“Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels. … In part due to the success of [the Voting Rights Act], we are now in a very different Nation.”

I. Introduction

It has been said that the law of redistricting is complex, inconsistent and fact-intensive. At the local government level it is more than a game of number crunching and drawing lines on a map. Since the U.S. Supreme Court entered the political thicket almost half a century ago in Baker v. Carr and then swept counties and cities into the redistricting process in Avery v. Midland County, Texas, that process has grown more contentious and complex.

At the core of redistricting are the twin goals of population equality and electoral equality. The population equality goal is based largely on the “one person, one vote” doctrine under the Fourteenth Amendment. The electoral equality goal is focused on the protection of minority voting rights and is achieved through rigorous enforcement of Section 2 and Section 5 of the Voting Rights Act.

These key sections of the Act have rightly been dubbed the sword and shield of the Justice Department’s formidable arsenal against voting discrimination. With the support of a nuanced and sometimes wildly inconsistent body of precedent (much of it older than half of the audience listening to this afternoon’s program), the Voting Rights Act stands at the apex of a half century of legal development in a nation that experienced a turbulent history of racial injustice and discrimination in voting. It has been called the Crown Jewel of the Civil Rights Movement,

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2 Jack Young, Foreward to The Realist’s Guide to Redistricting (ABA 2d ed. 2010)
4 390 U.S. 474, 480 (1968) (“if voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population.”
and its singular success in barring widespread systemic voting discrimination cannot be denied. It imposed substantial federalism costs, but at the time of its enactment it validly authorized federal intrusion into sensitive areas of state and local policymaking.

A. The Formidable Arsenal’s Sword and Shield

Section 2 applies nationwide. It is often referred to as the “sword” of the VRA because it provides a cause of action for the government or private plaintiffs to challenge election laws and procedures, including redistricting plans, anywhere in the United States that have the purpose or effect of discriminating against a group based on race. When it was amended in 1982, Section 2 prohibits any election law or procedure that “results in a denial or abridgement of the right of any citizen of the United State to vote on account of race or color”.

Section 5 applies only to covered jurisdictions. Those jurisdictions include virtually all of the southern states along with Arizona, parts of Michigan, New York and California. Designed as a “shield” applicable only to prevent areas with a documented history of discriminating against voters of color from enacting further discriminatory procedures or redistricting or apportionment plans, Section 5 was initially enacted as a temporary remedial provision of the Voting Rights Act of 1965, but was reenacted and reauthorized in 1970, 1975, 1982 and most recently in 2006, when it was reauthorized and extended for another 25 years. Reauthorization came in July 2006 when Congress enacted and President Bush signed into law H.R. 9, the “Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.”

B. Preparation of a Redistricting Submission to DOJ

Municipal and county government attorneys need to be familiar with the “nuts and bolts” of redistricting. It is my aim today to provide you with a legal toolbox that will not only provide the rudimentary information about preclearance of redistricting plans, but will give you some insight into strategic issues, evidentiary shortcuts, doctrinal shifts that began with the last term of the U.S. Supreme Court, legislative strategy, policy guidance, and hopefully some practical suggestions that may facilitate your covered jurisdiction/governmental client’s successful navigation through the redistricting process.

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5 A civil action brought under Section 2 that challenges a redistricting plan as dilutive of minority voting strength is a vote dilution action. Vote dilution occurs when an electoral districting body unlawfully weakens a minority group's ability to elect a chosen candidate by creating a large, majority-dominated district. To remedy vote dilution, a legislature or other government body may create "majority-minority" districts, where the protected minority group constitutes a numerical majority of the population within the new district. Initially, the Fifteenth Amendment served as the primary avenue for dilution claims. In response to public outcry following two Supreme Court holdings that required intentional discrimination to prove a violation of the Fifteenth Amendment in voting dilution cases, Congress amended Section 2 in 1982 to remove any intent requirements. A more detailed analysis of Section 2 is beyond the scope of this presentation.
Redistricting can be administrative or judicial. An administratively submitted redistricting plan is reviewed by the Section 5 Unit of the Civil Rights Division’s Voting Section under a newly strengthened non-retrogression provision. A judicially scrutinized redistricting plan is one that is the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. Often a covered jurisdiction will find that, especially when redistricting takes place in an election year, when primary and general elections are imminent, or when the election machinery is already in full swing, it must also answer to a local U.S. District Court. This is a particularly sensitive area of federal-state-local interests, as where a federal court is asked to extend qualification deadlines, postpone elections, or shorten terms of office.

Whether the Section 5 submission is administrative or judicial, the submission of a local government redistricting plan must satisfy the non-retrogression requirements of Section 5. The submission must also satisfy substantially reinvigorated requirements designed to ferret out signs and indicia of purposeful discrimination, aided by a newly adopted multifactor analytical standard borrowed from housing discrimination precedent. The Justice Department’s recently issued revised Guidance was expressly written in order to reflect major changes wrought by the 2006 amendments to the Voting Rights Act. In addition to Section 5, moreover, a city or county submitting a redistricting plan for preclearance must also keep its sights set on compliance with Section 2’s requirements, bearing in mind at all times that a redistricting plan pre-cleared under Section 5 can nonetheless be challenged in a vote dilution action under Section 2.

C. A Cloud Over Section 5

Some argue that time may be running out on Section 5, the remedy that Congress devised in 1965 to overcome the historical pattern of denying blacks access to the ballot box in much of the South. In NAMUDNO, no sitting Justice in 2009 disagreed with Chief Justice Roberts on that point. While NAMUDNO may have been the canary in the coal mine for continued viability of Section 5 and the remedial policies it embodies as the law of the land, many are also keenly aware that the constitutionality of the Voting Rights Act Reauthorization and Amendments Act of 2006, 42 U.S.C. §1973c (2006), is now being challenged in Shelby County, Alabama v. Holder, Case #1:10-cv-00651-JDB (D. D.C.), on the ground that Congress did not have the constitutional authority, in 2006, to reauthorize Section 5 for another 25 years.

NAMUDNO may be more prophetic than many give it credit for. Eight of the Justices agreed that the racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nationwide. Eight agreed that many of the first generation barriers to minority voter registration and voter turnout have been eliminated. Eight agreed that the evil §5 was meant to address may no longer be concentrated in the covered jurisdictions singled out for

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6 Under the Voting Rights Act, a change in a “standard, practice, or procedure with respect to voting” must be “pre-cleared” by either declaratory judgment by the U.S. District Court for the District of Columbia or by submitting the proposed changes to the U.S. Attorney General. Actions under § 5 of the Voting Rights Act are heard by a three-judge court in accordance with 28 U.S.C. § 2284, whose decisions are immediately appealable to the Supreme Court. See 42 U.S.C. § 1973c(a). However, a district court judge may dismiss a claim prior to referring it to a three-judge court if the claim is “‘wholly insubstantial’ and completely without merit.” LULAC v. Texas, 113 F.3d 53, 55 (5th Cir. 1997) (per curiam).
preclearance. Eight agreed that there now appears to be more similarity than difference between covered and non-covered jurisdictions in most areas of the United States. Eight agreed that the justification for imposing current burdens on covered jurisdictions, differentiating between States, appears to be waning that may no longer be justified.”

This Nation has turned a corner since the enactment of the Voting Rights Act of 1965. The VRA is now 46 years old, and most will agree that racial discrimination in voting has declined tremendously. Most will also agree that much progress has been made in race relations as a result of an increasingly accessible electoral process, facilitated by the VRA’s subsequent revisions and extensions.

So while we will not ignore the cloud on Section 5 and must take into account the mounting constitutional challenges, we must also deal with the law as it exists. For now, Section 5 is presumptively constitutional and controlling law for covered jurisdictions. Its requirements are stringent. And they must be followed. That said, let us now discuss what covered jurisdictions in Alabama and other southern states must do to comply with Section 5, especially in light of the recently released 2010 Census data.

II. 2010 Census Redistricting Data Program

Congress enacted Public Law 94-171 in December 1975, requiring the Census Bureau to provide state legislatures with the small area census population tabulations necessary for legislative redistricting. Under P.L. 94-171, states participating in this voluntary program will define the small areas for which specific data tabulations are desired, including census block boundaries, voting districts, and state legislative districts, and submit these areas following timelines established by the Census Bureau. The total population tabulations are required to be transmitted to the states by April 1, 2011.

The 2010 Census Redistricting Data Program has five phases and will provide states the opportunity to delineate voting and state legislative districts and to suggest census block boundaries for use in the 2010 Census redistricting data tabulations (Public Law 94-171 Redistricting Data File).

The Redistricting Data Program is designed to ensure continued dialogue with the states in regard to 2010 Census planning, thereby allowing states ample time for planning, response, and participation.

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7The five phases include: Phase 1 - State Legislative District Project; Phase 2 - Voting District/Block Boundary Suggestion Project; Phase 3 - Delivery of the 2010 Census P.L. 94-171 Redistricting Data Files and Geographic Products; Phase 4 - Collection of Post-2010 Census Redistricting Plans; and Phase 5 - Evaluation of the 2010 Census Redistricting Data Program and Recommendations for 2020. See generally http://www.census.gov/rdo/program_phases/
The Redistricting Data Office coordinates the tabulation and release of Census Bureau data sets that are of specific interest to those in the redistricting and elections communities. The redistricting data releases include the

(1) 2010 Census Redistricting [P.L. 94-171] TIGER/Line Shapefiles, which are spatial extracts from the Census Bureau's MAF/TIGER database, containing features such as roads, railroads, rivers, as well as legal and statistical geographic areas, designed for use with geographic information system (GIS) software. The Shapefiles do not include demographic data, but they contain geographic entity codes that can be linked to the Census Bureau’s demographic data.

(2) 2010 Census Redistricting Maps, which are a comprehensive series of maps that may assist in working with the Summary Files.

(3) 2010 Census Block Assignment Files, which contain statewide 2010 Census tabulation block listings for a series of geographies.

(4) The Name Look-up tables provide a listing of those geographies by code and name.

(5) 2010 Census Redistricting Data [P.L. 94-171] Summary Files, which contain the redistricting data tabulated from the 2010 Census. The Summary File's Technical Documentation is now available through the summary file page, which also contains links to the Census 2000 Public Law 94-171 Redistricting Data, Citizen Voting Age Population (CVAP) Special Tabulation From the 2005-2009 5-Year American Community Survey, Congressional District Data, State Legislative District Data, and Voting Rights Determination Data.

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

1. Overview of the ACS

The American Community Survey (ACS) is a nationwide survey conducted in every county in the United States and every municipio in Puerto Rico designed to provide communities with demographic, economic, social, and housing data. The data collection takes place virtually every day of the year. Using a sample of about 3 million addresses including housing units and group quarters, the ACS collects information from people on education, transportation, housing value, marital status and other topics. The information generated by the ACS helps determine how billions of federal and state dollars are distributed. Data collection takes place nearly every day of the year across the country.

The U.S. Constitution requires a census every 10 years. It is the official count of every person living in the United States and is used to apportion seats in the House of Representatives.

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8 See http://www.census.gov/rdo/data/

9 http://www.census.gov/acs/www/guidance_for_data_users/e_tutorial/
and determine how to distribute billions of federal and state dollars. It is also used as the primary source of population data for redistricting at the state and local government level.

Recent decennial censuses have consisted of two questionnaires from the Census Bureau: a short form questionnaire and a long form. The short form asked basic questions such as age, sex, and race, while the long form asked those and many more detailed questions about social, housing, and economic characteristics. The long form was sent to a small percentage of the population and gave a snapshot of communities every 10 years.

The Census Bureau created a better way to provide more timely data by collecting it more frequently through the ACS. Instead of having data from the decennial census used throughout the decade until the next census, the ACS data provided an alternative, but with some limits in the form of sampling error and non-sampling error.

Non-sampling error can consist of errors in how the data are reported or problems in the processing of the survey questionnaire, while sampling error occurs when data are based on a sample of a population rather than the full population. Sampling error is easier to measure than non-sampling error and can be used to assess the statistical reliability of survey data. In a nutshell, the larger the sample for a given area, and the more months included in the data, the greater the confidence in the estimate.

Users of ACS data can assess the statistical reliability of these estimates by looking at the margins of sampling error which in turn are used to create confidence intervals. Confidence intervals define a range of values expected to contain the value of an estimate in the full population. ACS data are published with margins of error at the 90% confidence level.11

Due to the complexity of the sampling design and the weighting adjustments performed on the ACS sample, unbiased design-based variance estimators do not exist. As a consequence, the direct variance estimates are computed using a replication method that repeats the estimation procedures independently several times. The variance of the full sample is then estimated by using the variability across the resulting replicate estimates. Although the variance estimates calculated using this procedure are not completely unbiased, the current method produces variances that are accurate enough for analysis of the ACS data.12 To bring this hay down to where the cows can eat it, the ACS is less reliable, not as accurate and cannot safely be considered an equivalent source of data for the official U.S. Census. Take a look at the 5th Circuit’s recent foray into the esoterica of the ACS data when plaintiffs sought to use it to support a Section 2 vote dilution challenge.

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

The use of annual American Community Survey data (ACS data) in lieu of official Census data for redistricting purposes in a §2 suit was discussed at length in Benavidez v. Irving

10 http://www.census.gov/acs/www/methodology/sample_size_and_data_quality/
11 http://www.census.gov/acs/www/guidance_for_data_users/comparing_data/
According to the court, “[t]he ACS is an annual nationwide survey, conducted throughout the year by the Census Bureau, that covers many of the same topics as the old long form. The ACS samples three million households each year, a significantly smaller annual sample than the eighteen million covered by the census long form every ten years. The first ACS sample was conducted in 2005, and the first full set of data was released in 2006.” Id.

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

Let’s take a closer look at Benavidez. The issue in that case was whether the plaintiff satisfied the first Gingles precondition in their §2 action, namely, that the Hispanic minority population was able to demonstrate that a geographically compact majority-minority district can be created. The plaintiff’s expert relied on 2007 one-year ACS data instead of the 2000 Census data to support Hispanic population projections pivotal to determining whether a majority-minority district could be formed in compliance with the first Gingles precondition.

The court also addressed the presumption of accuracy of Official U.S. Census Data, noting that under established Fifth Circuit precedent, "[c]ensus figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing to override the presumptive correctness of the prior decennial census." This presumption hobbled the plaintiffs’ case. Indeed, the plaintiff in Benavidez was able to show that ACS data were produced by the U.S. Census Bureau and would replace the decennial census’ long form questionnaire, indicating the Census Bureau found the ACS data reliable for certain purposes. The ACS Guide issued by the Census Bureau for using the ACS data, however, “clearly state[d] that, for populations under 65,000, ‘the ACS samples too few households to provide reliable single-year estimates. For these communities, several years of data will be pooled together to create reliable 3-year or 5-year estimates.’” Id. at 458.

The ACS Guide provided, moreover, that due to the smaller sample size, "the ACS needs to combine population or housing data from multiple years to produce reliable numbers for small counties, neighborhoods, and other local areas,” and for that reason the Census Bureau would release one, three and five-year ACS estimates. Id. Further, the ACS Guide cautioned that ACS data had greater margins of error than traditional census data; moreover, the Census Bureau published margins of error for every ACS estimate so statisticians and demographers could make appropriate use of the data. According to the court, even though larger margins of error did not render the data as unreliable for all purposes, the margins of error had to be taken into account, and the purposes for which the data might be used had to be limited accordingly.

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

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

[Plaintiff’s expert] relies on the uncertain 2007 estimates in calculating the growth rate to project the 2008 population size, making his estimated growth rate and the 2008 population estimates correspondingly unreliable. Courts have rejected overly simplistic, 'crude' analyses that are easy and inexpensive to calculate but too inaccurate to serve as a basis for changing the basis of conducting elections.” (internal citations omitted). Id. at 459.

B. Census Undercounts: The Non-response Follow-Up Category

It is estimated that in 2000 only about 70% of the population returned their information, leaving several areas seriously under-counted and under-represented.

The final census counts for the 2010 Census will not be based solely on the questionnaires that are completed and mailed back by households.

Trained Census Bureau enumerators were to visit non-responding households starting in May 2010 and were to try six times if necessary to reach a knowledgeable household member, visiting housing units multiple days at different hours. When the enumerator made contact, he or she was to collect the census data by interview. If enumerators could not contact a household, they were to seek information in any way possible to estimate the number of people in the household.

According to the Census Bureau, in order to get ready for non-response follow up, it planned to test about 3 million applicants for skills in map reading, arithmetic, and reasoning skills, perform FBI criminal background checks, fingerprint those hired for another check, and thereby have a work force of a little over 1 million people at the end of the process. No other activity of this scale has ever been mounted in this nation.

The Census Bureau focused on hiring locally and tried to ensure that the census taker and local resident relate to each other with a high degree of comfort, culturally and linguistically.

At the end of this process, ideally every household should have some information about its occupants recorded.
Of course, the best and most cost-effective information the Census Bureau obtains will come from completed questionnaires mailed back by households.\textsuperscript{15}

III. The Redistricting Process


The U.S. Supreme Court recognized long ago that “no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”\textsuperscript{16} Political equality and “fair and effective representation” have been the touchstones of redistricting since the U.S. Supreme Court entered the political thicket\textsuperscript{17} over four decades ago in \textit{Baker v. Carr}, 369 U.S. 186 (1962). Our Nation’s highest Court in these seminal decisions embraced the guarantee under the Equal Protection Clause we know as the “one person, one vote” doctrine and applied it to provide meaningful protection for each citizen’s fundamental right to participate in the democratic process. That doctrine requires each state to “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”\textsuperscript{18}

The Civil Rights Movement made our Nation realize that the guarantees of political equality, fair and effective representation, and equal access to the polls were not sufficient to root out many of the racially discriminatory voting practices that marginalized African American citizens from the political and electoral process. Drawing on the "one person, one vote" doctrine, the Supreme Court soon recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."\textsuperscript{19}

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

That need was met by the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. §1973 et seq., landmark legislation that has seen no equal in the history of our Nation. The VRA “was designed by Congress to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century.” \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 308 (1966).

Much of the political landscape and most of the contours of modern election law developed over the past 45 years can be traced to the Voting Rights Act of 1965, the Crown Jewel of the Civil Rights Movement.\textsuperscript{20} The political reality that characterizes today’s most bitter and

\textsuperscript{15} http://blogs.census.gov/2010census/non-response-follow-up/

\textsuperscript{16} \textit{Wesberry v. Sanders}, 376 U.S. 1, 17 (1964).

\textsuperscript{17} \textit{Colegrove v. Green}, 328 U.S. 549, 556 (1946).


\textsuperscript{20} Sometimes we let the passage of years blur or even erase memories of the mountaintop experience that energized those fortunate souls who stood in the Oval Office that day in 1965 and witnessed LBJ signed the Voting Rights Act of 1965 into law. Consider standing in their shoes and looking back 45 years. Zachary J. Sullivan, \textit{A Proposed
intractable partisan disputes stems in part from case law interpreting and applying the key provisions of that landmark legislation. At the same time, the very best leaders elected at the federal, state and local level have come from the ranks of an electorate dedicated to equal electoral opportunity and unimpeded access to the political process.

B. Shaw v. Reno: Maximization and Race-Predominant Redistricting

Before Shaw was decided in 1993, state and local government entities were increasingly exposed to liability under the VRA for failing to create majority-minority districts whenever racial bloc voting existed, unless those districts were configured in a way that would amount to maximization of minority voting strength. In an effort to minimize exposure to liability, state and local government entities would rely on computerized census data and maps that took race into account in determining where to draw boundary lines in redistricting plans. This data was used to avoid retrogression and impermissible fragmentation of compact and cohesive minority population concentrations. Failure of a state or local government entity to draw a majority-minority district gave rise to substantial liability exposure, even if such district-manipulation had to be undertaken at the expense of dividing cities, counties, precincts or other recognized and traditional political subdivision boundaries.

1. Race-Based Legislation & Racial Stereotypes

The Court in Shaw v. Reno addressed “the meaning of the constitutional ‘right’ to vote and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups.” Speaking through Justice Sandra Day O’Connor, the

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

22 See, e.g., Sinkfield v. Bennett, No. CV-93-689-PR (Cir. Ct. Montgomery Co., Nov. 20, 1997) (Intervenors challenged the Consent Decree Plan from 1993 as violative of the “one-person, one-vote” doctrine with districts containing a 10.2% maximum deviation, districts that were unconstitutional racial gerrymanders under the line of cases from Shaw v. Reno, 509 U.S. 630 (1993), and districts were designed to intentionally overpopulate majority White districts and dilute their voting strength. Racial gerrymander claim was limited to the districts where the intervenors resided, court finding that race, while a factor, was not a main or predominant factor that subordinated traditional, race-neutral districting principles; moreover, the districts were within constitutionally permissible limits by finding that the deviation in one district was justified and that there was no evidence of dilution of voting strength).

23 Id. at 633.
Court suggested that drawing race-conscious districting lines may widen the racial divide rather than get us beyond race.

This Court never has held that race-conscious state decision making is impermissible in all circumstances. What appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification. For the reasons that follow, we conclude that appellants have stated a claim upon which relief can be granted under the Equal Protection Clause. See Fed. Rule Civ. Proc. 12(b)(6).24

…

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.25

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

The Court’s 1995 decision in Miller v. Johnson26, brought into even sharper focus the tension that takes place when a state or local government entity simultaneously attempts to satisfy the race-conscious mandate of §2 of the Voting Rights Act, while not running afoul of the Fourteenth Amendment’s prohibition against race-predominant decision making. For jurisdictions covered by Section 5, navigating between these extremes proved frustratingly complex. Constitutional precedent continued to develop in the redistricting arena when the Court in 1996 focused on the Texas and North Carolina congressional district cases of Bush v. Vera27 and Shaw v. Hunt28.

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

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24 Shaw v. Reno, supra at 642.
25 Shaw v. Reno, supra at 647.
In her concurring opinion in the 1996 decision involving congressional districts in Texas, *Bush v. Vera*, Justice Sandra Day O’Connor recognized that the process of reconciling the VRA’s requirements with those of the Equal Protection Clause "sometimes requires difficult exercises of judgment." Justice O’Connor’s guidance for state and local government entities was outlined in the following manner:

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 Section 2 liability is a compelling governmental interest.

Fourth, a district drawn to avoid Section 2 liability is narrowly tailored so long as it does not deviate substantially, for predominantly racial reasons, from the sort of district a court would draw to remedy a Section 2 violation.

Fifth, districts that are bizarrely shaped and non-compact and that otherwise neglect traditional principles and deviate substantially from the sort of district a court would draw are unconstitutional, if drawn for predominantly racial reasons.

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

### 3. No Prohibition on Drawing Majority-Minority Districts

As discussed in greater detail *infra*, the Justice Department recently promulgated a final Guidance relating to the administration of Section 5 of the Voting Rights Act, providing the answer to one of the FAQs, whether it is “prohibited to draw majority-minority districts.”

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

> Over 30 years ago the Supreme Court held that jurisdictions are free to draw majority-minority election districts that follow traditional, non-racial districting considerations, such as geographic compactness and keeping communities of interest together. Later

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Supreme Court decisions have held that drawing majority-minority districts may be required to ensure compliance with the Voting Rights Act.

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

C. Mid-Census Redistricting

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

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

The Attorney General's Procedures for the Administration of Section 5 are published at 28 C.F.R. Part 51 and provide detailed information about the administrative review process, also known as the preclearance process. The procedures identify covered jurisdictions, provide examples of the types of voting-related practices and procedures that require Section 5 review, describe the steps in making Section 5 administrative submissions, and explain the process by which submissions are reviewed and the factors considered in making Section 5 determinations. Voting Section's Minority Language Guidelines are separately codified as Part 55 of Title 28 of the Code of Federal Regulations. The Voting Section reprints copies of the Voting Rights Act, the Section 5 Procedures, and the Minority Language Guidelines in booklet form, and will mail copies upon request to covered jurisdictions and interested persons.

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A Detailed Index to the Section 5 Administrative Procedures is available at http://www.justice.gov/crt/about/vot/28cfr/51/index_51.php

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

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

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

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

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

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

E. Section 5 Administrative Guidelines and Procedures

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

► Subpart A -- General Provisions:

51.1 Purpose.

51.2 Definitions.

51.3 Delegation of authority.
51.4 Date used to determine coverage; list of covered jurisdictions.

51.5 Termination of coverage (bailout).

51.6 Political subunits.

51.7 Political parties.

51.8 Section 3 coverage.

51.9 Computation of time.

51.10 Requirement of action for declaratory judgment or submission to Attorney General.

51.11 Right to bring suit

51.12 Scope of requirement.

51.13 Examples of changes.

51.14 Recurrent practices.

51.15 Enabling legislation and contingent or non-uniform requirements.

51.16 Distinction between changes in procedure and changes in substance.

51.17 Special elections.

51.18 Court-ordered changes.

51.19 Request for notification concerning voting litigation.

► Subpart B -- Procedures for Submission to Attorney General:

51.20 Form of submissions.

51.21 Time of submissions.

51.22 Premature submissions.

51.23 Party and jurisdiction responsible for making submissions.

51.24 Address for submissions.

51.25 Withdrawal of submissions.
Subpart C -- Contents of Submissions:
http://www.justice.gov/crt/about/vot/28cfr/51/subpart_c.php

51.26 General.

51.27 Required contents.

51.28 Supplemental contents.

Subpart D -- Communications From Individuals and Groups:
http://www.justice.gov/crt/about/vot/28cfr/51/subpart_d.php

51.29 Communications concerning voting changes.

51.30 Action on communications from individuals or groups.

51.31 Communications concerning voting suits.

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

Subpart E -- Processing of Submissions:
http://www.justice.gov/crt/about/vot/28cfr/51/subpart_e.php

51.33 Notice to registrants concerning submissions.

51.34 Expedited consideration.

51.35 Disposition of inappropriate submissions.

51.36 Release of information concerning submissions.

51.37 Obtaining information from the submitting authority.

51.38 Obtaining information from others.

51.39 Supplementary submissions.

51.40 Failure to complete submissions.

51.41 Notification of decision not to object.

51.42 Failure of the Attorney General to respond.

51.43 Reexamination of decision not to object.

51.44 Notification of decision to object.
51.45 Request for reconsideration.

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

51.47 Conference.

51.48 Decision after reconsideration.

51.49 Absence of judicial review.

51.50 Records concerning submissions.


51.51 Purpose of the subpart.

51.52 Basic standard.

51.53 Information considered.

51.54 Discriminatory effect.

51.55 Consistency with constitutional and statutory requirements.

51.56 Guidance from the courts.

51.57 Relevant factors.

51.58 Representation.

51.59 Redistrictings.

51.60 Changes in electoral systems.

51.61 Annexations.

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

51.62 Enforcement by the Attorney General.

51.63 Enforcement by private parties.

51.64 Bar to termination of coverage (bailout).
Subpart H -- Petition to Change Procedures:
http://www.justice.gov/crt/about/vot/28cfr/51/subpart_h.php

51.65 Who may petition.

51.66 Form of petition.

51.67 Disposition of petition.

Appendix to Part 51 -- Covered Jurisdictions:
http://www.justice.gov/crt/about/vot/28cfr/51/apdx_txt.php

Copies of the full set of Guidelines are posted at the following sites:

All Section 5 Administrative Procedures (HTML)(112K):
http://www.justice.gov/crt/about/vot/28cfr/51/28cfr51.php

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

F. Contents of §5 Submissions: 28 C.F.R. PART 51 Subpart C

1. §51.26 General.

(a) The source of any information contained in a submission should be identified.

(b) Where an estimate is provided in lieu of more reliable statistics, the submission should identify the name, position, and qualifications of the person responsible for the estimate and should briefly describe the basis for the estimate.

(c) Submissions should be no longer than is necessary for the presentation of the appropriate information and materials.

(d) The Attorney General will not accept for review any submission that fails to describe the subject change in sufficient particularity to satisfy the minimum requirements of §51.27(c).

(e) A submitting authority that desires the Attorney General to consider any information supplied as part of an earlier submission may incorporate such information by reference by stating the date and subject matter of the earlier submission and identifying the relevant information.

(f) Where information requested by this subpart is relevant but not known or available, or is not applicable, the submission should so state.
2. §51.27 Required contents.

Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting:

(a) A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting.

(b) A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise changed.

(c) If the change affecting voting either is not readily apparent on the face of the documents, provided under paragraphs (a) and (b) of this section or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

(d) The name, title, address, and telephone number of the person making the submission.

(e) The name of the submitting authority and the name of the jurisdiction responsible for the change, if different.

(f) If the submission is not from a State or county, the name of the county and State in which the submitting authority is located.

(g) Identification of the person or body responsible for making the change and the mode of decision (e.g., act of State legislature, ordinance of city council, administrative decision by registrar).

(h) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change.

(i) The date of adoption of the change affecting voting.

(j) The date on which the change is to take effect.
(k) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(l) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change.

(m) A statement of the reasons for the change.

(n) A statement of the anticipated effect of the change on members of racial or language minority groups.

(o) A statement identifying any past or pending litigation concerning the change or related voting practices.

(p) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made.

(q) For redistrictings and annexations: the items listed under §51.28 (a)(1) and (b)(1); for annexations only: the items listed under §51.28(c)(3).

(r) Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. Such information may include items listed in §51.28 and is most likely to be needed with respect to redistrictings, annexations, and other complex changes. In the interest of time such information should be furnished with the initial submission relating to voting changes of this type. When such information is required, but not provided, the Attorney General shall notify the submitting authority in the manner provided in §51.37.

3. §51.28 Supplemental contents.

Review by the Attorney General will be facilitated if the following information, where pertinent, is provided in addition to that required by §51.27.

(a) Demographic information.

(1) Total and voting age population of the affected area before and after the change, by race and language group. If such information is contained in publications of the U.S. Bureau of the Census, reference to the appropriate volume and table is sufficient.

(2) The number of registered voters for the affected area by voting precinct before and after the change, by race and language group.
(3) Any estimates of population, by race and language group, made in connection with the adoption of the change.

(4) Demographic data provided on magnetic media shall be based upon the Bureau of the Census Public Law 94-171 file unique block identity code of state, county, tract, and block.

(5) Demographic data on magnetic media that are provided in conjunction with a redistricting shall be contained in a table of equivalencies giving the census block to district assignments in the following format:

(i) Each census block record (including those with zero population) will be followed by one or more additional fields indicating the district assignment for the census block in one or more plans.

(ii) All district assignments in the plan fields shall be right justified and blank filled if the assignment is less than four characters.

(iii) The file structure shall be as follows:

<table>
<thead>
<tr>
<th>Field</th>
<th>PL 94-171 reference name</th>
<th>Length</th>
<th>Data type</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>STATEFP</td>
<td>2</td>
<td>Numeric</td>
</tr>
<tr>
<td>county</td>
<td>CNTY</td>
<td>3</td>
<td>Numeric</td>
</tr>
<tr>
<td>tract</td>
<td>TRACT/BNA</td>
<td>6</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>block</td>
<td>BLCK</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>plan 1 District</td>
<td>User supplied</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>plan 2 District</td>
<td>User supplied</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
<tr>
<td>plan 3 District</td>
<td>etc</td>
<td>......</td>
<td></td>
</tr>
<tr>
<td>plan n District</td>
<td>User supplied</td>
<td>4</td>
<td>Alpha/Numeric</td>
</tr>
</tbody>
</table>

(iv) State and county shall be identified using the Federal Information Processing Standards (FIPS-55) code.

(v) Census tracts shall be left justified, and census blocks shall be left justified and blank filled if less than four characters.

(vi) Unused plan fields shall be blank filled.

(vii) In addition to the information identified in §51.20 (c) through (e), the documentation file accompanying the block level equivalency file shall contain the following information:

(A) The file structure.
(B) The total number of plans.

(C) For each plan field, an identification of the plan (e.g., state senate, congressional, county board, city council, school board) and its status or nature (e.g., plan currently in effect, adopted plan, alternative plan and sponsors).

(D) The number of districts in each plan field.

(E) Whether the plan field contains a complete or partial plan.

(F) Any additional information the jurisdiction deems relevant such as bill number, date of adoption, etc., and a listing of any modifications the submitting authority has made that alter the structure of the TIGER/line geographic file.

(b) Maps. Where any change is made that revises the constituency that elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or that changes voting precinct boundaries, polling place locations, or voter registration sites, maps in duplicate of the area to be affected, containing the following information:

1. The prior and new boundaries of the voting unit or units.
2. The prior and new boundaries of voting precincts.
3. The location of racial and language minority groups.
4. Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units.
5. The location of prior and new polling places.
6. The location of prior and new voter registration sites.

(c) Annexations. For annexations, in addition to that information specified elsewhere, the following information:

1. The present and expected future use of the annexed land (e.g., garden apartments, industrial park).
2. An estimate of the expected population, by race and language group, when anticipated development, if any, is completed.
3. A statement that all prior annexations subject to the preclearance requirement have been submitted for review, or a statement that identifies all annexations
subject to the preclearance requirement that have not been submitted for review.
see §51.61(b).

(d) Election returns. Where a change may affect the electoral influence of a racial
or language minority group, returns of primary and general elections conducted
by or in the jurisdiction, containing the following information:

(1) The name of each candidate.

(2) The race or language group of each candidate, if known.

(3) The position sought by each candidate.

(4) The number of votes received by each candidate, by voting precinct.

(5) The outcome of each contest.

(6) The number of registered voters, by race and language group, for each voting
precinct for which election returns are furnished. Information with respect to
elections held during the last ten years will normally be sufficient.

(7) Election related data containing any of the information described above that
are provided on magnetic media shall conform to the requirements of §51.20 (b)
through (e). Election related data that cannot be accurately presented in terms of
census blocks may be identified by county and by precinct.

(e) Language usage. Where a change is made affecting the use of the language of
a language minority group in the electoral process, information that will enable
the Attorney General to determine whether the change is consistent with the
minority language requirements of the Act. The Attorney General's interpretation
of the minority language requirements of the Act is contained in Interpretative
Guidelines: Implementation of the provisions of the Voting Rights Act Regarding

(f) Publicity and participation. For submissions involving controversial or
potentially controversial changes, evidence of public notice, of the opportunity for
the public to be heard, and of the opportunity for interested parties to participate
in the decision to adopt the proposed change and an account of the extent to
which such participation, especially by minority group members, in fact took
place. Examples of materials demonstrating public notice or participation include:

(1) Copies of newspaper articles discussion the proposed change.

(2) Copies of public notices that describe the proposed change and invite
public comment or participation in hearings and statements regarding
where such public notices appeared (e.g., newspaper, radio, or television,
posted in public buildings, sent to identified individuals or groups).

(3) Minutes or accounts of public hearings concerning the proposed change.

(4) Statements, speeches, and other public communications concerning the proposed change.

(5) Copies of comments from the general public.

(6) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(g) Availability of the submission.

(1) Copies of public notices that announce the submission to the Attorney General, inform the public that a complete duplicate copy of the submission is available for public inspection (e.g., at the county courthouse) and invite comments for the consideration of the Attorney general and statements regarding where such public notices appeared.

(2) Information demonstrating that the submitting authority, where a submission contains magnetic media, made the magnetic media available to be copied or, if so requested, made a hard copy of the data contained on the magnetic media available to be copied.

(h) Minority group contacts. For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process. [56 FR 51836, Oct. 16, 1991]

G. Guidance Concerning Redistricting Under Section 5 (Effective 9 Feb.2011)

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

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

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

1. Submissions under Section 5: Discriminatory Purpose or Effect

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

2. Highlights of 2011 Guidance

On June 11, 2010, the Attorney General published a notice in the Federal Register concerning proposed revisions to the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. Part 51. It invited interested persons to participate in the consideration of these amendments during the comment period that ended on August 10, 2010.33

On February 9, 2011, the final Guidance was issued. Its stated purpose was to clarify the scope of section 5 review based on the 2006 amendments to section 5 and to provide covered


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

jurisdictions and minority citizens with appropriate “guidance” concerning current Justice Department practices.34

The following is a summary of the 2011 Guidance, the complete text of which appears as an appendix to this written presentation.35

a. SCOPE OF REVIEW: The guidance clarifies the scope of section 5 review based on the 2006 amendments to section 5.

b. LONGSTANDING PRACTICES OF AG: The guidance describes long-standing practices of the Attorney General in the review of section 5 submissions to ensure that all covered changes affecting voting are promptly submitted for review and minimize the potential for litigation.

c. BENCHMARK STANDARD: The guidance clarifies the definition of the benchmark standard, practice, or procedure  and clarifies that jurisdictions may seek earlier termination of coverage through a bailout action, incorporating the Supreme Court’s holding in NAMUDNO [Northwest Austin Mun. Utility Dist. No. One v. Holder, 129 S.Ct. 2504 (2009)] that any jurisdiction required to comply with section 5 may seek to terminate that obligation pursuant to the bailout procedures under § 4(a) of the Act.

d. REVIEW PERIOD: The review period commences only when a submission is received by the Justice Department officials responsible for conducting section 5 reviews and clarifies that, in determining whether a change is covered, any inquiry into whether the change has the potential for discrimination is focused on the generic category of changes to which the specific change belongs. A voting change is covered regardless of the manner or mode by which a covered jurisdiction acts to adopt it, and dissolution or merger of voting districts, de facto elimination of an elected office, and relocations of authority to adopt or administer voting practices or procedures are all subject to section 5 review.

e. COURT-ORDERED CHANGES: The guidance clarifies that §5 review ordinarily should precede court review, and a court-ordered change that initially is not covered by section 5 may become covered through actions taken by the affected jurisdiction. The interim use of an unprecleared change should be ordered by a court only in emergency circumstances.

f. ELECTRONIC SUBMISSIONS: The guidance amends the addresses to which submissions can be delivered to reflect changes in the location of the Voting Section and its mail-handling procedures. It notes the availability of electronic submissions and fax submissions, as well as the availability of e-mail as a means of submitting additional information on pending submissions.

g. WRITTEN COMMENTS: Persons may provide written comments on submissions and their identity may be withheld by the Justice Department. The Attorney General may make written and oral requests for additional information regarding a submission, and the 60-day review period recommences when a jurisdiction voluntarily provides material supplemental information, or where a related submission is received.

h. RECONSIDERATION OF DECISION NOT TO OBJECT: The guidance clarifies the procedures when the Attorney General decides to reexamine a decision not to object and when he can reconsider an objection in cases of misinterpretation of fact or mistake of law.

i. DISCRIMINATORY PURPOSE: The guidance clarifies the substantive standard of §5 to reflect the 2006 amendments to the Act that legislatively overruled Bossier Parish II and Georgia v. Ashcroft when the Attorney General evaluates issues of discriminatory.

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

The 2011 Guidance was expressly drafted for the purpose of reverting to the legal standards that had been suspended following the U.S. Supreme Court’s 1999 decision in Reno v. Bossier Parish (Bossier II) and its 2003 decision in Georgia v. Ashcroft. Both decisions were rejected and legislatively overturned by the VRARA of 2006. With the 2011 Guidance now providing a redefinition of intentional and purposeful discrimination, substantial “meat” was put on the bones of the VRARA of 2006. The Justice Department drew heavily upon Arlington Heights v. Metropolitan Housing Development Corp. for a broad and far-reaching definition of discriminatory intent and incorporated this analytical standard into the Guidance.

1. Arlington Heights and Discriminatory Intent

The 2011 Guidance states that when the Justice Department is evaluating a submitted plan to determine if there is sufficient circumstantial evidence that the jurisdiction has not carried

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

38 Georgia v. Ashcroft, 123 S. Ct. 2498 (2003) held that Section 5 did not prohibit covered jurisdictions from reducing the proportions of a minority voting age population in some majority-minority districts “even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice.”
its burden of proving a negative, that is, that the jurisdiction has not shown “the absence of the prohibited discriminatory purpose,” the Voting Section attorney examining the plan will follow the illustrative, non-exclusive list of “subjects for proper inquiry” enumerated in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977), to determine whether discriminatory intent existed. The sensitive inquiry prescribed by Arlington Heights calls for several areas to be reviewed in making such determination. The 2011 Guidance makes it explicitly clear that Voting Section attorneys examining Section 5 Submissions of redistricting plans from covered local government entities will be evaluating the Arlington Heights factors, which include:

(a) whether the impact of the official action bears more heavily on one race than another,

(b) the historical background of the decision,

(c) the legislative or administrative history,

(d) the specific sequence of events leading up to the submitted change,

(e) whether there are departures from the normal procedural sequence, and

(f) whether there are substantive departures from the normal factors considered.39

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

• The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction;

• The extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated;

• The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination;

• The extent to which minority voting strength is reduced by the proposed redistricting;

• The extent to which minority concentrations are fragmented among different districts;

• The extent to which minorities are over-concentrated in one or more districts;

• The extent to which available alternative plans satisfying the jurisdiction’s legitimate governmental interests were considered;

39 Arlington Heights, supra at 266-68
• The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and

• The extent to which the plan is inconsistent with the jurisdiction’s stated redistricting standards.

2. Failure to Maximize not Discriminatory Purpose per se

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

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

I. Section 5 Benchmark

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

Generally, the most recent plan to have received Section 5 preclearance or to have been drawn by a Federal court is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a Federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. McDaniel v. Sanchez, 452 U.S. 130 (1981); Texas v. United States, 785 F. Supp. 201 (D.D.C. 1992); Mississippi v. Smith, 541 F. Supp. 1329, 1333 (D.D.C. 1982), appeal dismissed, 461 U.S. 912 (1983).
A plan found to be unconstitutional by a Federal court under the principles of Shaw v. Reno and its progeny cannot serve as the Section 5 benchmark, Abrams v. Johnson, 521 U.S. 74 (1997), and in such circumstances, the benchmark for Section 5 purposes will be the last legally enforceable plan predating the unconstitutional plan.

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

J. Scope of Section 5 Review: Riley v. Kennedy

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

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

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

In order to determine whether an election practice constitutes a “change” as that term is defined in our §5 precedents, we compare the practice with the covered jurisdiction’s “baseline.” We have defined the baseline as the most recent practice that was both precleared and “in force or effect”—or, absent any change since the jurisdiction’s coverage date, the practice that was “in force or effect” on that date. See Young, 520 U. S., at 282–283. See also Presley, 502 U. S., at 495. The question is “whether a State has ‘enact[ed]’ or is ‘seek[ing] to administer’ a ‘practice or procedure’ that is ‘different’ enough” from the baseline to qualify as a change. Young, 520 U. S., at 281 …. 

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

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

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

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

A. General Considerations

How does a local government body go about the process of developing a redistricting plan that can survive a DOJ objection or a challenge in federal court? Legislative history will be a particularly critical component when a state or local government entity is called upon to evaluate changes reflected in a new redistricting plan adopted in light of population shifts and changes following the 2010 Census. Compliance with the one person, one vote requirement under the Fourteenth Amendment and with the requirements of Section 2 and Section 5 of the Voting Rights Act will be the focal point of that legislative history.
A covered jurisdiction will want to develop a defensible legislative history and a factually support legislative record, both key factors in protecting and undergirding the legal efficacy of a redistricting plan.

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

Consider at the outset what relevant legislative evidence should be included in the legislative history, particularly in light of the proposed §5 regulations, and in light of constitutional and statutory precedent formulated since the U.S. Supreme Court decided Thornburg v. Gingles, Growe v. Emison, Shaw v. Reno, U.S. v. Hays, Miller v. Johnson, Bush v. Vera, Cromartie v. Hunt, LULAC v. Perry, Bartlett v. Strickland, and the score of landmark decisions that form the backbone of VRA litigation. Dovetailed with these Supreme Court decisions is a helpful an alysis of Alabama redistricting cases decided under the 1990

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41 See, e.g., Brooks v. Camp, No. 93-T-364-N (M.D.Ala) (Proceedings alleging that legislative district lines violated minority voters’ constitutional rights by violating the one person, one vote principle and discriminating against minority were stayed on the ground that the legislative process had not run its course; during the stay, U.S. Supreme Court decided Growe v. Emison, 507 S. Ct. 25 (1993), reaffirming the principle that federal courts should defer to state courts regarding apportionment of state legislative districts where the State via legislature or judiciary had begun to address the task itself; federal court deferred to the Alabama state courts and rejected challenge that the state courts lacked subject-matter jurisdiction to redistrict or reapportion the State Legislature).

42 See, e.g., Sinkfield v. Bennett, No. CV-93-689-PR (Cir. Ct. Montgomery Co., Nov. 20, 1997) (Intervenors challenged the Consent Decree Plan from 1993 as violative of the “one-person, one-vote” doctrine with districts containing a 10.2% maximum deviation, districts that were unconstitutional racial gerrymanders under the line of cases from Shaw v. Reno, 509 U.S. 630 (1993), and districts were designed to intentionally overpopulate majority white districts and dilute their voting strength. Racial gerrymander claim was limited to the districts where the intervenors resided, court finding that race, while a factor, was not a main or predominant factor that subordinated traditional, race-neutral districting principles; moreover, the districts were within constitutionally permissible limits by finding that the deviation in one district was justified and that there was no evidence of dilution of voting strength).

43 See, e.g., Sinkfield v. Kelley, 531 U.S. 28 (2000) (Where legislative districts were drawn for the acknowledged purpose of maximizing the number of majority-minority districts, 531 U.S. at 28, white voters who resided in majority-white districts that neighbored majority-minority districts were held to lack standing under U.S. v. Hays to challenge their majority-white districts were the product of racial gerrymandering in violation of the Equal Protection Clause, since “they have neither alleged nor produced any evidence that any of them was assigned to his or her district as a direct result of having ‘personally been subjected to a racial classification.”’ Id. at 30).
census, prepared by the Minnesota Secretary of State’s office and the NCSL Redistricting Task Force and can be found at

http://www.senate.leg.state.mn.us/departments/scr/redist/redsum/alsum.htm

B. Local Government’s Legislative History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) office or position;

(c) date of election;

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

(e) relative qualifications of each candidate;

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

(g) policies and written platforms of each candidate;

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

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

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

(k) name recognition of each candidate;

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

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

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

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

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

Line drawers cannot draw a district that dilutes voting strength for a group of voters with rights under Section 2 and compensate for that dilution by drawing another minority district for voters who would not have a Section 2 claim. Mere geographical compactness and a mathematical majority of minority voters in a district may not be sufficient if a
redistricting plan relocates a minority district. Newly located minority districts must take into consideration communities of interest within the new district, perhaps separate and apart from race.\(^{45}\)

**C. Traditional Districting Principles**

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

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

Since the Supreme Court decided *Shaw v. Reno*\(^ {46}\) in 1993, the courts in Section 2 vote dilution litigation have recognized a number of goals or policies, some of which are geographical or natural and others political and legal, that fall under the heading “traditional districting principles.” These include, but are not limited to, the following:

1. compactness,
2. contiguity,
3. preservation of political subdivision boundaries of cities and counties,
4. preservation of communities of interest (or communities defined by actual shared interests),
5. preservation of cores of prior districts,
6. incumbent protection, and
7. compliance with Section 2 of the Voting Rights Act.\(^ {47}\)

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

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

In other words, depending on context of the case and the kind of analysis in which the court is engaged, the traditional districting principle of compactness may refer to geographical

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\(^{45}\)NCSL, *Redistricting Law 2010* at 113.

\(^{46}\) 509 U.S. 630 (1993).

compactness as a substantive requirement in a vote dilution case for creating a legally effective redistricting plan with viable minority districts, where the concept of compactness is considered critical to the advancement of §2’s ultimate purposes, namely, to ensure that a minority group has an equal opportunity to participate in the political process and elect representatives of their choice. Compactness, in this sense, is central to the Supreme Court’s analysis of minority vote dilution claims.

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

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

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

E. Problematic Population Groups

1. College students: *Fairley v. Hattiesburg*

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

Inclusion of college and university students in the population count for purpose of a municipal redistricting plan was upheld in *Fairley v. City of Hattiesburg*, 584 F.3d 660, 672 (5th Cir. 2009). There the plaintiffs sought judicial approval of their illustrative *Gingles* plan by “removing the dormitory students, whether legal residents or not, from districting calculations would reduce the ideal number of officially-counted residents per district.” As the Fifth Circuit
noted, "[b]ecause the excluded students are mostly white, that would have made it easier to create a third majority black ward."

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

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

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

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

Boddie v. City of Cleveland, 2010 U.S. Dist. LEXIS 3075 (N.D. Miss. 2010) (Boddie II), earlier proceedings, 297 F.Supp.2d 901, 905-06 (N.D.Miss.2004) (Boddie I), reached a different result based on a standing analysis. There the plaintiff in a §2 action argued that the inclusion of the non-resident student population residing at Delta State University (DSU) into the apportionment base was impermissible. The district court agreed and held that the non-resident student population who resided in dormitories at the university should not be included in the apportionment base for the City's aldermanic wards. The court reasoned that states and other political subdivisions are not required to include transients, short-term residents or temporary residents in the apportionment base upon which their voting districts or wards are based, citing Burns v. Richardson, 384 U.S. 73, 91-92, 86 S.Ct. 1286, 1296-97, 16 L.Ed.2d 376 (1966). The court also noted that in Fairley v. Patterson, supra at 602, the Fifth Circuit had upheld a Forrest County, Mississippi, supervisory redistricting plan which omitted from the reapportionment calculations all non-resident students at the county's two colleges who were unmarried and resided in dormitories or fraternity houses on campus; this totaled some 3,077 students. Non-resident students residing off campus were included in the Forrest County apportionment base; only those residing in dormitories were excluded.48

The court then addressed the City’s argument that excluding the students would violate their rights under the equal protection clause and the one person, one vote doctrine, but found

48 Fairley, 493 F.2d at 602-603.
that this was the same argument raised in *Fairley* on behalf of the Forrest County students at the University of Southern Mississippi and William Carey College who were excluded from the apportionment base. Rejecting the City’s argument, the district court concluded that such claims could only be asserted by the students themselves, and that no other person or entity had standing to assert those rights on behalf of the students, holding at 906:

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

2. Efforts to Bar Same Day Voting for College Students

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

...
Opponents of these various state measures are mounting a campaign to oppose what they see as efforts to turn a 21st Century voting system back to the 19th Century. In response to claims by Republican Gregory Sorg, the bill’s lead sponsor, that this proposed legislation is “a reasonable classification to account for one demographic group that is unlike any other and threatens to overwhelm the legitimate residents of a town or city,” others with college town experience have expressed sharply opposing views. During legislative committee hearings, for example, several local election officials spoke of the pleasure with which they added college students to the checklist, noting that students are part of civic life and are tallied in the census counts that decide how many lawmakers cities get to send to the state legislature, while others have more pointedly charged that H.B. 176 is unconstitutional under the New Hampshire constitution and the U.S. Constitution.53

Last month an online editorial pointed out that if H.B. 176 became law, “anyone who moved to New Hampshire for to attend school, regardless of whether they were 18 or 80, would have to vote where they lived prior to moving to the state.”54 Under current state law, students in New Hampshire are allowed to vote in their communities regardless of how long they have resided there or whether or not they intend to remain. While proponents of this legislation argue that such lax standards risk the legitimacy of elections, especially in local races, the New Hampshire Secretary of State has come out against it and predicted that if it should pass, the Governor would almost certainly veto it.55

According to some election experts, this controversy over voter reform is more about partisanship than anything else. For example, voter reform efforts in New Hampshire have recently focused on same day voting by college students. H.B. 223 was introduced in the New Hampshire House of Representatives to eliminate Election Day registration, which sends swarms of college students to polling places and create the potential for fraud. Another bill, H.B. 176, would allow college students to vote in their college town only if they or their parents are permanent residents there, leaving all other to vote in their home towns or states. Such efforts are seen by some as reactionary efforts to curb college voters.56

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


54 Id.
55 Id.; Tom Fahey, State House Bureau Chief, Voting Bills Draw Public Protest, Union Leader.com, Feb. 25, 2011, accessible online at http://www.unionleader.com/article.aspx?headline=Voting+bills+draw+public+protests&articleId=d0a964bb-ea11-4fbc-44ab-acc77f63c5f0

56 Id. at 11-12.
New Hampshire, unlike most states, allows for same day registration of voters. This coupled with a lax definition of residency creates an environment in which people may be claiming residency in multiple locations,” the statement said. “This is not an idea targeting any particular political party or ideology — it’s simply about getting back to the basic principles of ensuring residency and protecting integrity of our ballot system.57

Doug Chapin, Director of Election Initiatives at the Pew Center on the States recently observed that “[e]lection policy debates like photo ID and same-day registration have become so fierce around the country because they are founded more on passionate belief than proven fact,” and that “[o]ne side is convinced fraud is rampant; the other believes that disenfranchisement is widespread. Neither can point to much in the way of evidence to support their position, so they simply turn up the volume.”58

Alabama election law appears to have wisely steered clear of this debate. Students in Alabama must be held to the same eligibility requirements as any other voter in the jurisdiction, and if a student has fulfilled all of the registration requirements, i.e., Voter ID, age, citizenship and residency durational requirements, and has registered on time for the election, he or she should be permitted to vote and should lodge an immediate protest with a precinct election official if told otherwise. A college students like any other qualified voter may cast an absentee ballot if he or she expects to be prevented from going to the polls on Election Day because he or she is a registered Alabama voter living outside the county.59

3. Prisoners & Prison Gerrymandering Claims

Prison-based gerrymandering is the result of the Census Bureau's practice of counting incarcerated persons where they are imprisoned, rather than in the community of their legal residence.60 In states, counties and other local jurisdictions that have large regional correctional centers, penitentiaries, jails and prison populations, those jurisdictions receive enhanced representation, that is, they are eligible for greater representation in government "on the backs" of people who have no voting rights in the prison community and are not treated or considered as legal residents of the prison district for any purpose.

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

57 Id.
political constituents, but counting non-voting slaves as part of the population base enhanced the South's influence in Congress - at the expense of other parts of the country in choosing the President and Vice-President.\textsuperscript{61}

Consider the fact that more people live in U.S. Prisons than in our 3 least populous states combined. Consider also that the Census Bureau's practice was developed 200 years ago, when prison populations were relatively small and not large enough to distort the democratic process. Finally, consider the fact that the Census Bureau's antiquated practice results in districts that dilute the voting power of communities that are mostly urban and comprised of persons of color, while rural, suburban and overwhelmingly white districts where large prisons and large prison populations are located are over-represented.\textsuperscript{62}

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

One can point to particularly extreme examples in

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

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

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

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

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

\textsuperscript{61} \url{http://www.miller-mccune.com/politics/prison-based-gerrymandering-dilutes-blacks-voting-power-16880}

\textsuperscript{62} Id.; Peter Wagner, Using the Census Bureau's Advanced Group Quarters Table, Prison Policy Initiative, February 14, 2011, accessible online at \url{http://www.prisonersofthecensus.org/technicalsolutions.html}
Until the Census Bureau changes this practice and starts counting incarcerated persons as residents of the community where they resided prior to incarceration and to which they almost always return upon their release - which appears to be what Ford's H.B. 94 is designed to accomplish, we will continue to count 2 million people in the wrong location.

To address the prison-based gerrymandering problem states can correct the census data by collecting home addresses of people in prison in the state and then adjusting the U.S. Census counts prior to redistricting. Along with H.B. 94 in Illinois, the states of New York, Florida, and Maryland are now considering legislation to accomplish this.63

Another ameliorative approach that states and counties can take is to remove prison populations prior to redistricting. While this does not put the prisoners back into their rightful residential communities, it does eliminate the large and unjustifiable vote enhancement created by crediting their numbers to prison districts. Wisconsin's legislature is considering a bill that would exclude incarcerated prisoners 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.64

Finally, for the first time, the Census Bureau has decided to publish the Advanced Group Quarters Data in early May 2011. The Advanced Group Quarters Table will include the block level counts of correctional facilities and other group quarters and will eventually be published as Table P42 in Summary File 1 in June, July and August 2011. This data will not be in a particularly convenient format, and state and local redistricting bodies will need build their timelines around having this data in early May. Technically, the data will be published in a text file on the Bureau's FTP site, and in addition to the block counts, the Census Bureau will provide state totals, state-county totals, state-county-census tract totals, and totals for various kinds of voting districts and subtotals of some of the group quarters types. It has been estimated that this will be a text file with 13 million rows and 10 columns of counts, quite a large amount of date to process in order to locate the approximately 5,000 correctional facilities in this nation, of which only 1,500 are state and federal prisons.65

F. Political or Partisan Gerrymandering Post-Vieth: Constitutional Limits

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

63 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

64 Id.

65 Peter Wagner, Using the Census Bureau’s Advanced Group Quarters Table, The Prison Policy Initiative, February 14, 2011, http://www.prisonersofthecensus.org/technicalsolutions.html (“The Census Bureau’s decision to release an Advanced Group Quarters table is a huge step forward that will give communities more choices about how to draw their districts. [T]he Advanced Group Quarters table has its limitations, but with advance planning we can minimize the impact of those limitations, and draw better districts to minimize the effect of prison-based gerrymandering in this round of redistricting.”)
given rise to such zealous line-drawing practices as cracking and packing, by which safe districts are created for incumbents by either cracking an opponent’s concentration of favorable partisan support or packing a district with supporters of the incumbent’s party.

Although the issue seemed fairly settled in 1986, the Supreme Court in recent years has wavered on whether political gerrymandering claims are even justiciable. In 2004, the Court was just one Justice shy of declaring that no justiciable standard could be devised for such claims. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a plurality led by Justice Scalia declared that *Davis v. Bandemer* should be overruled and all such claims should be declared nonjusticiable. The U.S. Supreme Court affirmed the judgment of the district court. Justice Scalia, joined by the Chief Justice, Justice O’Connor, and Justice Thomas, concluded that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating these claims exist. They would therefore overrule *Davis v. Bandemer*, 478 U.S. 109 (1986), in which the Court held that political gerrymandering claims are justiciable but could not agree on a standard for assessing them.

Justice Kennedy concurred in the judgment, agreeing that there are currently no manageable standards for measuring whether a political gerrymander burdens the representational rights of a party’s voters, but not wanting to foreclose the possibility of finding a limited and precise rationale for correcting a proven constitutional violation. He suggested exploration of the First Amendment as a possible basis for analyzing a partisan gerrymander, looking for whether a redistricting plan burdens the representational rights of the complaining party’s voters for reasons of ideology, beliefs, or political association.

Writing separately in dissent, Justices Stevens, Souter, and Breyer each proposed a different standard for adjudicating political gerrymandering claims. Justice Breyer suggested that the differing standards did not mean that no constitutional standard could be developed, but rather that they served to stimulate further discussion that might result in a majority agreeing on a standard in some future case.

**G. Bailout After NAMUDNO**

When the U.S. Supreme Court played the ultimate game of dodge ball when it decided *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009), it avoided resolving a clear challenge to the constitutionality of §5, as it was renewed and extended for another 25 years under the VRARA of 2006. It also breathed new life into a Section 4(a), little-noticed provision of the Voting Rights Act that allows covered jurisdictions under certain prescribed conditions to bail out of coverage. The bailout provision of the Voting Rights Act, according to the Court, must be interpreted to permit all political subdivisions, including the utility district in question, to seek to bail out from the preclearance requirements of §5. It was undisputed that the utility district was a "political

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

67 Justice Anthony Kennedy’s concurrence in the outcome of *Vieth* suggested that a justiciable standard might emerge in the future, possibly based on the First Amendment, and refused to close the door altogether on such claims.
"[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

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

H. Unsettled and Problematic Legal Issues

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

1. No justification for presumptively unconstitutional racial gerrymanders.

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

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predominant redistricting by arguing that it was attempting in good faith to comply with the Voting Rights Act.

2. No violation of the Equal Protection Clause by a presumptively constitutional partisan gerrymander.

**Can a presumptively constitutional partisan gerrymander violate the Equal Protection Clause?** Probably not, unless Justice Kennedy can garner four more justices to adopt his view expressed in his *Vieth* concurrence that a justiciable standard for political gerrymandering might someday be discovered. This question arises in the context of post-*Vieth* partisan-motivated line-drawing. It has been suggested that if district lines were drawn for obvious political reasons, as in *Easley v. Cromartie*, 532 U.S. 234, 248 (2001), or if district lines correlated with race because they were drawn based on political affiliation, as in *Bush v. Vera*, 517 U.S. 952, 968 (1996), or if district lines were the result of political gerrymandering as egregious as that engaged in by the Texas legislature in *LULAC v. Perry*, 548 Uwe2. S. 399 (2006), even in disregard of traditional districting principles, the plan could survive constitutional attack. See generally Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone From Bad to Worse on Partisan Gerrymandering?* 14 Cornell J.L. & Pub. Pol’y 367 (2005).

3. Constitutionality of districting based on CVAP as opposed to TPOP.

**Is districting based on CVAP instead of TPOP constitutional?** Probably yes, as a political question to which the courts would defer. This question arises in the context of the Ninth Circuit’s initial holding in *Garza v. County of Los Angeles*, 918 F. 2d 763 (9th Cir 1990) that CVAP-based districting could be unconstitutional, that is, a redistricting plan based on CVAP instead of TPOP would have violated the Equal Protection Clause. *Burns v. Richardson*, 384 U.S. 73 (1966) has been interpreted as authority for holding that the Equal Protection Clause does not require states to use TPOP figures to achieve compliance with the one person, one vote doctrine. The Fourth and Fifth Circuits agree that states and local governments should be deferred to in making decisions on which population figures to use. One of the most recent decisions on point held “[w]hile traditional districting principles typically require the use of total population in drawing district boundaries, in determining whether the minority group at issue has a sufficient majority in an illustrative district to satisfy the first Gingles precondition, courts look to the VAP, and in particular to the CVAP, as the relevant population in the district.” *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010), citing *Rodriguez*

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


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

5. Relevance of reasons for and causes of racial polarization relevant under Section 2 only in considering totality of circumstances.

Are the reasons for and causes of racial polarization relevant in considering the first Gingles factor of legally significant white racial bloc voting in a Section 2 vote dilution action, or only when considering the totality of the circumstances? [Charleston County, Solomon, Nipper, Clarke, LULAC, Uno, Goosby, Babylon]. Probably yes, if the jurisdiction can present systematic proof of partisanship causation under the totality of circumstances analysis, rather than during the inquiry into the third Gingles threshold precondition which precludes an inquiry into why voters are racially polarized. The Fifth Circuit’s decision in LULAC, 999 F.2d at 891-92 found the third Gingles precondition unsatisfied because "partisan affiliation, not race, caused the defeat of the minority-preferred candidate". The Fourth Circuit has rejected the approach that would address causation during the third Gingles precondition inquiry in Alamance County, 99 F.3d at 615-16 n. 12, Charleston County, 365 F. 3d 341 (4th Cir. 2004), Goosby v. Town Bd., 180 F.3d 476, 493 (2d Cir.1999) (treating causation under the totality of circumstances analysis rather than the third Gingles precondition), Milwaukee Branch of the N.A.A.C.P. v. Thompson, 116 F.3d 1194, 1199 (7th Cir.1997); Sanchez v. Colorado, 97 F.3d 1303, 1313 (10th Cir.1996); Uno, 72 F.3d at 980-81; and Nipper v. Smith, 39 F.3d 1494, 1524-25 & n. 60 (11th Cir.1994) (en banc). The Fourth, Fifth and Eleventh Circuits appear to agree that evidence of the reason for polarized voting is a critical factor in the totality analysis, but in the one case in which it squarely addressed the issue, it deferred to the trial court’s findings of fact rather than assess the evidentiary basis for the challenge to polarized voting as a result of political partisanship, while recognizing that the trial court struggled with partisanship vs. race as the cause of polarized voting, noting “Charleston County has presented evidence of partisanship. For instance, since 1995 (African-American) Timothy Scott has repeatedly been elected as a minority Republican (Scott recently finished his term as Chairman of the Council), with
overwhelming support from white voters and only minimal support from minority voters. Although Scott is the Council's only minority member in the last decade, the County claims that Scott's success shows minorities can win election to the Council, so long as they share the political philosophy that prevails among the majority of Charleston County's residents. In addition, two white Council members, Dr. Charles Wallace and Charlie Lybrand, ran as minority-preferred Democrats and lost, only to switch parties and win as Republicans with little minority support. According to the County, all of this demonstrates that minority-preferred candidates have suffered electoral defeat on account of partisan politics, not race or color.” The Fourth Circuit found that there was “no systematic proof” to support the jurisdiction’s claim that partisanship rather than race drives its racially polarized voting patterns.

6. Consideration of exogenous elections in a Section 2 racial polarization analysis.

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

7. Proportionality measured regionally rather than statewide.

Is proportionality measured statewide or regionally? [DeGrandy, LULAC] If the plaintiffs frame their vote dilution claim in statewide rather than regional terms, as was the case in LULAC v. Perry, 548 U.S. 399, 436 (2006), proportionality should be considered statewide, although considering proportionality statewide does not automatically dictate that the state can satisfy Section 2 by showing rough proportionality regardless of where majority-minority districts are locate and how those districts are

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72 Realist’s Guide at 55.
drawn. *DeGrandy* held that it was proper to measure proportionality regionally where it analyzed the proportion of Hispanics in the population in relation to Dade County’s population instead of at the state level, and both the district court and parties at trial never framed their vote dilution claim in statewide terms.

Still other issues remain to be resolved in Voting Rights Act jurisprudence. For example, will the development and use of independent redistricting commissions continue to grow? Will Section 5 withstand the latest constitutional challenges in the event the U.S. Supreme Court agrees to hear *Shelby County*? Can a multiracial, multiethnic coalition satisfy the 1st *Gingles* precondition in light of *Strickland*? Can a Local Government entity use redistricting to enhance minority voting strength, in the absence of a judicial determination of prior voting discrimination or strong evidence of a past history of voting discrimination? Can a Local Government entity develop a strategy to anticipate the *Rooker-Feldman* doctrine in redistricting litigation that takes place in parallel state and federal forums\(^{73}\) and invoke federalism-based defenses?\(^{74}\) And finally, what will the role of GIS technology and computer modeling be in 2011-2012 redistricting litigation?

**CONCLUSION**

The Voting Rights Act of 1965 was landmark legislation. It is now 46 years old. Racial discrimination in voting has declined significantly, and good progress has been made in race relations as a result of an increasingly accessible electoral process in part attributable to redistricting plans hammered out at the local government level, where grassroots democracy must thrive. Much of this progress was facilitated the Act’s subsequent revisions and extensions, coupled with the conscientious, principled and collaborative efforts of state, local and federal

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\(^{73}\) *Johnson v. DeGrandy*, 512 U.S. 997 (1994) (U.S. not barred by *Rooker-Feldman* doctrine or by res judicata from bringing a Section 2 challenge in federal court, where it was not a party to a prior state court action challenging the State of Florida’s legislative plan and the parties in the state court proceedings had not had a full and fair opportunity to litigate that res judicata requires.); *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala., Dec. 19, 1997) (three-judge court) (White plaintiffs challenged the legislative redistricting plan adopted by an Alabama state court in *Sinkfield v. Bennett*, No. CV-93-689-PR (Cir. Ct. Montgomery Co., Aug. 13, 1993), on grounds that it violated the principle of one person, one vote, was a racial gerrymander, and diluted White voting strength; federal district court directed the Rice plaintiffs to intervene in the state-court lawsuit, *Sinkfield v. Bennett*, No. CV-93-689-PR (Cir. Ct. Montgomery Co.), whereupon the state court dismissed their claims on the merits in *Sinkfield v. Bennett*, No. CV-93-689-PR (Cir. Ct. Montgomery Co., Nov. 20, 1997), aff’d, *Rice v. Sinkfield*, No. 1970449, 732 So.2d 993 (Ala.1998) (per curiam); further, while their appeal to the Alabama Supreme Court was pending, the Rice plaintiffs returned to federal district court, which dismissed their complaint without prejudice on the basis of res judicata and the *Rooker-Feldman* Doctrine).

\(^{74}\) *Growe v. Emison*, 507 U.S. 25, 34-37 (1993)(Federal district court erred in not deferring to the state court, despite the admonition that reapportionment is primarily the duty and responsibility of the state through its legislature or other body, rather than of a federal court; the federal court in this instance “raced to beat the state court to the finish line, even tripping along the way,” NCSL, *Redistricting Law 2010* at 130, rather than coming to the rescue of the state’s electoral process. The state court had been willing and able to adopt a congressional plan in time for the elections, and its plan was ultimately allowed to become effective for the upcoming elections. ); *Branch v. Smith*, 538 U.S. 254 (2003)(suggesting that a state court action in a covered jurisdiction to draw new districts could be enjoined if a federal court plaintiff could plausibly argue that Section 5 preclearance timelines could affect candidates qualifying for the primary election).
officials, minority voters, and organizations like the ACLU, NAACP LEDF, MALDEF, and LULAC. If Section 5 survives the latest constitutional challenges, it will have a significant effect on the American political landscape for decades to come.

In a time when many see signs of waning racism and mounting evidence that the need to protect minority candidates from white competition is no longer manifest, at least to the extent that there was such a need 1965, local governments must now satisfy the demands of a strengthened Section 5 in submitting redistricting plans for preclearance. Does this mean that local government will be compelled to continue creating race-conscious districts and that redistricting efforts by cities and counties will be forced to make race-conscious districting a priority, on pain of litigation and resulting delay in their ability to conduct elections if they disregard the regulations, recommended procedures and most recent 2011 Guidance for enforcement of Section 5? Covered jurisdictions must answer these questions without delay.

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

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

Griffith & Griffith, Attorneys, P.O. Drawer 1680, 123 South Court St., Cleveland, MS 38732 O:662.843.6100  M:662.402.3133  F:662.843.8153  Business E-Mail: bgriff@griffithlaw.net