BETWEEN A ROCK AND A HARD PLACE:
THE DIFFICULT PASSAGE THROUGH THE SCYLLA OF
THE VOTING RIGHTS ACT AND THE CHARYBDIS OF SHAW

by Benjamin E. Griffith

This is an overview of the redistricting process, and one that is not written upon a clean slate. It traces the journey from the “political thicket” of Baker v. Carr[1] to the “political apartheid” condemned in Shaw v. Reno[2] and its progeny. From 1993 to 2000 we have witnessed a rapid development of a coherent body of racial gerrymandering precedent, from which a number of practice pointers and guidelines for legislative redistricting can be gleaned.

The redistricting process is of paramount concern to legislative bodies and other governmental entities made up of single-member districts and multi-member districts. Distilled to its essence, the redistricting process entails reallocating political power by, first, equalizing district population under the one person, one vote standard of the Fourteenth Amendment, and, second, complying with the non-retrogression command of §5 of the Voting Rights Act, for covered jurisdictions, and the non-dilution standard of §2 of the Voting Rights Act of 1965, as amended.

Sections 2 and 5 of the Voting Rights Act of 1965, as amended, have been called “two of the weapons of the federal government’s formidable arsenal” in the fight against voting discrimination. They combat different evils, and are different in their structure, purpose and application, and they impose different duties upon state and local government bodies.

Understanding that difference is especially important for legislators and attorneys who represent covered jurisdictions, states and their political subdivisions to which §5 applies. And understanding that difference helps explain the level of judicial deference given to legislative preferences, policy choices and political programs of covered jurisdictions.

Nationwide vs. Limited Scope

Compared with the nationwide applicability of §2 and its corresponding broader mandate based on the “results test” legislatively enacted in 1982, §5, with its centralized review procedure for changes in voting, electoral systems and practices, has a much more limited purpose than §2. But it still has quite a bite.

The Starting Point for Redistricting

The orthodox starting point for the redistricting process, in these very unorthodox times, is about one year after the decennial census has been conducted. Since Baker v. Carr, the United States Supreme Court has consistently adjudicated equal protection claims in the context of legislative districting regarding inequalities in population between districts, and has developed and enforced the “one person, one vote” principle. See, e. g., Reynolds v. Sims.[3]

One-Person, One-Vote Standard

The Equal Protection Clause’s guarantee of “one person, one vote” insures that every voter, no matter what district he or she lives in, will have an equal say in electing a representative, and that every person receives equal representation by his or her elected officials. The Court in Reynolds recognized that “the fundamental principle of representative government in this country is one of equal representation for equal
numbers of people, without regard to race, sex, economic status, or place of residence within a State,” and held that “the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.” The Court realized, however, “that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.” Since Reynolds, the Court has refined the parameters for determining when population differences among legislative districts unconstitutionally dilute the votes of the members of the larger districts. In Gaffney v. Cummings, the Court ruled that “minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.” During that same term, the Court emphasized in White v. Regester, “we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation.”

10% Benchmark: Maximum Relative Deviation

The generally recognized benchmark for determining whether a given legislative reapportionment plan violates the one person, one vote standard was set forth in Brown v. Thompson, where the Court stated: “Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.” See also Connor v. Finch. The Court's one person, one vote jurisprudence has thus generally established three levels for determining whether population deviations between voting districts violate the Equal Protection Clause. First, if the maximum relative deviation is less than 10%, the population differential will be considered de minimis and will not alone support a claim of vote dilution. Second, if the maximum relative deviation is greater than 10%, it is prima facie evidence of a one-person, one-vote violation, and the state must justify the population disparity by showing a rational and legitimate state policy for the districting plan. Brown v. Thompson. Third, there is a level of population disparity beyond which a state can offer no possible justification. Although it is not clear precisely what that upper level is, the Court has stated in dictum that a maximum deviation of 16.4% “may well approach tolerable limits.” Mahan v. Howell.

Equal Protection Claim Despite No Population Deviation

The Court has long recognized that “even where there is no population deviation among the districts, racial gerrymandering presents a justiciable equal protection claim.” Davis v. Bandemer. Multi-member as well as single-member districting plans that unconstitutionally diminish the effectiveness of the votes of racial minorities have been challenged and on occasion invalidated.

The forum for effectuating those changes may start out as a legislative reapportionment committee, an administrative body or a judicial forum. For Section 5-covered governmental entities it will be either the Civil Rights Division of the United States Department of Justice or the United States District Court for the District of Columbia, or both. The redistricting process has become increasingly complex since the Supreme Court’s 1993 decision in Shaw v. Reno. Legislative bodies facing the redistricting process for the first time since Shaw must juggle, balance and satisfy the competing requirements of the Voting Rights Act (§2 and §5, if a covered jurisdiction) and the Fourteenth Amendment (one person, one vote standard and the prohibition against racial gerrymandering).

The Forces at Work
Getting a handle on the redistricting process requires that one understand exactly what forces are involved, both on the stage and behind the scenes. Private plaintiffs forged a classic alliance with the Civil Rights Division of the Justice Department during the late 1980's and early 1990's, by which an unwritten but compulsory standard of maximization of minority voting strength surfaced. Coupled with a cohesive and unusually homogenous band of experts conversant in the language of statistical analysis and demographics, the private plaintiffs and Justice Department coalition worked feverishly to compel state and local governmental entities to cordon off identifiable population pools based upon racial classifications, eventually giving rise to the term “safe” minority seats. This same coalition was significantly aided by judicial activists who had no qualms with equating minority participation with minority electoral success.

Maximization and Racial Classification

For the unwashed and unclean who dared question the Justice Department’s rigid demands of minority maximization and creation of the maximum number of minority districts wherever possible, lawyers representing governmental entities sought with very little success to persuade their own federal government to retreat from this slippery slope of persistent racial classification and resegregation based upon skin color.

In the Beginning: Shaw at the Three-Judge Court Level

Finally, armed with a sufficiently egregious case of the State of North Carolina’s Twelfth Congressional District which wound like a gargoyle from one minority population hub to another, like a string of pearls from the state’s northeast Piedmont area to the southwest, paralleling and as narrow as Interstate 85 at points, a determined group of plaintiffs were finally able to persuade a majority of the United States Supreme Court to take a look at the grotesque and distorted physical shape of the legislative district boundaries resulting from such a race-based and racially motivated line drawing process. Although the legislative purpose analysis of Village of Arlington Heights v. Metropolitan Housing Redevelopment Corp. had been on the books since 1977, its specific application in the context of legislative redistricting had not yet been widely accepted. In fact, its methodology had never been utilized up to this point in a case challenging the redistricting process as a government-compelled racial gerrymander. In this emotionally charged background Justice Sandra Day O’Connor gave the opening volley in Shaw v. Reno, noting that “it is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.” While race conscious redistricting is not always unconstitutional, she observed, and the Court had never held that race conscious state decisionmaking was impermissible in all circumstances, the Court now confronted a redistricting plan so extremely irregular on its face that it could rationally be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without a sufficiently compelling justification. The Court then said:

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

Beginning the Passage from Shaw I to Cromartie
Shaw v. Reno made it clear that an allegation that the State deliberately segregated voters into districts on the basis of race without compelling justification stated a claim for relief under the Equal Protection Clause of the Fourteenth Amendment, sufficient to survive a Motion to Dismiss.

Deliberate Segregation by Race: Explicit Racial Classification

One of the building blocks in the primary holding of Shaw v. Reno was the 1976 decision of Washington v. Davis, in which the Court held that a claim of invidious racial discrimination in violation of the Equal Protection Clause is not automatically established by proof of a racially disproportionate impact, and that “proof of racially discriminatory intent or purpose is required.” Also, under Arlington Heights, a plaintiff is not required to prove that the challenged official action rests solely on officially discriminatory purposes:

Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the “dominant” or “primary” one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Central Mandate of Equal Protection Clause

Miller v. Johnson recognized that the Equal Protection Clause’s central mandate is “racial neutrality in government decisionmaking,” a mandate which clearly prohibits purposeful discrimination between individuals on the basis of race.

Fatal Strict Scrutiny

Shaw v. Hunt (Shaw II) also made it clear that a state’s reapportionment scheme will not survive strict scrutiny if proven to be predominantly based upon race without sufficient regard to, or in subordination of, traditional districting criteria and is not shown to be narrowly tailored to serve a compelling state interest.

Applying the Arlington Heights legislative purpose methodology, as extended in Shaw v. Reno and its progeny, it is clear that a redistricting plan that explicitly distinguishes between individuals on racial grounds falls within the core of the Equal Protection Clause’s prohibition. The Arlington Heights methodology provides a mechanism for mounting an attack upon a facially neutral redistricting plan that nonetheless can be proven to be the product of race-based motive and purpose. The focus of plaintiffs leveling an attack against such a plan is to establish that race was the predominant factor, “motivating the legislature’s decision to place a significant member of voters within or without a particular district.”

Deferece to Legislative Process

As the Court noted in Arlington Heights, judicial deference is normally accorded the action of a legislative body concerned with balancing numerous competing considerations, with the courts refraining from reviewing the merits of such legislative decisions in the absence of a showing that they are arbitrary or irrational. When those legislative considerations include racial discrimination, however, as where one of the motivating factors in that decision was discriminatory purpose, judicial deference to state legislative action will not be justified.
Lawyer v. Department of Justice[^20] focused on the traditional judicial deference to the role of a legislative body performing its task of redistricting and reapportionment. Drawing on Wise v. Lipscomb[^21], the Supreme Court in Lawyer characterized that task as one in “which the federal courts should make every effort not to pre-empt,” and noted that judicial deference is triggered by two things:

First, the “state should be given the opportunity to make its own redistricting decisions so long as it is practically possible,” and

Second, the “state must choose to take that opportunity.”

Lawyer simply recognized that when the state does take that opportunity, “the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law.”

**Reasonable Opportunity to Meet Constitutional Requirements**

Thus, if a reapportionment scheme is declared unconstitutional as in Shaw II, Wise v. Lipscomb and Lawyer v. Department of Justice direct that the state legislative body, whenever practicable, should properly be afforded a “reasonable opportunity to meet the constitutional requirements by adopting a substitute measure” rather than the federal court devising and ordering into effect its own plan; provided, that the “new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the constitution.”[^22]

This is the process for assessing a proposed remedial plan, a process which incorporates the core principle of federal judicial deference to state legislative action. Such deference is a cornerstone of our federalism which contemplates timely and effective state legislative response to a judicial determination that a given plan under challenge violates constitutional or statutory voting rights.

**Mixed Motive Analysis**

In the term before Lawyer was decided, Bush v. Vera[^23] also brought into this analysis the Mount Healthy City Board of Education v. Doyle[^24] mixed-motive formulation for determining whether race has predominated over or trumped other non-racial traditional districting principles such as party affiliation. In Justice O’Connor’s concurring opinion in Bush, she expressed her view that compliance with §2’s results test was a compelling state interest, and that such an interest could co-exist in principal and practice with Shaw v. Reno and its progeny. In Justice O’Connor’s plurality opinion in that same case, moreover, she noted that this was a mixed motive case in which the state conceded that one of its goals in creating the three Congressional districts in question was to produce majority-minority districts, but that other goals, particularly incumbency protection, played a role in drawing the district lines. Based on a careful review of the lower court’s factual findings and the record, Justice O’Connor was convinced that the lower court’s determination that race was the predominant factor in the drawing of the districts had to be sustained. She concluded:

The district court had ample bases on which to conclude both that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, and that political gerrymandering was accomplished in large part by the use of race as a proxy.

**Drawing Lines in Exclusively Racial Terms**

Part of the basis for the conclusion was the state’s own §5 submission that explained the drawing of one of the districts in exclusively racial terms, as well as an admission contained in legislative communications with the Department of Justice “written at the end of the redistricting process that incumbency protection had
been achieved by using race as a proxy.” Such evidence was further underscored by objective evidence strongly suggesting the predominance of race in the district plans and demographic maps. Despite their strong correlation between race and political affiliation, these plans and maps revealed that “political considerations were subordinated to racial classifications in the drawing of many of the most extreme and bizarre district lines.” For example, in concluding that District 30 was subject to strict scrutiny, Justice O’Connor in her plurality opinion reasoned:

The fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations. The record discloses intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles. District 30's combination of a bizarre, non-compact shape and overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another is exceptional....

The O’Connor Concurring Opinion

In Mark Packman’s chapter entitled “That’s Some Catch, That Catch-22”, contained in Census 2000: Strategies and Considerations for State and Local Government (ABA Publishing April 2000), Mr. Packman has distilled Justice O’Connor’s guidance in her concurring opinion in Bush v. Vera into the following helpful principles for state and local government entities involved in the process of redistricting:

- First, as long as states do not subordinate traditional criteria to race, they may intentionally create majority-minority districts without coming under strict scrutiny.
- Second, a state may have to create majority-minority districts where the three Gingles preconditions (reasonable compactness, minority cohesion, and white bloc voting) are satisfied.
- Third, the state’s interest in avoiding §2 liability is a compelling governmental interest.
- Fourth, a district drawn to avoid §2 liability is narrowly tailored so long as it does no deviate substantially, for predominantly racial reasons, from the sort of district a court would draw to remedy a §2 violation.
- Fifth, districts that are bizarrely shaped and non-compact and that otherwise neglect traditional principles and deviate substantially from the sort of district a court would draw are unconstitutional, if drawn for predominantly racial reasons.

Cromartie v. Hunt

Near the end of the 1999 term, the U. S. Supreme Court handed down Cromartie v. Hunt, concluding that Plaintiffs’ challenge to the North Carolina Congressional districting plan was not suited for summary judgment.

In this third trip for the Shaw plaintiffs to the United States Supreme Court, the Supreme Court reversed a grant of summary judgment for the Plaintiffs who had challenged under a Congressional districting plan as an impermissible racial gerrymander violative of the Fourteenth Amendment. The grounds for the Supreme Court’s reversal were twofold: first, summary judgment was inappropriate because of the factual
nature of the intent requirement, and second, the non-movants did not bear the burden of proof on the issue of intent. According to the Court,

Summary judgment in favor of the party with the burden of persuasion, however, is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact. Id. at 1552.

The Supreme Court in reaching this conclusion relied upon the traditional presumption that the Legislature acted in good faith while districting.

**The Cromartie Trial: Smoking Gun E-Mail**

From an evidentiary standpoint, the subsequent trial after remand of *Cromartie* brought racial gerrymander litigation into the cyberspace era by its reliance on e-mail in the form of the controversial “Cooper-Cohen e-mail.” This internal e-mail “exposed a process in which voters were categorized by race, the shifted in and out of the First District by a computer program until a precise percentage of minority voters in the district was achieved”[26] The Cooper-Cohen e-mail clearly demonstrated that

A. The chief architects of the challenged redistricting plan evolved a methodology for segregating voters by race,

B. Applied that method to the challenged district, and

C. Through their use of such method, produced evidence of the means by which the plan’s racial gerrymandering could be achieved with “scientific precision.”

**Prima Facie Racial Gerrymander**

Similar to the Herschel computer precision highlighted in *Miller v. Johnson*,[22] the computer system used in *Cromartie* was revealed by the Cooper-Cohen e-mail to have used such “exact racial percentages when constructing districts” as to give rise to the clear inference that a motive existed to compose a new Twelfth Congressional District “with just under a majority-minority in order for it not to present a *prima facie* racial gerrymander.”

According to the Court, “using a computer to achieve a district that is just under 50 percent minority is no less a predominant use of race than using it to achieve a district that is just over 50 percent minority.” Slip Op. at 24.

**Facial Race-Driven Criteria**

According to the Court, based upon extensive direct and circumstantial evidence, the legislature used facial race-driven criteria by

(a) drawing the district to collect precincts with high racial identification rather than political identification,

(b) bypassing precincts with higher partisan representation, that is, more heavily Democratic precincts in favor of precincts with a high African-American population,

(c) eschewing traditional districting criteria such as contiguity, geographical integrity, community of interest and compactness in redrawing the plan, and
(d) using race as the predominant factor in drawing the district, through its apparent use of race as a proxy for political characteristics.

**Admissions by Legislators**

Admissions by legislators, as discussed by the trial court in *Cromartie*, revealed that the racial composition of the remedial district was seen by the legislature as “a mandate, a necessity.” Slip Op. at 26.

**Strict Scrutiny Analysis**

The Dole Compromise, a disclaimer of any right to proportional representation, set forth in §2 of the Voting Rights Act, as amended in 1982, became one of the focal points for the Court’s strict scrutiny analysis. That analysis focused on the construction of the First Congressional District in *Cromartie*. First, the Court noted that the state in its remedial plan continued to use race as the predominant factor in creating the majority-minority First District. Second, as a consequence, strict scrutiny had to apply, so that the state could then survive the constitutional challenge only by showing the District was narrowly tailored to achieve a compelling governmental interest. Third, according to the Court, §2 directs courts to examine the totality of circumstances to ascertain whether the political processes are equally open to all citizens and allows the courts to consider the extent of minority electoral success, but under the Dole Compromise disclaims any right of proportional representation. Fourth, once the §2 *Gingles* preconditions[28] are met, the Court must then consider the Senate Report factors.[29] Fifth, the state defendants presented sufficient evidence, according to the Court, to establish that it had a compelling reason, that is, a strong basis in evidence, to address race in constructing the remedial First District. Accordingly, race, while a predominant factor in composing the First District, was not impermissibly used in establishing the district’s borders. A compelling state interest was shown to exist in obtaining §5 preclearance, and the district was narrowly tailored to meet that interest.

**Race-Consciousness**

The concurrence and dissent of District Judge Thornburg in *Cromartie v. Hunt* focused on the extent to which race may be considered in the districting process, the burden of proof, the probative value of statistical evidence and certain aspects of trial testimony. First, Judge Thornburg complained that the majority had failed to distinguish between race-consciousness and race predominance, with only the latter potentially triggering strict scrutiny. Judge Thornburg also argued that the majority had apparently misunderstood the burden of proof that rested with the plaintiffs, who “conducted their case as if they were entitled to a presumption that race predominated and merely had to rebut defendants’ efforts to overcome this presumption.” Slip Op. at 8, Thornburg, concurrence and dissenting opinion. The burden of proof was labeled by Judge Thornburg as a “heavy” one, a burden of showing by a predominance of the evidence that racial motives predominated in substantial disregard of legitimate districting criteria. *Id.* Judge Thornburg also criticized the statistical evidence relied upon by the majority, stating that it was best equivocal, and only pointed to politics as at least as plausible a motivating factor as race, in the drawing of the Twelfth Congressional District. According to Judge Thornburg, witnesses who were “peripheral players” in the legislative decisionmaking process, who had no significant involvement with or specific knowledge of that process, were given disproportionate weight by the majority. Finally, Judge Thornburg complained that the highest performing Democratic precincts were excluded from the Twelfth District, inconsistent with predominant use of race and use of race as proxy for political partisanship.

On March 16, 2000, the Supreme Court granted an application for stay of judgment of the U. S. District Court for the Eastern District of North Carolina entered March 8, 2000, providing that in the event jurisdiction is noted or postponed, the stay will remain in effect pending the sending down of the judgement of the Supreme Court. *Hunt v. Cromartie*.[30]

**Key Legislative Players: Practice Pointers**
Notwithstanding District Judge Thornburg’s dissent, it is submitted that the key points in dispute in *Cromartie v. Hunt*,[31] provide a good list of potential topics to discuss with legislators about to embark on the redistricting process once the Census 2000 results come in.

First, public or private statements, speeches, e-mail communications, etc. are fair game in the evidence-gathering process. Recall the “smoking gun e-mails” from the *Cromartie* trial.

Second, be careful and circumspect in bringing key players into the legislative decisionmaking process. Each of those key players may be a potential witness on the issue of motive and purpose.

Third, as early in the redistricting process as possible, identify and articulate clearly the relevant and applicable traditional districting criteria, and then apply those criteria consistently throughout the process.

Fourth, understand and adhere to clear legal guidelines for implementing the race-predominant standard, bearing in mind that a deviation from a consistent race-neutral methodology or an over-emphasis upon race to the point that race-consciousness may be characterized as race-predominance, may lead to a successful constitutional challenge, strict scrutiny analysis and invalidation of racially gerrymandered districts.

Fifth, consideration should be given to the rigorous *Daubert* standard when legislators are trying to decide whether and to what extent experts should be retained and utilized during the legislative decisionmaking process. Indeed, there are experts upon experts in the field of statistical analysis, demographics, evaluation of exogenous and endogenous electoral evidence, racial bloc voting analysis, race-predominance analysis and many other discrete evidentiary subcategories. It is not premature for a legislative body or committee to make a preliminary assessment of a redistricting expert’s reasoning, methodology and credibility during that legislative process. An early *Daubert* assessment of experts whose reports, findings and conclusions may be central to any viable redistricting plan, may indeed provide valuable evidentiary support at a trial years later. One should bear in mind that the Supreme Court has given trial courts discretion to prevent unreliable expert witnesses from testifying, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[32] and has extended that discretion to “non-scientific” experts, *Kumho Tire Co. v. Carmichael*.[33] The rigorous standards set out in *Daubert* have been recognized in and appear to be applicable to vote dilution litigation under the Voting Rights Act.[34] should be applied when the trial judge is deciding whether proffered expert testimony will be both relevant and reliable under Rule 702 of the Federal Rules of Evidence.[35] *Daubert* authorized courts to undertake a “preliminary assessment of whether that reasoning or methodology underlying the testimony is scientifically valid or whether that reasoning or methodology properly can be applied to the facts at issue.”[36] Later in *General Electric Co. v. Joiner*,[37] held that a trial court’s decision to admit or exclude expert scientific evidence would be reviewable only for an abuse of discretion, and that “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”[38] In 1999 the Supreme Court held that the trial judge’s general “gatekeeping” obligation under *Daubert* also applies to testimony that is based on technical and other specialized knowledge.[39]

**Theriot v. Parish of Jefferson**

The Fifth Circuit in *Theriot v. Parish of Jefferson*, 185 F. 3d 477 (5th Cir. August 17, 1999), upheld the District Court’s judgment that the Plaintiffs had failed to carry their burden of proving that race predominated in the design and configuration of a councilmanic district. The Court thus rejected the Plaintiff’s claim that the district was unconstitutional because it resulted from a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. Because the Plaintiffs had failed to carry their burden
of proof regarding the predominance of race in the district’s configuration, the District Court had declined to apply strict scrutiny, but held that even if they did carry the burden of proof, the District was narrowly tailored to meet a compelling state interest.

Affirming, the Fifth Circuit in a panel opinion by Judge Carl Stewart, reviewed the District Court’s determination that race did not predominate. The Court applied the clearly erroneous standard of review. Accusing the Plaintiffs on appeal of trying to manufacture clear error, the Fifth Circuit panel showed extraordinary deference to every factual finding and legal conclusion made by the District Court.

A. Legislative Purpose

Plaintiffs attacked the District’s shape and demographics as providing direct and circumstantial evidence of an impermissible racial classification. The Fifth Circuit found, however, that incumbency protection, maintaining communities of interest, addressing one person, one vote concerns and natural geographic conditions, as opposed to race, predominated in the drawing of the district boundaries. An earlier finding of a §2 vote dilution in *East Jefferson Coalition for Leadership & Development v. Parish of Jefferson* [40] had required the parish to redraw its districts, that the issue of race was plainly subordinate to incumbency protection and maintenance of other political advantages.

B. Communities of Interest with Common Socioeconomic Conditions

Plaintiffs objected to the District Court’s consideration of evidence pertaining to communities of interest based on social and economic needs and conditions the district residents had in common. Plaintiffs argued that such information—showing the neighborhoods and subdivisions comprising the district contained low income residents who are “less educated, more often unemployed, and more poorly-housed than voters in other districts”—was not available to the councilpersons at the time they drew the districts. Plaintiffs based their objection on *Bush v. Vera*, [41] where the United States Supreme Court had refused to overturn the District Court’s finding that race predominated over other traditional redistricting principles since the State of Texas’ supporting data was not available to the legislature in any organized fashion before the challenged district was created [42]. As if to reconcile its findings with those in *Bush*, the Fifth Circuit in *Theriot* recharacterized the principal holding of *Bush*:

The Court [in *Bush*] also held that the state was not required to compile a comprehensive administrative record and courts are not required to dismiss facts not explicitly mentioned in the redistricting plan’s legislative history.

Unfortunately, in neither *Bush* nor *Theriot* was there any legislative history considered or any administrative record reviewed by the governing body at the time the district lines were drawn pertaining to socioeconomic conditions. The Fifth Circuit in *Theriot* solved that glaring evidentiary gap by referring to the earlier judicial proceedings and the evidentiary record of socioeconomic conditions of the Parish’s neighborhoods and subdivisions, noting that many of the same councilpersons in that earlier litigation were involved in the present suit and “are well aware of the socioeconomic conditions throughout Jefferson Parish.” Legislative reliance upon evidentiary data or consideration of that data is one thing, but general awareness of adjudicative facts and generalized exposure to a complex evidentiary record spanning over a decade is quite another. This is especially true when the core issue is whether the legislative body drew district boundaries out of an improper legislative motivation, and whether it intended to classify and segregate by race, and whether the legislative body had the legislative purpose to exalt race over traditional districting principles.

C. One Person, One Vote Considerations and Compactness

Plaintiffs in *Theriot* also challenged the District Court’s conclusion that one person, one vote concerns were paramount and of primary concern in the district’s configuration. Plaintiffs argued that the district was
bizarre on its face. The District Court nonetheless found that one person, one vote, geography and other factors dwarfed issues pertaining to race, and according to the Fifth Circuit those findings had bountiful evidentiary support as scene through the Fifth Circuit’s appellate lens:

Geographically, the district court found that the past redistricting tradition in Jefferson Parish did not strictly adhere to geometric standards of compactness. According to the district court, the “very irregular” geography and topography of the parish (including the fact that it is 50 percent water) substantially limits the ability of the Parish to adhere to such standards. Consequently, the district court rejected appellants’ assertion that the District was bizarre on its face. We agree and find that any irregularity associated with the shape of District 3 is derivative of politics, joining communities of interest, one-person, one-vote concerns, and the geography and population distribution in the parish. With regard to geography and demographics, it is most apparent that the black population resides in an east-west direction, as opposed to north-south. Consequently, remedying the Section 2 violation required a district which, in some measure, proceeded in an east-west direction rather than the usual north-south direction.

D. Any Consideration of Race

The Fifth Circuit flatly rejected any suggestion that mere consideration of race, even where it is de minimis, mandates a finding that race predominates. The Court noted:

Issues of race were relevant, inasmuch as the Parish Council was directed to remedy a Section 2 violation, yet did not predominate.

The Fifth Circuit also noted that strict scrutiny does not apply to all cases of intentionally created majority-minority districts, stating:

In like manner, this Court has opined that “strict scrutiny does not apply to all cases involving the intentional creation of majority-minority districts.” Clark v. Calhoun County, Mississippi, 88 F.3d 1393, 1404 (5th Cir. 1996). Race is inherently a consideration where, as here, a governing body must respond to violations of Section 2 of the Voting Rights Act. See id. at 1407.

A Petition for Writ of Certiorari was filed in Theriot on January 18, 2000, in No. 99-1203.

Chen v. City of Houston[43]

Chen v. City of Houston was a Shaw–Miller–Bush racial gerrymandering claim in which the District Court addressed the concept of “functional compactness.” In concluding that the City of Houston presented sufficient relevant and probative evidence that it had considered and balanced traditional districting principles in developing and adopting its 1997 redistricting plan, the District Court held that the City avoided summary judgment on the Plaintiffs’ Fourteenth and Fifteenth Amendment claims of racial gerrymandering.

Functional Compactness

In the City’s resolution adopting its redistricting plan, the City provided that the district should be compact and composed of contiguous territory, but that compactness and contiguity "involve a functional as well as a geographic dimension. Dysfunctional dimension may take on added weight in situations in which geographic compactness may not be possible in light of the fact that some areas are attached to the remainder of the city only by relatively long and narrow strips of land. Functional compactness and contiguity includes, but is not limited to, consideration of factors such as
Transportation and communication
existence of common social and economic interests
ability of citizens of a council district to relate to each other and to their representative on the council and the ability of the council member to relate effectively to his or her constituency
existence of shared interests. Id. at 756.

Citing the three-judge district court decision in DeWitt v. Wilson,[44] which was summarily affirmed by the U. S. Supreme Court,[45] the District Court in Chen stated at 756 n.10:

The court is persuaded...that the concept of functional compactness is an appropriate districting principle to be considered by legislators in developing districting plans in situations, such as presented in this case, in which true geographical compactness is not feasible because of the configuration of the area being districted.

**Legislative Immunity**

Plaintiffs in Chen also sought to subpoena one of the city council members, who in turn filed a motion to quash the subpoena and invoked her legislative immunity. The District Court rejected the plaintiffs’ argument that the decision by this council member and other council members who voted in favor of the adopted redistricting plan to invoke legislative immunity was evidence that their testimony would have been detrimental to the city’s position and would have supported the plaintiffs’ position, stating:

Legislative immunity exists to protect the workings of the legislature from intrusion by the judiciary.... Council member Wong’s decision to invoke legislative immunity can be considered evidence of her intent to protect the legislative process as easily as it can be considered evidence of detrimental testimony.[46]

**Race as Predominant Factor**

The District Court concluded that while plaintiffs had presented significant probative evidence that the City considered race an important factor in adopting its 1997 redistricting plan, they failed to satisfy their burden under Shaw v. Hunt to produce evidence raising the genuine issue of material fact regarding their claim that race was the predominant factor to the subrogation of traditional districting principles, and they had not presented evidence from which a reasonable jury could conclude that race was the criterion that in the city’s view could not be compromised, citing Shaw v. Hunt.[47] Thus while race was without dispute a consideration, the City had presented evidence to the District Court that race was not the predominant factor, and the District Court also had before it the City’s evidence that the 1997 plan was the result of careful consideration and balancing of traditional districting principles, and that "the district shapes and the lack of precise geographical compactness are an unavoidable result of the shape and lack of compactness of the city itself." Id. at 762.

**Chen’s Affirmance by Fifth Circuit**

On appeal, the Fifth Circuit upheld the District Court’s granting of summary judgment in favor of the City of Houston, rejecting the Plaintiffs’ claim that the City’s redistricting plan violated the one-person, one-vote principle, and that the districts created constituted an impermissible racial gerrymander under Shaw v. Reno. The Fifth Circuit distinguished Hunt v. Cromartie on the grounds that in Chen,

(a) Plaintiffs here bore the burden of persuasion, and
the presumption of legislative good faith and integrity added to and did not lessen the Plaintiffs’ burden facing summary judgment.

**Direct Evidence of Race Predominance**

The Fifth Circuit in *Chen* suggested that the only direct evidence that could suffice to establish predominance of race in a *Shaw v. Reno* challenge would consist of either

(a) “brazen admission that race predominated” over traditional districting principles or

(b) a clear pattern of Department of Justice pressure similar to *Shaw’s* “end-product of DOJ intervention” [which was] “a monstrosity that massively violated traditional districting principles...” or similar to “the rabid extremes of the Department of Justice conduct in *Miller*.”

As the Fifth Circuit put it in *Chen*, “a plaintiff is required to do more than merely demonstrate that the Department of Justice has had somewhat effective input in the process to trigger strict scrutiny.”

**Reno v. Bossier Parish (II) School Board:**

A Revised Standard for Section 5 Preclearance

On January 24, 2000, the United States Supreme Court announced its decision in *Reno v. Bossier Parish (II) School Board* holding that §5 of the Voting Rights Act of 1965, as amended, does not prohibit preclearance of a redistricting plan enacted with a “discriminatory but non-retrogressive purpose.” Justice Scalia, speaking for the majority in this 5-4 decision, concluded that §5’s purpose requirement applies only to plans adopted with a retrogressive intent and that §5 preclearance has a “limited meaning” and is “nothing more than a determination that the voting change is no more dilutive than what it replaces.”

**Section 5 Preclearance**

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, establishes a centralized review procedure in our federal system, by which a “covered jurisdiction,” that is, a state or political subdivision subject to §5, may change a “voting qualification or prerequisite to voting,” or “standard practice or procedure with respect to voting,” only if that change has been precleared by either the United State District Court for the District of Columbia or by the Attorney General of the United States.

In *Lopez v. Monterey County*, the Court stated that with respect to the basic nature of the §5 preclearance process, “Congress designed the preclearance procedure to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process and will accomplish this by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General or the United States District Court for the District of Columbia.”

This was the second appearance of *Bossier Parish* in the Supreme Court. Three years earlier, the Court had held in *Reno v. Bossier Parish (I) School Board* that §5 preclearance of a covered jurisdiction’s voting standard, practice or procedure may not be denied solely on the basis that it violates §2 of the Voting Rights Act. In *Bossier Parish I*, the Court rejected the Attorney General’s position that §2 of the Voting Rights Act is effectively incorporated into §5, but concluded nonetheless that §2 evidence of a redistricting plan’s dilutive impact may be relevant even though it is not dispositive of a §5 inquiry. While *Bossier Parish I* purported to “clarify the relationship between §2 and §5 of the Voting Rights Act of 1965,” *Bossier Parish II* rejected the Justice Department’s efforts to blur the distinction between §2 and §5 by shifting the focus of §5 from non-retrogression to vote dilution and by changing the §5 benchmark from a jurisdiction’s existing plan to a hypothetical, undilutive plan. In refusing to extend §5 to discriminatory but non-retrogressive vote-dilution purposes, the Court in *Bossier Parish II* noted that the Justice Department’s reading of the §5 preclearance...
provision “would also exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts,... perhaps to the extent of raising concerns about §5’s constitutionality....” Moreover, the majority opinion in *Bossier Parish II* made it clear that “proceedings to preclear apportionment schemes and proceedings to consider the constitutionality of apportionment schemes are entirely distinct.

As noted earlier and as the Court made clear in *Bossier Parish II*, §2 and §5 are different in their structure, purpose and application, and impose different duties upon state and local government bodies.[53]

As the Court had reasoned earlier in *Shaw v. Reno*,[54] “the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies §5 still may be enjoined as unconstitutional.” With regard to the limited meaning that §5 preclearance has in the vote-dilution context, Justice Scalia speaking for the majority in *Bossier Parish II* emphasized that preclearance does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than it what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of §5, but must be attacked through the normal means of a §2 action. As we have repeatedly noted, in vote-dilution cases §5 prevents nothing but backsliding, and preclearance under §5 affirms nothing but the absence of backsliding.” [citing *Bossier Parish I*, 520 U.S. at 478, *Miller v. Johnson*, 515 U.S. 900, 926 (1995), and *Beer v. United States*, 425 U.S. 130, 141 (1976)].

**Increased Flexibility**

The practical effect of *Bossier Parish II* is that it will provide a greater degree of flexibility for state and local governments in the sixteen states that, in whole or in part, are covered by §5’s preclearance requirement, and will likely reduce the long-exerted pressure by the Justice Department’s Civil Rights Division to create majority-minority districts in those covered jurisdictions. Judicial preclearance comes in the form of a “declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying and abridging the right to vote on account of race or color.”

By limiting §5’s purpose requirement to plans adopted with a retrogressive intent, covered state and local governments will have a much easier time complying with §5 than they had previously.

**Justice Thomas: Federal Intervention Unnecessary**

In a concurring opinion, Justice Thomas pointed out that while the Justice Department had intervened and argued throughout this litigation that a “safe” majority-minority district was necessary to ensure the election of a black school board member to the Bossier Parish School Board, such federal intervention that spawned this seven year litigation odyssey was unnecessary, in view of the fact that while the litigation was pending, three blacks were elected from majority white districts to serve on the Bossier Parish School Board.

In a terse dissenting opinion, Justice Stevens, joined by Justice Ginsburg, expressed his “profound disagreement” with the Court’s holding, arguing that the majority’s interpretation of the §5 term “purpose” was at war with “both controlling precedent and the plain meaning of the statutory text.”

Justice Breyer in his dissenting opinion voiced his agreement with Justice Souter’s dissent, with the exception that Breyer would not reconsider the correctness of the Court’s “effects” case, *Beer v. United States*, “because, regardless, §5 of the Voting Rights Act prohibits preclearance of a voting change that has the purpose of unconstitutionally depriving minorities of the right to vote.”

**Justice Souter: Pouring Old Poison into New Bottles**
In a lengthy opinion concurring in part and dissenting in part with the majority, joined in by Justices Stevens, Ginsburg and Breyer, Justice Souter complained that Congress did not intend to let state and local governments “pour old poison into new bottles.” Justice Souter’s fundamental complaint was that the majority’s constricted interpretation of §5 would require the Justice Department to approve a redistricting plan with a known discriminatory effect, leaving too much wiggle room for discrimination and mischief. The usual shrill voices of the entrenched liberal left have echoed Souter’s dire warnings, predicting that *Bossier Parish II* will reduce if not eliminate “the most important power of the act, in that it requires local officials to create a lawful plan in the first place, and, at least, negotiate with minority interests if it does not meet muster in preclearance.” An example of this negative reaction can be found in J. Nowak, *The Gang of Five & The Second Coming Of An Anti-Reconstruction Supreme Court.*

**Beer’s Non-Retrogression Standard**

Justice Souter made it clear that he would overrule *Beer v. United States*, a decision which he labeled “a precursor of sorts” of the majority opinion in *Bossier Parish II*. *Beer*, according to Souter, held that “the only anticipated redistricting effort sufficient to bar preclearance is retrogression in minority voting strength, however dilutive of minority power a redistricting plan may otherwise be,” and he criticized *Beer* as a mistaken restriction of the effect prong of §5 to retrogression, and then chastised the majority in *Bossier Parish II* as “even more wrong today when it limits the clear text of §5 to the corresponding retrogressive purpose.” Refusing to give in to the demand that “recognized error be compounded indefinitely,” Souter chastised the majority opinion as an erroneous interpretation of the scope of §5’s purpose prong, compounded by the Court’s prior mistake in *Beer* about the meaning of §5’s effects requirement.

The age, health and tenure of the nine Justices of the United States Supreme Court is a delicate subject to bring up. It is, however, a subject with more than passing relevance when one ponders the potential difference in appointments to a vacancy on that nine-member Court by a Republican President George W. Bush or a Democratic President Al Gore. Given the very fragile five-four majority in *Bossier Parish II* which has restrictively transformed the reach and impact of §5’s preclearance requirement, a single presidential appointment (with Senate confirmation) can change that five-four majority to a four-five minority quicker than you can say “dilutive intent.”

**Evidentiary Considerations During the Legislative Process**

The legislative redistricting process should be conducted with a constant awareness of the fact that the entire legislative history will likely be the focus of pretrial discovery in the event a subsequent racial gerrymandering challenge or an action under §2 or §5 of the Voting Rights Act is mounted. Relevant legislative evidence may include the following:

1. Any narrative statements, exhibits or evidentiary materials submitted to the Section 5 Unit of the Civil Rights Division of the Justice Department, for covered jurisdictions, over the period of at least the preceding decade;

2. Correspondence, e-mail, faxes and communications of any kind, nature and description to and from the state legislature and its representatives, on the one hand, and the Attorney General of the United States and the Voting Section attorneys, on the other, during that same relevant time period, including informal telephone memoranda and summaries of contacts;

3. Clear, consistent and unambiguous reference to traditional race-neutral criteria and standards such as compactness, contiguity, incumbency protection, partisan political interests, respect for political subdivision boundaries and preservation of non-racial communities of interest in the redistricting process;
4. Relevant newspaper articles, television interviews and other forms of recorded media coverage, whether on the national, state or local level, that identify or describe the principal goals and objectives of the redistricting process, the balanced use of race along with other non-racial factors in making boundary line changes, and other public expressions of legislative purpose bearing on the issue of whether and to what extent race predominated or was merely one of many factors in the drawing of boundaries of a given district.

*Lawyer v. Department of Justice*, supra, also suggests that a legislative body could develop the requisite legislative history sufficient to satisfy the “strong showing” of necessity required for race-based remedial action, through resort to a bona fide declaratory judgment action through which the legislative body could seek to establish a great likelihood of a §2 violation in the absence of affirmative governmental race-conscious districting.

**Conclusion**

The hazardous journey of Aeneas and his brave mariners can be compared with the task facing state legislators on the eve of the release of the Census 2000 data. In Virgil’s epic, *The Aeneid*, this ancient hero of the Trojan War was warned not to navigate through the perilous straits of Charybdis, since many ships before him had barely avoided its deadly whirlpools only to be sucked into the black cavern of Scylla. As you legislative mariners face the task of redistricting and the prospect of defending the resulting redistricting plans against potential vote dilution and Equal Protection challenges, as was most recently done in the States of Tennessee and Alabama,* respectively, your work is cut out for you. As you seek to draft balanced and racially fair plans that comply with the constitutional mandate of one-person, one-vote and the Voting Rights Act, constantly look over your shoulder to avoid having those plans branded “race-based.”

The multi-factored, multi-level process is not for the faint of heart. But remember, Aeneas didn’t get caught between that rock and a hard place, and went on to found the Roman race—who, as Virgil wrote, “left to other nations such things as art and science, and ever remembered that they were destined to bring under their empire the peoples of the earth, ... to spare the humbled and to crush the proud.”

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377 U.S. 533, 568 (1964) (holding the states are required by the Equal Protection Clause of the Fourteenth Amendment to draw their legislative districts based on population data, and that the use of data more than ten years old for such purposes is “constitutionally suspect.”).

377 U.S. at 560–61.

Id. at 577.


431 U.S. 407, 418 (1977) (“The maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as de minimis, they substantially exceed the ‘under-10%’ deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments.”).

462 U.S. at 842-43.


One definition of racial gerrymandering is the drawing district lines predominantly on the basis of race without sufficient regard for traditional non-racial districting principles such as compactness, contiguity, incumbency protection, political partisanship considerations and respect for political subdivision boundaries.

429 U.S. 252 (1977). The Court identified as subjects of proper inquiry in determining whether racially discriminatory intent existed with respect to challenged legislative action, the following:

[1] “The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.”

[2] “The specific sequence of events leading up to the challenged decision may also shed some light on the decisionmaker’s purposes.”

[3] “Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.”

[4] “Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.”

[5] “The legislative or administrative history might be highly relevant, especially where there are contemporaneous statements by members of the decisionmaking body, minutes of its meetings, or reports.”
[6] “In some extraordinary instances, the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.”


[24] 429 U.S. 274 (1977). The Mount Healthy mixed-motive analysis arose initially in the context of a First Amendment case which held that a public employee discharged or otherwise disciplined for engaging in constitutionally protected conduct is not entitled to any relief if his employer can prove that it would have taken the same action in the absence of such conduct. The pertinent holding from Mount Healthy was stated in terms of a rule of causation in the context of multiple contributing factors:

A rule of causation which focuses solely on whether protected conduct played a part, “substantial” or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment decision resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 285-86.


[27] 864 F. Supp. 1354, 1363, aff’d, 515 U.S. 900 (1995). The trial court in Miller was provided an enlightening demonstration of state-of-art redistricting on a computer, “Herschel,” which allowed the user to map voting districts at the census level with the greatest of ease. As the trial court noted: “Only Georgians truly understand the depth of respect that is accorded to this equipment by such an appellation.” Id.

[28] The U. S. Supreme Court established a three-part standard for proving vote dilution claims in Thornburg v. Gingles, 478 U.S. 30 (1986), holding that there are three “necessary preconditions” for plaintiffs to prove by a preponderance of the evidence in order to prevail in a §2 vote dilution case:
First, 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. Second, the minority group must be able to show that it is *politically cohesive*. Third, the 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.

[29] In the report of the Senate Judiciary Committee accompanying the 1982 Voting Rights Act Amendments which included amended §2, the Senate Judiciary Committee elaborated on the nature of §2 violations and the proof required to establish those violations. The following typical factors which may be relevant to a §2 claim, now referred to as “Senate Report factors,” include:

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.

Additional factors that in some cases have had probative value...are:

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[.]

whether the *policy* underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is *tenuous*.


Reno v. Bossier Parish School Board, 117 S.Ct. 1491, 1502, 137 L.Ed.2d 730 (1997)(“To be sure, the link between dilutive impact and intent to retrogress is far from direct, but ‘the basic standard of relevance...is a liberal one,’ Daubert v. Merrell Dow Pharmaceuticals, Inc...., and one we think is met here.”); Johnson v. Desoto County Board of Commissioners, 204 F.3d 1335, 1341 (11th Cir. 2000)(In a §2 challenge by black voters to a county’s at large method of electing its school board and county commission, the Eleventh Circuit found that voter registration evidence could be credible and reliable data, although less probative than pure population data in voting cases, and that “like most evidence presented by expert testimony, we think its admissibility has to be determined on a case-by-case basis by the district court. See generally Daubert v. Merrell Dow Pharmaceuticals, Inc....”).

Rule 702 provides that “if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” See Daubert, 509 U.S. at 589.

509 U.S. at 592-93. Under this broad standard of discretion provided to the trial judges as “gatekeepers,” the Supreme Court provided several examples of the elements that the trial court should consider in the exercise of that discretion: First, whether the proffered knowledge can be or has been tested empirically, that is, whether it is “falsifiable;” second, whether the theory or technique has been subjected to peer review or publication; third, whether the method contains a high known or potential rate of error, as in the case of a particularly scientific technique; and fourth, whether the methodology upon which the expert testimony is based is generally accepted. Id.


Joiner, 118 S.Ct. at 519.

Kumho Tire, 119 S.Ct. at 1171.

926 F.2d 487 (5th Cir. 1991).


Bush v. Vera, 517 U.S. at 966.


F. Supp.2d at 762. Cf. Latino PAC vs. City of Boston, 581 F. Supp. 478 (D. Mass. 1984)(Legislative immunity held applicable to voting for a local government redistricting plan, even one that allegedly discriminated against minorities.)

116 S.Ct. at 1901, 9 F. Supp.2d at 763.

See Abrams v. Johnson, 117 S.Ct. at 1934 (“It is not Justice Department interference per se that is the concern, but rather the fact that Justice Department pressure led the state to act based on an overriding concern with race.”).


520 U.S. at 474.


[56] 75 Notre Dame L. Rev. 1091, 1119 (Mar. 2000) (“Not surprisingly, the five Justices in the *Bossier Parish* majority were the same five Justices who had found that white voters could have a legislative district drawn to protect minority race voting power even though white voters were overrepresented in a legislative delegation after the creation of the district that was designed to protect minority race voters.”).

[57] *RWTAAC v. Sundquist*, 2000 W.L. 378159 (6th Cir. April 3, 2000)(holding legislative redistricting plan unlawfully diluted black voting strength and enjoining use of the House Plan in future elections); *Kelly v. Bennett*, 2000 WL 508748 (M.D. Ala. April 24, 2000)(upholding *Shaw*-based challenge to four Senate districts and three House districts, where race predominated in drawing the districts, which could not survive strict scrutiny and were thus unconstitutional.)