what?" Elections are about competition, and the best and most robust electoral contests are competitive. Competition demands a level playing field, and pre-VRA competitive elections between minority candidates and non-minority candidates did not exist in this country. At the time of its historic enactment in 1965, the VRA was firmly anchored to a compelling need to right a wrong: total exclusion of minority citizens from every meaningful aspect of the democratic process on account of race. African American citizens had been subjected to racial discrimination in all phases of the electoral process, from literacy tests, poll taxes and registration practices to racially gerrymandered redistricting plans that virtually fenced them out of the political process. It was essential for Congress in 1965 to craft remedial legislation that would open the ballot box to African American citizens and provide a broad range of guarantees of equality of electoral opportunity. There was a compelling need to provide a strong and effective mechanism that would compensate for and remedy the racial distortion of American politics that had been wrought by Jim Crow laws and decades of discriminatory practices. Justice Thurgood Marshall in his dissenting opinion in U.S. v. Mississippi,[95] captured the essence of the rationale for creating a supermajority or "safe" district when he said "Negroes must constitute a substantial majority of citizens in a district in order to have a reasonable opportunity to elect a candidate of their choice."[96]

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<center>Something More than a "Mere Majority"</center>

This brings us to the 65% rule of thumb for "safe districts." The rationale articulated by Justice Marshall was the underpinning for the 7th Circuit's decision in <u>Ketchum v. Byrne</u>,[97] in which the 7th Circuit concluded that the district court abused its discretion when it failed to use a 65% super majority in fashioning a remedy, since it failed to give the minority group a realistic opportunity to elect the representative of its choice. In its discussion of the "widely accepted understanding" that the 65% guideline or standard was needed in order to enable black voters to exercise their franchise in a full and meaningful way, the 7th Circuit said:

> Minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice. There is simply no point in providing minorities with a "remedy" for the illegal deprivation of their representational rights in a form which will not in fact provide them with a realistic opportunity to elect a representative of their choice.

<center>"Effective" Majority Tied to Race and Ethnicity</center>

Over a decade later in <u>Barnett v. City of Chicago</u>,[98] the 7th Circuit addressed need to draw the City of Chicago's ward map in such a way as to concentrate and enable blacks and Latinos to elect aldermen of their choice – "their choice being aldermen of their own race and ethnicity." Citing <u>Ketchum v. Byrne</u>, the 7th Circuit said:

> How concentrated these groups must be in order to constitute an effective majority in the sense just indicated depends on voting-related characteristics of the population, notably age, citizenship, registration, and turnout. Because blacks have a younger age distribution than whites, and a smaller percentage of eligible blacks are registered to vote than of eligible whites, it is a rule of thumb that blacks must be at least 65 percent of the total population of a district in order to be able to elect a black.

In the field of redistricting, the Voting Rights Act through the Section 5 preclearance procedure wrought a sea change in electoral access and opportunity. Of course, creation of a "safe district" in a redistricting plan entailed the deliberate use of race in a purposeful manner, but its goal was to facilitate the creation and use of redistricting plans for state and local government elective offices that did not minimize or cancel out African American voting strength. Critics would eventually attack "safe" districts as racial classifications, and race-based redistricting over the next three decades would be subjected to strict judicial scrutiny. In 2003, the Court in <u>Georgia v Ashcroft</u>[99] said that states, in order to maximize a minority group's electoral success, may choose to create a certain number of "safe districts," in which it would be "highly likely that minority voters will be able to elect the candidate of their choice."[100]

There have been fleeting moments when courts have moved away from "safe" districts as an inevitable tool in VRA litigation. In a case decided prior to <u>Bartlett v. Strickland</u>'s adoption of a bright-line majority requirement for the 1st <u>Gingles</u> precondition, [101] the court in <u>United States v. City of</u>

Euclid[102] addressed whether a Section 2 plaintiff, in this case the United States, could satisfy the 2nd Gingles precondition of minority political cohesion. The City of Euclid invited the court to adopt a requirement that a Section 2 plaintiff show that the minority-preferred candidate regularly receives 70% or more minority votes before its minority-voting patterns could be deemed cohesive, but the court declined, noting that "no such hard and fast benchmark exists."[103]

Safe Districts Based Predominantly on Race

To the extent that "safe" districts are created predominantly on the basis of race and reflect racial classifications inherently suspect in light of Shaw v. Reno[104] and its progeny[105], redistricting plans based on the 2010 Census that reflexively include such super majority districts may be perceived by many as resting on shaky constitutional ground unless supported by clear evidence of the need for such race-based districting. It has been almost 18 years since Justice Sandra Day O'Connor wrote in Shaw that "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls,'"[106] and that "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution."[107] The societal harm caused by such racial classifications with respect to voting is seen most vividly in racial gerrymandering, which "even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."[108]

That brings us to the difficulty encountered and the institutional resistance that one can anticipate when proposing such solutions as abandoning "safe" districts in the remedial phase of voting rights litigation, whether based on the new two-prong Section 5 test based on nonretrogression and discriminatory purpose or the amorphous "results" test of Section 2. Shaw recognized that laws fall within the core of the Equal Protection Clause's prohibition when they explicitly distinguish between individuals on racial grounds.[109] It also tells us that in the absence of extraordinary justification, race-based assignments of voters and separating of citizens into different voting districts on the basis of race fly in the face of the Equal Protection Clause's command that the Government treat its citizens as individuals and not "as simply components of a racial, religious, sexual or national class."[110]

Moving Beyond the Problem of Race

A leading scholar and litigator in the field of voting rights litigation has addressed the question of whether President Barack Obama's election in 2008 marked the beginning of a post-racial era in which race bears less significance and has less consequences, and whether President Obama's electoral success can or should be substituted "for a more localized inquiry into the possible existence of racially polarized

voting."[111] Amassing objective support for a formidable argument that this nation has not yet moved beyond the problem of race and that significant racially polarized voting and voting discrimination persists in many communities throughout the country, she concludes that discriminatory voting patterns in the 2008 election were most evident in five southern states that are covered jurisdictions under the Voting Rights Act.[112] Her conclusions are supported by homogenous or extreme case analysis, ecological regression analysis and other accepted forms of statistical analyses of exogenous and endogenous elections[113], exit polls from Section 5 covered states, and a host of factors such as the role and influence of partisanship and race in shaping 2008 voting preferences, Obama's status as a biracial candidate, ballot or voter drop-off, the impact of a Presidential running mate, national fundraising during the 2008 Presidential election, heavy Democratic registration rates, DNC proportional representation rules and complex primary rules, and closed primaries.[114]

Continued Need for VRA's Protections

In a nutshell, a compelling case can be made for not reading too much into the Obama victory and not seizing on any generalized presumptions that one can draw regarding racially polarized voting levels in any given jurisdictions. This same cogent argument supports the continued need for the protections afforded by Section 2 and Section 5 of the Voting Rights Act. That continued need is further evidenced by the fact that in 2006, just two years before President Obama's election, Congress reauthorized the expiring provisions of the VRA based on strong evidence of significant levels of racially polarized voting that still existed in covered jurisdictions, evidence that included judicial findings, scholarly studies, expert analyses, exit polls, and personal testimonies that illustrated the extent to which high levels of polarized voting remain a significant obstacle.[115]

Diminishing Barriers to Equal Minority Participation

Closer analysis of concrete electoral data, however, sheds a different light on the argument that black Americans today continue to face significant barriers to equal political participation. That argument of persistent diminished voting power on the part of minority voters, while sincerely advanced, should be juxtaposed with current minority electoral data. And what does that data indicate? It indicates the robust extent of minority electoral success in the very states that she identifies as least-supportive of Barack Obama in the primary and general election. In sharp contrast to the somewhat pessimistic view that there have only been begrudging gains attributable to the Voting Rights Act's successful implementation over the past 46 years, the data indicates an electoral pattern that is much more positive, optimistic and encouraging for minority-preferred candidates and minority voters seeking to elect their candidates of choice. For all of the great strides this nation has witnessed in sheer numbers and percentages of minority electoral success since 1965, there is but unambiguous evidence of consistent minority access to the political process, increased levels of minority participation in the electoral process, and quantum leaps in

the ability of minority voters and their candidates of choice to mobilize and claim a permanent seat at the table of American Democracy. There is more optimistic evidence to consider.

The Gender and Multicultural Leadership Project 2011 database tells the rest of this story. In Mississippi, there are approximately 530[116] black elected officials at the state and local government level, making it the state in the nation with the highest number of black elected officials at the state and local government level. The GMCL project's key components are a national database of over 10,000 elected officials of color, by race and gender; an annotated bibliography and analytical framework on the intersection of gender, race/ethnicity, class; and a multipage interactive project website. An instructive part of the national database of non-white officials,[117]provides a picture of the political landscape that is much more concrete, optimistic and encouraging than the pessimistic and defeatist views expressed above.

Compared to states not subject to Section 5 of the Voting Rights Act, the numbers reveal impressive gains in minority electoral positions in every southern state, with black elected officials at the state and local government level numbering 498[118] in Alabama, 452[119] in Georgia, 426[120] in South Carolina, 401[121] in North Carolina, 467[122] in Louisiana, 309[123] in Texas, 222[124] in Florida, 139[125] in Tennessee, and 177[126] in Virginia. Compare these numbers to New York's 135[127] black elected officials, Massachusetts' 29[128], Connecticut's 59[129], New Jersey's 209[130], Ohio's 108[131], Pennsylvania's 115[132], Maryland's 94[133], Michigan's 193[134], and California's 98[135]. Somehow the phrase "gross statistical disparity" does not roll off one's tongue when we take a look at this comparative data. This data is drawn directly from the 2011 database compiled by The Gender and Multicultural Leadership Project (GMCL), a national study of America's political leadership in the 21st century that focuses on race, ethnicity, and gender and specifically addresses African American, Latino, Native American, and Asian American elected officials in U.S. politics.

The GMCL project has come at a unique time in our nation's history. Obviously, it does not provide a conclusive legal argument for jettisoning the protections provided by Sections 2 and 5 of the Voting Rights Act. Nor is elimination of the protections afforded by the VRA a realistic option. The published results of the GMCL project does provide overwhelming proof, however, that the ideals, goals and objectives of the Voting Rights Act are being realized and that perhaps a stringent, territorial application of its provisions should be reconsidered.

"We the people" are undergoing significant demographic changes that are clearly impacting and will continue to impact for decades to come the leadership ranks of the United States at the federal, state and local government level. The project highlights how America's increasingly diversified leadership is becoming part of the fabric of the governance structures, now and as the United States gradually becomes "majority-minority" over the next five decades.[136] There is indeed a shift in conventional thinking about

how the dynamics of race will play out in the cities and suburbs, along the coasts and in the heartland. There is a dramatic shift in what it means to be a minority in America.

The GMCL project's conclusion is supported by studies recently published by The Brookings Institution indicating that our nation has reached a "demographic pivot point between its racial past and multi-ethnic future."[137] Citing a "sharply altered geography for blacks" and growing new minority populations in which Hispanics, Asians and smaller new minorities accounted for all or most of the growth in 33 of the 49 states with growing populations according to the 2010 Census, one of these studies notes how the child population represents such an important part of the demographic pivot. Specifically, Hispanics, Asians and multiracial children account for all of the net growth in the nation's under-18 population, a statistic that is more telling than any other about our nation's social, economic and political future.

<center>Impact of Black Flight on Safe Districts</center>

As for the nation's black population, almost 75% of its growth during the last decade occurred in the South. Now a form of "black flight" has been documented in the black population shifts since 2000. Of the nation's 30 largest cities with the largest black populations, 19 have lost black residents. The steepest losses have taken place in the "northern black magnets" of Detroit and Chicago as well as Atlanta, Houston and Dallas, where more and more black residents have move to the suburbs. Contrary to the "glass is half empty" glumness of the traditional elites of the Civil Rights Movement that our nation is growing more and more segregated racially, Frey concludes that "[n]ew generations of African Americans with fewer ties to the segregated city neighborhoods of their parents and grandparents seem ready to follow earlier generations of whites to suburbia." What impact will this "black flight" trend have on the need for "safe districts" in a local government redistricting plan that reflects such dramatic population shifts?

Underscoring Frey's conclusion about the loosening bonds between middle-class blacks and previously segregated neighborhoods, current data points to a consistent reduction in black residential segregation during the past two decades.[138] As one commentator has noted with regard to the steady progress of this migratory phenomenon,

> 61 of the 100 largest metro areas registered declines in black-white segregation when measured by the index of dissimilarity—which ranges from zero (complete integration) to 100 (complete segregation). Among those places showing reduced segregation since 2000 are a slew of southern metro areas (Tampa, Atlanta, Orlando, and Houston), two Midwest cities that did not suffer substantial black losses (Indianapolis, and Kansas City) and one that did (Detroit). …
>
> The Sun Belt cities are emblematic of growing economy areas which are attracting new generations of middle-class blacks. The historic segregation of blacks has changed modestly, but consistently, over the last two decades, largely as a result a rising black middle class and the impact of the 1968 Fair Housing Act.

Given the strong evidence that this voting rights glass is more than half full, what can and should be the fate of "safe" districts? Will jurisdictions covered by Section 5 of the VRA be on shaky ground under the non-retrogression standard if they seek to promote more competitive crossover districts in single-member districting plans at the state and local government level, particularly if they can provide evidence of significant white crossover support for minority-preferred candidates?

<p style="text-align:center"><u>The End Game of Safe Districts: A Gift to Republicans</u></p>

Perhaps the seeds of a solution to placing safe majority-minority districts on automatic pilot may be found only when the problem is accurately defined. The problem lies in two decades of partisan political maneuvering, and it may be getting just the right definition at the epicenter for the most significant racial redistricting litigation since *Shaw v. Reno*,[139] North Carolina, a state where it seems that opponents and proponents of safe minority districts have switched sides.[140] In July 2011, the state legislature of North Carolina redrew the Congressional districts by shifting more blacks into the two districts already represented by black Democrats. This effort to draft a Section 5-compliant plan immediately drew criticism from Democrats who charged that Republicans were using the VRA for partisan advantage under the guise of shoring up black majority districts to comply with Section 5. Amidst observations from independent experts that the state's plan could change the North Carolina congressional delegation from its current 7 Democrats and 6 Republicans to 10 Republicans and 3 Democrats, Democratic Congressman Mel Watt complained that the plan was "a sinister Republican effort to use African-Americans as pawns in their effort to gain partisan political gains."[141] One may recall that it was Congressman Watts' own bizarrely contorted, meandering district that was cited in the 1990s as a classic example of an unconstitutional racial gerrymander in <u>Shaw v. Reno</u>,[142] after which the state legislature slightly reduced its supermajority concentration of black voters, and Congressman Watts was re-elected to his safe seat time and time again. Congressman Watts was making the same argument against the 2011 North Carolina Republican plan that was made against his congressional district in 1993, that race played too predominant a role in creating it. Turning his back on race-base redistricting, Congressman Watts now argues that the VRA's goal was "to level the playing field for African-American candidates and voters. It was not designed to create racial ghettos." As the Vice-Chair of the U.S. Commission on Civil Rights aptly noted with respect to Congressman Watts' remarks, "Something very interesting is going on. The Democrats are waking up to the fact that this focus on creating safe minority seats has been a gift to the Republicans."

As Congressman Watts and other well-meaning African-American political commentators now realize, racial gerrymandering was not benign, and creation of "majority-minority" districts in order to give black voters the strength of a voting bloc, initially perceived as a progressive political tactic and a

"benign form of affirmative action that would usher more black members into a Congress that had admitted only a handful," has come with a significant downside.[143]

Part of that downside is that minority-packed safe districts "discourage moderation" and that "[p]oliticians seeking office in majority-black or –brown districts found that they could indulge in crude racial gamesmanship and left-wing histrionics."[144] Others have noted that "[h]emming most black voters into a few districts also had a deleterious effect on surrounding areas, now "bleached" of voters whose interests tend toward equality of opportunity. Their absence encourages pols in districts left overwhelmingly white to use the "Southern strategy" of playing to the resentments of white voters still uncomfortable with decades of social change."[145] Still others have pointed out that Southern Republicans encouraged creation of safe districts, those with huge black majorities, and that the quid pro quo came when Republicans, now in control of most state legislatures, were provided "a distinct advantage in the re-districting battles that have followed last year's census. And they're using that advantage to continue packing black voters into a handful of districts."[146] Creating majority-minority safe seats has led to "re-segregating the South" and has led black voters to believe, incorrectly, that they have made substantial gains simply by having more black representatives in Congress, when they "would have had more influence if they has been spread through several legislative districts, forcing candidates to court them."[147]

Safe Majority-Minority Districts under DOJ's Regulations

As the 11th hour realizations of the unintended consequences of unbridled creation of safe districts have begun to add up, one may seek guidance by consulting the DOJ's 2011 regulations interpreting the VRARA of 2006. When the U.S. Department of Justice through the Office of the Assistant Attorney General for the Civil Rights Division, published its 2011 Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76. Fed. Reg. 7470 (Feb. 9, 2011), its express purpose was to provide assistance to jurisdictions covered by the preclearance requirements of Section 5. While its guidance is not legally binding, the Justice Department set forth a detailed analytical format for covered jurisdictions to follow in their efforts to satisfy what were now two separate and necessary components of the Section 5 standard of review in light of the 2006 VRARA, discriminatory purpose and retrogressive effect. Under the discriminatory purpose component, the 2011 guidance states:

> The single fact that a jurisdiction's proposed redistricting plan does not contain the maximum possible number of districts in which minority group members are a majority of the population or have the ability to elect candidates of choice to office, does not mandate that the Attorney General interpose an objection based on a failure to demonstrate the absence of a discriminatory purpose. Rather, the Attorney General will base the determination on a review of the plan in its entirety.

This 2011 Guidance was followed by publication of the Revision of Voting Rights Procedures, 76 Fed. Reg. 21239, 28 C.F.R. Parts 0-51, AG Order No. 3262-2011 (Apr. 15, 2011). The April 15, 2011

Revision of the Justice Department's Procedures for the Administration of Section 5 of the Voting Rights Act was for the purpose of clarifying "the scope of section 5 review based on recent amendments to section 5" and to "provide better guidance to covered jurisdictions and interested members of the public concerning current Department practices." It was drafted for the purpose of reverting to the legal standards that had been suspended following two controversial decisions over the scope and application of Section 5. To get to what that means, we must look at Bossier II and Georgia v. Ashcroft once again.

When the Supreme Court decided Reno v. Bossier Parish (Bossier II),[148] a majority held that a redistricting plan enacted with a discriminatory purpose would not violate Section 5 so long as it was not retrogressive in purpose or effect, and 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. Among the legitimate conclusions that one can draw from this abandonment of Bossier II is that there will now be a more vigorous insistence by DOJ on exacting compliance with both prongs, a newly defined version of retrogression and a separate test for discriminatory purpose.

When the Supreme Court decided Georgia v. Ashcroft,[149] a majority 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." Among the legitimate conclusions that one can draw from this rejection of Georgia v. Ashcroft is that Congress in authorizing and extending Section 5 intended to repudiate what that case stood for. One may thus anticipate that this repudiation of Georgia v. Ashcroft's lenience in not preventing covered jurisdictions from partially dismantling majority-minority districts signals something quite different, in fact, something that is opposed to allowing covered jurisdictions to reduced minority voting age population in majority-minority districts. This rejection of Georgia v. Ashcroft by Congress, and the DOJ's subsequent effort to implement in its regulations guidance for covered jurisdictions regarding when they may and may not reduce minority VAP in a majority-minority district, may signal a renewed emphasis upon racial maximization, this time with a slightly different formulation. Under the April 15, 2011 Revision of Voting Rights Procedures, a Section 5 submission with respect to which DOJ finds an indeterminate number of "relevant factors"[150] and "additional factors"[151] for redistricting plans, may be found to have a discriminatory purpose. The 64 million dollar question is whether such a discriminatory purpose finding will be made if the jurisdiction shows that it (1) proportionately reduced the minority voting age population in majority-minority districts, (2) the demographic makeup of those districts has been transformed by urban to suburban migration of significant segments of minority groups, and (3) the jurisdiction's electoral history reveals a greater likelihood of significant minority electoral influence and minority electoral success through

minority influence and coalition districts. Such a jurisdiction will still have to carry a heavy burden of proof to convince DOJ that safe districts with a reduced minority voting age population can nonetheless provide a fair and equal opportunity for minority voters in concert with white crossover votes to elect candidates of their choice.

To understand the reach and potential application of the April 15, 2011 Revision, one need look no further than Section 51.59. Entitled "Redistricting plans," this section sets forth in subsection (a) a number of factors in addition to those "relevant factors"[152] listed in Section 51.57 that the Attorney General will consider in making determinations with respect to Section 5 submissions. The additional factors listed in Section 51.59(a) include "[t]he extent to which minorities are over concentrated in one or more districts."

Section 51.59 (b) is entitled "Discriminatory purpose" and contains a provision strikingly similar to the 2011 Guidance with respect to maximization. It states 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." Until the meaning, scope and intended effect of this regulatory embodiment of Congress's legislative reversal of Georgia v. Ashcroft is fleshed out in the lower courts and ultimately in the Supreme Court, covered jurisdictions will be forced to play a guessing game with the Section 5 Unit of the Civil Rights Division's Voting Section on whether this implies that failure to maximize "plus" one or more other suspect criteria (benignly designated as "relevant factors" and "additional factors") may be the basis for an administrative determination of "discriminatory purpose." Indeed, several covered jurisdictions have already acted on the assumption that the DOJ will seek to return to another iteration of racial maximization, and, like Texas, are either abandoning the less costly but more problematic administrative preclearance route under Section 5, in favor of filing declaratory judgment actions in the United States District Court for the District of Columbia seeking judicial approval of state legislative redistricting plans, or, like Louisiana and Virginia (whose Section 5 submission was recently precleared, leading to dismissal of its declaratory judgment action[153]), have simultaneously pursued administrative preclearance through a Section 5 submission and a declaratory judgment action in the District Court for D.C., decisions that have predictably evoked criticism from the left.[154]

Rather than adhere to Justice O'Connor's hopeful observation in Georgia v. Ashcroft,[155] that the VRA's purpose "is to foster our transformation to a society that is no longer fixated on race," are we witnessing the early stages of a reinvigorated Justice Department's effort to implement a revised, more race-based standard for Section 5 review that is based on an explicit rejection of Georgia v. Ashcroft? Rather than heed Chief Justice Roberts' pragmatic observation that the most effective way to prevent discrimination on the basis of race is to stop propagating laws that discriminate on the basis of race,[156] are

we on the cusp of a renewed effort by a re-staffed Justice Department poised to warn covered jurisdictions that it will be more favorably predisposed to preclear the sordid products of race-conscious redistricting in furtherance of increasingly non-competitive majority-minority districts, and that it is prepared to do so without regard to the demonstrated need for such districts to ensure minority voters equal electoral opportunity and in some cases without regard to traditional districting principles?

Instead of breathing life into the Court's tentative embrace of the revolutionary idea that race has become less of a factor in the American electoral process,[157] do these new Section 5 Regulations and the 2011 Guidance signal an intent by a more robust Justice Department to withhold preclearance in the event covered jurisdictions fail to adopt the "maximum possible number" of majority-minority districts, provided there are present one or more of the dozens of "relevant" factors and "additional" factors enumerated in its April 15, 2011 Revision? Are we on the verge of witnessing a pattern of formal objections to Section 5 submissions based upon failure to maximize? One likely scenario may involve a redistricting plan submitted by a covered jurisdiction that has reduced or eliminated safe seats for minority candidates. If that jurisdiction has experienced (1) significant residential integration, (2) substantial and reliably recurring white crossover voting, and (3) a recurrent pattern of electoral success by minority-preferred candidates, can we anticipate that such a plan nonetheless will be perceived by DOJ as decreasing the minority's ability to elect their candidate of choice? Can we anticipate that such a plan will be denied Section 5 preclearance and branded as one based on a discriminatory purpose, submitted by a racially motivated jurisdiction? Time, as they say, will tell.

Conclusion

Courts will continue to grapple with the standards and benchmarks for acceptable statistical estimates of racial polarization and significant racial bloc voting, the most crucial piece of evidence in voting rights litigation. Applying nuanced concepts of population equality and electoral equality, the courts with some assistance from the U.S. Census Bureau are close to resolving the knotty questions over college student inclusion and prisoner exclusion from census counts, both of which could skew a given jurisdiction's electoral districting system if not handled in a principled manner. The courts' treatment of such problematic population groups may provide a more informed and principled approach to the growing issue of how to account for undocumented aliens in our electoral system.[158]

Finally, "safe" districts, whether referred to by that name or by coalition, crossover or *majority-minority control districts* as some experts label them,[159] are not sacred cows. Even the most ardent supporters of the VRA have conceded that "majority minority districts quarantine poor blacks in inner-city ghettos,"[160] and the lack of competitiveness in such districts is as extreme as in politically gerrymandered districts skewed to such a partisan extreme as to eliminate candidates from the opposing party. Minority voters who are able to combine their voting strength with a predictable number of white

crossover votes to secure electoral success for their candidate of choice, regardless of whether that candidate is of the same race or ethnicity, have the ability to elect and the equal opportunity to participate in the electoral process that the Voting Rights Act guarantees. Anything less than such an ability to elect is illusory, but anything more is on no higher ground than a rigged election. Democracy is not about guaranteed electoral outcomes.

The core value of the VRA's guarantee was originally intended to be assurance to minority groups that they would enjoy equal access to the political process and equal electoral opportunity. Through a series of administrative regulations and aggressive enforcement, aided at times with judicial interpretations of key provisions of the Act by some lower courts, however, the nation witnessed over a decade of enforced emphasis on equal electoral *results* virtually guaranteed by racially saturated, racially maximized, and racially gerrymandered electoral districts. The pendulum predictably swung back to the center, however, as supermajority race-based districts were dismantled in part through evenhanded application of the Equal Protection Clause of the 14th Amendment beginning with Shaw v. Reno. With the current Administration's renewed commitment to aggressive enforcement of the 2006 Amendments to the VRA, however, the pendulum may swing back to the left of center as a newly invigorated Justice Department embarks on enforcement of what it interprets to be key guarantees under the VRA, guarantees that again may confuse equal opportunity with equal, racially identified results through automatic invocation of "safe" minority seats or supermajority districts at both the liability and remedy stages of redistricting litigation.

The American public is tiring of the partisan bickering that has contributed to persistent gridlock, brinksmanship and a political theology based on "ready, shoot, aim." There is a window of opportunity that will not remain open indefinitely as the body politic attempts to bring a greater degree of balance back to our governmental processes and fundamental governance. And yes, there is still hope that such balance can be achieved through the irresistible tug of political coalition-building and the energetic tendency of voters and diverse groups of voters to pull, haul and trade in the marketplace of political ideas. Our melting pot of a political system has the potential to obviate the need to create "safe" or majority-minority control districts in favor of encouraging the creative building of bridges through viable minority influence districts and crossover districts.[161]

ENDNOTES

[1] John Hardin (Jack) Young, Forward to J. Gerald Hebert, Paul M. Smith, Martin E. Vandenberg and Michael B. DeSanctis, The Realist's Guide to Redistricting – Avoiding the Legal Pitfalls (2d.ed 2010 ABA Section of Administrative and Regulatory Practice).

[2] Baker v. Carr, 369 U.S. 186 (1962), Westbury v. Sanders, 376 U.S. 1 (1964), and Reynolds v. Sims, 377 U.S. 533 (1964).

[3] Justice Felix Frankfurter coined this phrase in his concurring opinion in Colegrove v. Green, 328 U.S. 556 (1946), when he expressed his reluctance for the courts to get involved in providing relief for legislative malapportionment, noting at 555: "Courts ought not to enter this political thicket." The continuing vitality of Reynolds was recently noted in a one person, one vote decision involving efforts to force a state legislature to accelerate and conclude the legislative reapportionment process in the same year that decennial census data had been released. In Miss. State Conf. of the NAACP v. Barbour, 2011 U.S. Dist. LEXIS 52822, at *23-24 (S.D. Miss. May 16, 2011), appeal pending, the three-judge court in observed that "[i]n the wake of Reynolds, courts generally have accepted that some lag-time between the release of census data and the reapportionment of a state's legislative districts is both necessary and constitutionally acceptable, even when it results in elections based on malapportioned districts in the years that census data are released. See, e.g., Fairley v. Forrest County, Mississippi, 814 F. Supp. 1327 (S.D. Miss. 1993); Ramos v. Illinois, 781 F. Supp. 1353 (N.D. Ill. 1991), aff'd, 976 F.2d 335 (7th Cir. 1992)…. [W]e cannot conclude that a temporary delay in the implementation of new census data, as contemplated by the application of Section 254 to the facts of this case, renders the State's reapportionment policy unconstitutional. We therefore hold that federal interference in the Mississippi legislative redistricting process is premature at this time."

[4] The VRA's enactment came on the heels of Selma's "Bloody Sunday." Oracle ThinkQuest, http://library.thinkquest.org/CR0214523/selmamarch.htm; Selma-to-Montgomery March, http://www.nps.gov/nr/travel/civilrights/al4.htm. See Steven F. Lawson and Charles Payne, Debating the Civil Rights Movement 1945-1968 at 32-33 (2d. ed. 2006 Rowman & Littlefield Pub.)("Although demonstrations in Selma did not create the voting rights bill, they sped up its timetable and ensured that it would contain provisions strong enough to accomplish at long last the goal of enfranchisement. That it did.")

[5] NAMUDNO v. Holder, 129 S.Ct. 2504, 2511 (2009) (Roberts, C.J.).

[6] In 1975, the VRA was amended to include language minority assistance provisions, Pub. L. No. 94-73, 89 Stat. 400 (1975), prohibiting jurisdictions from conducting English-only elections if they had prescribed levels of limited-English proficient citizens of voting age. While beyond the scope of this chapter, the key enforcement mandate is set forth in sections 4(f)(4) and 203 of the VRA, and an excellent historical analysis is provided by James Thomas Tucker, Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act, 10 N.Y. J. Legis. & Pub. Pol. 195 (2006).

[7] Beer v. United States, 425 U.S. 130, 141(1976).

[8] Beer clarified the meaning and scope of the nonretrogression principle as a tool to fight voting discrimination. As Bernard Grofman has noted in Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control, 5 Elec. L. J. 250 n. 2 (2006), up until the Supreme Court's decision in Georgia v. Ashcroft, Beer "was the governing interpretation of how the retrogression standard for Section 5 of the Voting Rights Act was to be operationalized" and that interpretation "was in terms of (expected versus previous) descriptive representation." Id. See n. 10, *infra*.

[9] Id.

[10] The Court altered Beer's retrogression standard in two respects. First, it directed that minority voting strength be assessed in the context of total, overall voting strength, rather than in isolation as under Beer, and suggested that minority voting strength could be enhanced by white crossover votes, thereby assessing the combined voting strength when evaluating a minority population's voting strength. Georgia v. Ashcroft, 539 U.S. at 479,486). This meant that when a candidate supporting minority interests was elected from a district through support of a coalition of black *and* white voters, that district could fairly be treated as one that contributed to minority voting strength, regardless of whether minority voters preferred that candidate over other candidates. Second, the Court defined Beer's core concept of "effective exercise of the electoral franchise" in terms that were broader than mere ability to elect, reasoning that "a court or the Department of Justice should assess the totality of circumstances in determining

retrogression" and in doing so should consider such relevant circumstances as "the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." Id. at 479, 484. The Court thus compared the new plan in Georgia v. Ashcroft with the benchmark plan as a whole, suggesting that creation of districts where minorities could have electoral influence might suffice to offset reductions in minority voting strength in other districts sufficiently enough to merit Section 5 preclearance. "In other words, the Court found that the minority's decreased ability to elect their candidate of choice was not dispositive in a Section 5 inquiry." Kyle Faget, *Georgia v. Ashcroft - A New Statistical Model*?, 13 Geo. Pub. Pol'y Rev. 45 (2008), citing Georgia v. Ashcroft, supra at 480.

[11] 42 U.S.C.§1973(a).

[12] 42 U.S.C. §1973(b).

[13] S.Rep. No. 97-417, at 27 (1982).

[14] Michael J. Pitts, The Voting Rights Act and the Era of Maintenance, 29 Ala.L.Rev. 903, 984 (2008).

[15] *Id*. at 984.

[16] 478 U.S. 30 (1986).

[17] Thornburg v. Gingles, 478 U.S. 30 50-51, 106 S.Ct. 2752, 92 L.Ed 2d 25(1986).

[18] S.Rep. No. 97-417, at 28-29. The seven Senate Report factors are: (1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process; (2) The extent to which voting in the elections of the state or political subdivision is racially polarized;(3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;(4) If there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) Whether political campaigns have been characterized by overt or subtle racial appeals; (7) The extent to which members of the minority group have been elected to public office in the jurisdiction. The Senate Report also recognized two less significant, but sometimes relevant, factors that in some cases warrant consideration as part of Section 2 plaintiff's evidence to establish a violation: (8) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group, and (9) Whether "the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice of procedure is tenuous."

[19] Johnson v. DeGrandy, 512 U.S. 997, 1014 n.11 (1994).

[20] United States v. Charleston County, 316 F.Supp.2d, 268, 291(D.S.C. 2003), aff'd, 365 F.3rd 341 (4th Cir. 2004).

[21] United States v. Euclid City School Board, 632 F.Supp.2d 740, 749 (N.D.Ohio 2009).

[22] SCLC v. Evans, 785 F. Supp. 1469, 1473 (M.D. Ala. 1992).

[23] Gonzalez v. City of Aurora, 535 F.3d 594, 598 (7th Cir. 2008).

[24] 548 U.S. 399, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006).

[25] 548 U.S. 399, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006), citing Shaw v. Hunt, 517 U.S. 899, 917, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996).

[26] Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence, 90 Mich.L.Rev. 1833, 1851 (1992).

[27] See Richard H. Pildes, Is Voting Rights Law Now at War With Itself? Social Science and the Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1563 (2002).

[28] Ecological inference refers to "the statistical process of drawing inferences about individuals from aggregate data." Bruce M. Clarke & Robert Timothy Reagan, Fed. Judicial Ctr., Redistricting Litigation: An Overview of Legal, Statistical, and Case-Management Issues 53 (2002); Ecological regression is one method for drawing such inferences and has been called the "standard technique" most commonly used in voting rights cases. See Reed v. Town of Babylon, 914 F.Supp. 843, 851 (E.D.N.Y.1996);

[29] 871 F.2d 529, 539 n. 12 (5th Cir.1989).

[30] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 69 (D. D.C. 2002*), rev'd*, 539 U.S. 461, 474 (2003).

[31] 42 U.S.C. § 1973(b).

[32] 40 F.3d 807, 812-13 (6th Cir.1994), cert. denied, 514 U.S. 1109, 115 S.Ct. 1960, 131 L.Ed.2d 851 (1995).

[33] 883 F.2d 1232, 1240 (4th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990).

[34] Id. at 816 (Boggs, J., Conc. Op.).

[35] 129 S. Ct. 1231 (2009).

[36] D. James Greiner, Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot, 86 Ind.L.J. 447, 456 (2011), citing Strickland at 1246.

[37] Id.

[38] 40 F.3d 807, 817 (6th Cir.1994)(Boggs, J., Conc. Op.).

[39] See generally Levy v. Lexington County, 589 F.3d 708, 719 (4th Cir. 2009) (Where district court failed to articulate why it preferred one expert's data based on his "eyeball method" over the other expert's method of analysis, other than the fact that one used more analytical methods than the other, the 4th Circuit concluded that there was an insufficient basis for appellate review of the district court's findings, noting that while "absolute perfection on the base statistical data is not to be expected, a trial court should not ignore the imperfections of the data used nor the limitations of statistical analysis," citing Overton v. City of Austin, supra.

[40] United States v. Euclid, 580 F. Supp. 2d 584, 596 (N.D. Ohio 2008).

[41] 99 F. 3d 600 (4th Cir. 1996).

[42] Gingles, 478 U.S. at 68.

[43] Alamance, 99 F.3d at 612.

[44] 589 F.3d 708, 716 (4th Cir. 2009).

[45] Levy v. Lexington County, supra at 717, citing Collins II, 99 at F.3d at 614 n.11.

[46] 521 U.S. 74 (1997).

[47] Abrams v. Johnson, 521 U.S. at 92. See D. James Greiner, Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot, 86 Ind.L.J. 447, 456 (2011).

[48] 580 F.Supp.2d 584, 596 (N.D. Ohio 2008).

[49] United States v. City of Euclid, 580 F.Supp.2d 584, 596 (N.D. Ohio 2008).

[50] United States v. City of Euclid, supra at 595.

[51] See, e.g., Johnson v. Miller, 864 F.Supp. 1354, 1391 (S.D. Ga. 1994) (relying on reconstituted election analysis). Id. at 594 n. 10.

[52] Rodriguez v. Bexar County, Texas, 385 F. 3d 853, 861 (5th Cir. 2004) ("This method of aggregation allows a researcher to determine how an individual candidate performed within the boundaries of the target district even though the actual election covered a different geographical area."). See also Johnson v. Miller, 864 F. Supp. 1354, 1391 (S.D. Ga. 1994) ("Statistically speaking, reconstituted election results from precincts within a certain district, actual prior election results from a certain district, and frequency distributions are the primary methods used to estimate the percentages needed to give [minority] voters an equal opportunity to elect a candidate of their choice."), aff'd, Miller v. Johnson, 515 U.S. 900 (1995).

[53] 201 F. Supp. 2d 618 (D. S.C. 2002).

[54] Id. at 643.

[55] Probit analysis was used by Dr. Epstein in Georgia v. Ashcroft, 539 U.S. 461, 473 (2003) and implicitly condoned by the U.S. Supreme Court, Kyle Faget, GEORGIA V. ASHCROFT: A New Statistical Model? 13 Geo. Public Pol'y Rev. 45 (2008), giving rise to predictions that it may alter significantly future voting rights litigation when adopted or applied by lower courts. At issue in Ashcroft were several redistricting plans previously approved by the Democratically-controlled Georgia General Assembly, Act of 2002 Ga. Laws 444, codified as amended at Ga. Code Ann. §28-2-2(West 2006). The State of Georgia petitioned the United States District Court for the District of Columbia for a declaratory judgment approving the plans, arguing that probit analysis supported the lawfulness of the redistricting plan under the federal Voting Rights Act, Georgia v. Ashcroft, 195 F. Supp. 2d 25, 66-68 (D.C. Cir. 2002). The District Court found the plan impermissible because it reduced the likelihood that minority voters in some districts would be able to elect their candidate of choice. Id., 195 F. Supp. 2d at 31. The Supreme Court, however, reversed, holding that the Georgia plan did not "deny or abridge the right to vote on account of race or color," because, overall, it promoted minority voting strength. Georgia v. Ashcroft, 539 U.S. at 487.

[56] 195 F. Supp. 2d 25 (D. D.C. 2002), rev'd, 539 U.S. 461, 474 (2003).

[57] Id., 195 F. Supp. 2d at 66-68.

[58] Id., 195 F. Supp. 2d at 66-68.

[59] Bartlett v. Strickland, 129 S.Ct. 1231, 1244 (2009)(suggesting possibility that 20% white crossover voting is inconsistent with racial bloc voting).

[60]Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, providing that an alien who votes in violation of any federal, state, or local statute or regulation can be deported. IIRAIRA is considered "harsh, massive anti-immigration legislation" by those on the left, Socheat Chea, Highlights of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996: Tolerance No More, http://library.findlaw.com/1999/Jun/1/127033.html, and a godsend for those on the right.

Inclusion of a large amount of undocumented immigrants in the 2010 Census for the State of Texas has recently triggered a constitutional challenge that was recently filed against the Texas Legislature and U.S. Census Bureau in *Teuber v. State of Texas* http://www.redistrictingonline.org/uploads/TeuberBurgGrundenvtexas_1.pdf. Plaintiffs are seeking to enjoin use of 2011 census redistricting data on the grounds that it includes a substantial amount of noncitizens that are unable to vote, and allege that including undocumented immigrants in the U.S. census data used for redistricting denies the plaintiffs of their rights under the Constitution, § 2 of the Voting Rights Act and the Texas state constitution. The plaintiffs claimed that because a large amount of undocumented immigrants "tend to reside in areas where Hispanic citizens also reside," those congressional and legislative districts have a substantially smaller population of actual voters compared to others since districts are formed based on total population, thereby unfairly diluting the voting strength of voters residing in districts without a significant population of nonvoting undocumented immigrants in violation of the 'one man, one vote' principle. Aside from Texas, according to FAIR (Federation for American Immigration Reform), charges of ineligible, non-citizen voting have been made in several federal elections in California and twice in Florida. Non-Citizen Voting in Federal Elections, at n. 3 & 4, http://www.fairus.org/site/News2?page=NewsArticle& id=16957&security=1601&news_iv_ctrl=1010#_ednref. A representative from Florida reportedly said in a post-9/11 interview that "one of the guys that flew into the buildings in New York had voted in Florida." "Putnam Opposed Voting Reform Act," Lakeland, Florida Ledger, December 17, 2001. Non-Citizen Voting in Federal Elections, at n.2, http://www.fairus.org/site/News2?page=NewsArticle&id=16957&security=1601&news_iv_ctrl=1010#_edn2.

In March 2011, following a joint investigation by ICE's Homeland Security Investigations, an illegal alien from the Philippines was charges with 17 counts of perjury, mutilation of election materials and tampering with voting machines in connection with illegal voting by a non-U.S. citizen, after she admitted to a U.S. Citizenship and Immigration Services officer during an interview for an immigration benefit that she had voted in an election. Later investigation revealed she had voted nine times in primary, general and consolidated elections between 2003 and 2009 and had falsely claimed to be a U.S. citizen on two Illinois voter registration applications. Illegal alien arrested, charged with voter fraud, News Release by U.S. Immigration & Customs Enforcement, March 17, 2011, http://www.ice.gov/news/releases/1103/110317lakecounty.htm.

 In Colorado, the Department of State recently compared the state's voter registration database with driver's license records to determine whether non-citizens are registered to vote in the state, and the comparison identified 11,805 individuals who were registered to vote and were non-citizens at the time they obtained a driver's licenses. Tony Lee, Thousands of Illegal Aliens Voted in Colorado, Human Events, April 6, 2011, http://www.humanevents.com/article.php?id=42729.

Hyperbole and outrage attend much of this debate – on both sides. See, e.g., Jim Kouri, Voter Fraud: Illegal Alien Voters Ignored by Justice Department, Accuracy in Media, Oct. 29, 2010, http://www.aim.org/guest-column/voter-fraud-illegal-alien-voters-ignored-by-justice-department/("But the dirty little secret is there exists an enormous amount of proof that illegal aliens are being registered to vote and they're being registered as Democrats. And our political leaders know it…. Many government officials — mostly liberals — claim that illegal aliens voting is not a major problem, conservative activists respond that while the potential number identified may be small, an election can be decided by a few votes.") and Elise Foley, More Claims of Voter Fraud by Illegal Immigrants, The Washington Independent, Nov. 1, 2010, http://washingtonindependent.com/102203/more-claims-of-voter-fraud-by-illegal-immigrants ("[T]he idea of widespread efforts by undocumented immigrants to vote could easily lead to voter intimidation. Ban Amnesty Now, an anti-illegal immigration group, sent out an email signed by Maricopa County, Ariz., Sheriff Joe Arpaio asking volunteers to man the polls to watch for illegal immigrants trying to vote. Arpaio said he did not give the group permission to send the email in his name and cut his ties to the group, of which he was previously co-chairman. In Texas, the King Street Patriots have been accused of hovering over

voters, particularly minorities, while observing at the polls. These groups are theoretically only trying to prevent illegal immigrants from voting, but progressive groups say they could keep Latinos and other minorities from voting. Latino voters could have a major impact on a number of races but have been targeted by ads that urge them not to vote.")

[61]Nathaniel Persily, The Law of the Census: How to Count, What to County, Whom to Count, and Where to Count Them, 2011Cardozo L.Rev. De Novo 755, 785-86 (2011); Edwin D. Goldfield and Daivd M. Pemberton, 1950 Census, in Encyclopedia of the U.S. Census 143 (Margo J. Anderson, Ed., 2000).

[62] 449 F.2d 575, 579 (3rd Cir. 1971). See Note, Student Voting and Apportionment: The "Rotten Boroughs" of Academia, 81 Yale L.J. 35 (1971).

[63] Id. at 580-81. See Nathaniel Persily, The Law of the Census: How to Count, What to County, Whom to Count, and Where to Count Them, 2011Cardozo L.Rev. De Novo 755, 785-86 (2011).

[64] Id. at 786. The decision to apply the usual residence rule to students can also serve as a template governing how the census counts other populations, such as prison inmates.

[65] Burns v. Richardson, 384 U.S. 73, 91-92 (1996).

[66]584 F.3d 660, 672 (5th Cir. 2009). Accord, Jolicoeur v. Mihaly, 5 Cal.3d 565, 488 P.2d 1, 96 Cal.Rptr. 697 (1971); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Worden v. Mercer County Bd. of Elections, 61 N.J. 325, 294 A.2d 233 (N.J. 1972)(bona fide resident students held entitled to vote in their college or university communities and could not be subjected as a class during the voter registration process to questioning beyond that to which other applicants were subjected). See also Singer, Student Power at the Polls, 31 Ohio St.L.J. 703, 714 (1970); Guido, Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment, 47 N.Y.U.L.Rev. 32, 36 (1972).

[67] 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).

[68] 384 U.S. 73, 91-92 (1966).

[69] 493 F.2d 598 (5th Cir. 1974).

[70] Fairley, 493 F.2d at 602-03.

[71] 2010 U.S. Dist. LEXIS 3075, at *11-12.

[72] John C. Keeney, Felon Disfranchisement, America Votes! A Guide to Modern Election Law and Voting Rights 91(ABA 2008)

[73] http://www.prisonersofthecensus.org/news/2011/02/23/preventing/

[74] 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

[75] 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

[76] Part XX of the New York revenue budget A9710-D was signed by Governor Patterson on August 11, 2010, and provides that in each federal decennial census in which the Census Bureau does not implement a policy of reporting incarcerated persons at each such person's residential address prior to incarceration, the state correctional services department must provide to the New York State Task Force on Demographic Research and Reapportionment specific information for each incarcerated person subject to the its jurisdiction and located in the state as of the April 1 date for which the decennial census reports population, including "(i) A unique identifier, not including the name, for each such person; (ii) The street address of the correctional facility in which such person was incarcerated at the time of such report; and (iii) The residential address of such person prior to incarceration. New York Prison Gerrymandering Bill, http://www.prisonersofthecensus.org/NYS_A9710-D.html. In April 2011, state senators and others seeking to enjoin enforcement of the new legislation filed a state court civil action, Senator Elizabeth O'Connor Little et al v. New York State Task Force on Demographic Research and Reapportionment et al, New York Supreme Court, Albany County, No. 2310-211, in which the plaintiffs alleged that the new law effectively moves "a phantom population of almost 58,000 non-voting prisoners into residences already occupied by others, and from upstate Republican districts to downstate New York City Democratic districts which constitutes political

gerrymandering," and further charge that a portion of the law violates the state constitution, dilutes the votes of certain communities, and enhances the voting power of others. See Jennifer Golson, *Rights groups ask court to join prisoner-redistricting suit,* May 27, 2011 (Thomson Reuters), accessible online at http://newsandinsight.thomsonreuters.com/New_York/News/2011/05_-May/Rights_groups_ask_court_to_join_prisoner-redistricting_suit/ and http://naacpldf.org/news/rights-groups-ask-court-join-prisoner-redistricting-suit. On May 17, 2011, the NAACP Legal Defense Fund (LDF), the Brennan Center for Justice, the Center for Law and Social Justice, Dēmos, LatinoJustice PRLDEF, the New York Civil Liberties Union, and the Prison Policy Initiative, moved to intervene on behalf of New Yorkers whose voting rights are directly impacted by the plaintiffs' challenge. According to counsel for the NAACP LDF, the issue in the case is not money, but fairness in the democratic process, and failing to count prisoners as residents of those mostly minority communities equal representation. Noting that 98% of the prisons in the state are located in disproportionately white Senate districts, the intervenors have responded to the plaintiffs' charge of political gerrymandering by pointing out that the plaintiffs are seeking to count inmates where they are imprisoned, a practice which "artificially inflates the voting strength of those who live in districts where prisons are located, and dilutes the voting strength of every New Yorker who lives in a district that does not house a state prison." Case Update: Little v. LATFOR, May 17, 2011, http://naacpldf.org/case-issue/little-v-latfor

Moreover, under state law persons convicted of felony offenses and held in state prisons are not eligible to vote. As a result, Ho noted that prisoners are not constituents of those districts, and "legislators who represent that community don't represent incarcerated people."

[77] With many prisons having been built in North Florida during the past decade, that state's approximately 82,000 prison inmates may play a significant role in its redrawing of political boundaries based on the 2010 decennial census. According to The Prison Policy Initiative, Gulf County, Florida has two new prisons that account for a large percentage of its 13,000 residents, and a prison built in Gadsden County, Florida could indirectly result in changing state legislative boundaries that affect Tallahassee and other Big Bend counties. In light of August 2001 opinions by the Attorney General of Florida that county commissions and school boards must include prisoners when redistricting, the impact of prison gerrymandering may be felt on the local government level in redistricting as well as on the state legislative level. L.A. Progressive, July 18, 2011, http://www.laprogressive.com/law-and-the-justice-system/prison-based-gerrymandering/

[78] 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

[79] Editorial, *An End to Prison Gerrymandering*, New York Times, August 22, 2010, http://www.nytimes.com/2010/08/23/opinion/23mon3.html

[80] Id.

[81] Id.

[82] 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.") See also Caren E. Short, "Phantom Constituents": A Voting Rights Act Challenge to Prison-Based Gerrymandering, 53 How.L.J. 899 (Spring 2010) (substantive discussion of the Census Bureau's practice of counting prisoners as residents of the town in which their prisons are located) (hereinafter "Phantom Constituents").

[83] "Phantom Constituents," supra n. 57, at 902-03.

[84] 449 F.3d 305 (2nd Cir. 2006).

[85] "Phantom Constituents," supra n. 57, at 939-44.

[86] NAACP LDF Report, cited at http://www.laprogressive.com/law-and-the-justice-system/prison-based-gerrymandering/

[87] The term "majority-minority control district" was coined by Professor Bernard Grofman in *Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control*, 5 Election Law Journal 250, 254 (No. 3, 2006), http://www.socsci.uci.edu/~bgrofman/143%20Grofman-Operationalizing%20Section%205%20Retrogressiion%20Standard.pdf

[88] Cf. Michael J. Pitts, Redistricting and Discriminatory Purpose, 59 Am. U. L. Rev. 1575, 1604 n. 134 (2010) (noting that the Supreme Court has referred to at least five types of electoral districts: "safe," "majority-minority," "coalition," "cross-over," and "influence." See generally Bartlett v. Strickland, 129 S. Ct. 1231 (2009); Georgia v.

Ashcroft, 539 U.S. 461 (2003). For purposes of Section 5 …, it makes the most sense to distinguish between two types of districts: "ability to elect" and "influence." An "ability to elect" district is what the Court might term a "safe," "majority-minority," "coalition," or "cross over" district…. In these "ability to elect" districts, minority voters control electoral outcomes either by being able to control the outcome (by forming a majority of the electorate) of both the primary and general election or by being able to control the outcome of the primary election and then having the candidate they selected in the primary go on to victory at the general election because of a predictable number of crossover votes from white voters. In ability to elect districts, minority voters almost always secure "descriptive" representation in that the winning candidate in the district will typically be of the same race or ethnicity as the minority voters who control electoral outcomes. See Ashcroft, 539 U.S. at 480-81 (O'Connor, J., concurring) (describing how "safe" districts operate);…. In contrast, an "influence" district is one where minority voters do not have the ability to control the outcome (i.e., form a majority of the electorate) of either the primary or general election, but have a significant enough amount of the population that they might theoretically play a role in swinging an election one way or another. …In these "influence" districts, what theoretically will happen is that a white Democrat wins in the primary and defeats a white Republican in the general election.")

[89] Cf. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977)("A staff member of the legislative reapportionment committee testified that in the course of meetings and telephone conversations with Justice Department officials, he 'got the feeling … that 65 percent would be probably an approved figure' for the nonwhite population in the assembly district in which the Hasidic community was located. …").

[90] Kristen. Clarke, The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation, 3 Harv. L. & Pol'y Rev. 59, 84 (2009).

[91] Ellen D. Katz, Engineering the Endgame, 109 Mich. L. Rev. 349, 386 (2010).

[92] Michael J. Pitts, The Voting Rights Act and the Era of Maintenance, 59 Ala. L. Rev. 903, 983-84 (2008).

[93] Jacob Whitted, Bartlett v. Strickland: The Crossover of Race and Politics, 87 Denv. U. L. Rev. 581, 597-98 (2010).

[94] Jacob Whitted, Bartlett v. Strickland: The Crossover of Race and Politics, 87 Denv. U. L. Rev. 581, 598 (2010).

[95] 444 U.S. 1050 (1980).

[96] Id.

[97] 740 F. 2d 1398, 1413-15 (7th Cir. 1984).

[98] 141 F. 3rd 699 (7th Cir. 1998).

[99] 536 U.S. 461, 480 (2003).

[100] Citing Thornburg v. Gingles, 478 U.S. 30, 47-50, 106 S.Ct. 2752 (1986)).

[101] United States v. City of Euclid, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

[102] Id.

[103] Id. at 596 n. 15.

[104] Shaw v. Reno, 509 U.S. 630 (1993).

[105] A redistricting plan may be subject to constitutional challenge under the Equal Protection Clause of the 14th Amendment if it can be shown "that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." Shaw v. Reno, 509 U.S. 630, 649, 113 S.Ct. 2816, 2828, 125 L.Ed.2d 511 (1993). In order to make such a showing, the plaintiff must establish that "race was the predominant factor motivating the legislature's decision," and that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Miller v. Johnson, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995). If race is determined to be the predominant, overriding factor in a redistricting plan, it will be subject to "strict scrutiny," which requires it to be "narrowly tailored to achieve a compelling state interest." Id. at 904, 115 S.Ct. at 2482.

[106] Id. at 647.

[107] Id. at 657.

[108] Id. at 657.

[109] Id. at 642.

[110] Id. at 647.

[111] Kristen. Clarke, <u>The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation</u>, 3 Harv. L. & Pol'y Rev. 59, 69 (2009).

[112] Id. at 69.

[113] See generally D. James Greiner, <u>Ecological Inference in Voting Rights Act Disputes: Where Are We Now, And Where Do We Want To Be</u>?, 47 Jurimetrics J. 115, 116-17 (Winter 2007) ("After *Thornburg v. Gingles* noted a district court finding that two particular techniques (commonly called bivariate ecological regression and homogenous precincts) were 'standard in the literature for the analysis of racially polarized voting.' Judicial discussion of the issue largely ceased….").

[114] Kristen. Clarke, <u>The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation</u>, 3 Harv. L. & Pol'y Rev. 59, 65-66 (2009).

[115] Id. at 85.

[116] http://www.gmcl.org/maps/mississippi/state.htm

[117] http://www.gmcl.org/maps/national/federal.htm

[118] http://www.gmcl.org/maps/alabama/federal.htm

[119] http://www.gmcl.org/maps/georgia/federal.htm

[120] http://www.gmcl.org/maps/south_carolina/federal.htm

[121] http://www.gmcl.org/maps/north_carolina/federal.htm

[122] http://www.gmcl.org/maps/louisiana/federal.htm

[123] http://www.gmcl.org/maps/texas/federal.htm

[124] http://www.gmcl.org/maps/florida/federal.htm

[125] http://www.gmcl.org/maps/tennessee/federal.htm

[126] http://www.gmcl.org/maps/virginia/federal.htm

[127] http://www.gmcl.org/maps/newyork/federal.htm

[128] http://www.gmcl.org/maps/massachusetts/federal.htm

[129] http://www.gmcl.org/maps/connecticut/federal.htm

[130] http://www.gmcl.org/maps/new_jersey/federal.htm

[131] http://www.gmcl.org/maps/ohio/federal.htm

[132] http://www.gmcl.org/maps/pennsylvania/federal.htm

[133] http://www.gmcl.org/maps/maryland/federal.htm

[134] http://www.gmcl.org/maps/michigan/federal.htm

[135] http://www.gmcl.org/maps/california/federal.htm

[136] Gender and Multicultural Leadership: The Future of Governance http://www.gmcl.org/index.htm. \; see generally William H. Frey, <u>Immigration and the Coming "Majority Minority"</u>, The Brookings Institution, December 18, 2009 http://www.brookings.edu/opinions/2009/1218_immigration_frey.aspx (there are now four states and a slew of cities with minority-majority populations, and realistic census projections push the minority majority tipping point to 2050).

[137] William H. Frey, <u>A Pivotal Decade for America's White and Minority Populations</u>, State of Metropolitan American, No. 28, March 25, 2011 http://www.brookings.edu/opinions/2011/0325_census_demographics_frey.aspx

[138] William H. Frey, Census Data: Blacks and Hispanics Take Different Segregation Paths, State of Metropolitan America, No. 21, December 16, 2010 http://www.brookings.edu/opinions/2010/1216_census_frey.aspx.

[139] 509 U.S. 630 (1993).

[140] David G. Savage, *Justice Department walks a line on political redistricting*, August 16, 2011, Tribune Washington Bureau, http://www.miamiherald.com/2011/08/16/2361354_p2/justice-department-walks-a-line.html#ixzz1WG2ORmWo

[141] Id.

[142] 509 U.S. 630 (1993).

[143] Cynthia Tucker, *Voting Rights Act: I was wrong about racial gerrymandering*, June 1, 2011, AJC, http://blogs.ajc.com/cynthia-tucker/2011/06/01/voting-rights-act-i-was-wrong-about-racial-gerrymandering/

[144] Id.

[145] Id.

[146] Id.

[147] Id.

[148] 528 U.S. 320 (1999).

[149] 123 S. Ct. 2498 (2003).

[150]The relevant factors are set forth in the DOJ's Revision of Voting Rights Procedures promulgated April 15, 2011, 28 CFR Parts 0 and 51 [CRT Docket No. 120; AG Order No. 3262–2011], at § 51.57: "Among the factors the Attorney General will consider in making determinations with respect to the submitted changes affecting voting are the following: (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."

[151] The additional factors considered with respect to redistricting plans are set forth in the DOJ's Revision of Voting Rights Procedures promulgated April 15, 2011, 28 CFR Parts 0 and 51 [CRT Docket No. 120; AG Order No. 3262–2011], at § § 51.59: (a) … In determining whether a submitted redistricting plan has a prohibited purpose or effect the Attorney General, in addition to the factors described above, will consider the following factors (among others): (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. (b) Discriminatory purpose. 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."

[152] Supra n. 122.

[153] http://redistricting.lls.edu/states-VA.php#litigation

[154]Republican redistricting strategy limits public input, Facing South, July 21, 2011, http://www.southernstudies.org/2011/07/republican-redistricting-strategy-limits-public-input.html; Texas Seeks Clearance for Political Maps, The Texas Tribune, July 19, 2011, http://www.texastribune.org/texas-redistricting/redistricting/texas-seeks-clearance-for-political-maps/; Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three Judge Court, State of Texas v. United States of America, https://www.oag.state.tx.us/newspubs/releases/2011/071911compliant.pdf; Southern states seek end run around Justice Department over redistricting, Facing South, June 9, 2011, http://www.southernstudies.org/2011/06/southern-states-seek-end-run-around-justice-department-over-redistricting.html; Complaint for Declaratory Judgment Pursuant to Section 5 of the Voting Rights Act of 1965 and Request for Three Judge Court, Louisiana House of Representatives v. United States and Eric Holder, http://house.louisiana.gov/H_Redistricting2011/PCofHB1/Complaint%20for%20Declaratory%20Judgment.pdf; Complaint for Declaratory Judgment and Request for Three Judge Court with Expedited Review, Commonwealth of Virginia v. Holder, http://redistricting.lls.edu/files/VA%20vavholder%2020110519%20complaint.pdf.

[155] 539 U.S. 461, 490 (2003).

[156] Parents Involved v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[157] Bartlett v. Strickland, 129 S. Ct. 1231,1248 (2009) (although discussing Section 2 rather than Section 5, the Court noted "it is not concerned with maximizing minority voting strength.")

[158] Jack Martin, Special Projects Director of FAIR, Who Represents Illegal Aliens?, http://www.fairus.org/site/DocServer/apportion.pdf?docID=2061 (Sept. 2008) (advocating a change in the current apportionment system to reflect only the distribution of U.S. citizens, in order to remove the unequal representation of U.S. citizens in metropolitan areas with a large number of illegal aliens and other "high-illegal alien districts" as compared to U.S. citizens in "low-illegal alien areas" who have a diminished share of representation.").

[159] Bernard Grofman, Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control, 5 Election Law Journal 250, 254 (No. 3, 2006).

[160]Lani Guinier, <u>The Representation of Minority Interests: the Question of Single Member Districts</u>, 14 Cardozo L. Rev. 1135, 1163 (1993).

[161] Lower courts are increasingly willing to recognize that minority influence districts "count in any assessment of vote dilution." See <u>Gonzalez v. City of Aurora</u>, 535 F.3d 594, 600 (7th Cir. 2008) (concluding that Section 2 plaintiffs ignored the fact that several city wards "contain enough Latino citizens to produce substantial influence." Accord, <u>LULAC v. Perry</u>, supra. Cf. <u>Johnson v. De Grandy</u>, 512 U.S. 997, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994).)