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Recent Developments under Sections 2 & 5 of the Voting Rights Act Reauthorization & Amendments Act of 2006

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Section 2 & Section 5 as amended by the VRARA of 2006

by Benjamin E. Griffith and David D. O'Donnell

I. Introduction

The Voting Rights Act of 1965 has been called the "crown jewel" of the Civil Rights Movement. Its enactment into law came only after many bloody protests, confrontations and highly publicized marches by African-Americans. What they were seeking was nothing less than basic electoral access, full participation in the political process, equal opportunity and fundamental justice. The VRA provided the federal government and private citizens with effective means to overcome the vestiges of racial discrimination and institutional subjugation of minority communities throughout the United States, in every phase of the electoral process, from voter registration, ballot access, and casting votes to participation in the electoral process on equal footing with other voting groups.

Weapons in the Federal Government's Formidable Arsenal

This chapter will focus on two key provisions of the Voting Rights Act, Section 2 and Section 5, considered the most effective weapons in the fight to "attack the blight of voting discrimination"[1] in our nation. We'll examine the relationship between these provisions, which "differ in structure, purpose and application,"[2] and have been called "two of the weapons in the Federal Government's formidable arsenal,"[3] and their interplay with the Fourteenth Amendment.

Many who have smelled the smoke of the battle in litigation under the VRA would also agree these sections have been the most potent weapons in that arsenal. We will conclude this chapter with a candid assessment of continued federal enforcement of these sections of the VRA and how aggressive adherence to the original purpose of the Act may be the key to its successful application and effectiveness.

Sections 2 and 5 have long been understood "to combat different evils and, accordingly, to impose very different duties"[4] on state and local governments. Both have been extraordinarily effective in ameliorating the effects of institutional racism in every phase of the electoral process. With President George W. Bush's signing into law the VRARA on July 27, 2006, extending a strengthened version of Section 5 for another 25 years, our nation entered a new era in the ongoing struggle to protect, preserve and strengthen voting rights of racial and ethnic minorities.

II. Background and overview of Section 2

Section 2 of the Voting Rights Act prohibits voting practices and procedures that discriminate on the basis of race, color or membership in a language minority group. It offers protection against invidious barriers to a minority group's right to freely participate in the electoral process. Thus, Section 2, as amended in 1982, expressly prohibits the use of any standard, practice, or procedure which "results in a denial or abridgement of the right of any citizen … to vote on account of race or color." A "denial or abridgement" is proven if the evidence shows that members of the minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Section 2 then identifies the "extent to which members of a protected class have been

elected to office" as the principal evidence of minority "access" or "lack of access," but then emphasizes that the section is not to be construed as establishing "a right to have members of a protected class elected in numbers equal to their proportion in the population." Thus while the cognizable right of Section 2 is "equality of opportunity" of the minority electorate, not a right of proportionate electoral success for minority candidates, the evaluation of minority candidate success at the polls as the principal measure of equal opportunity has generated a fair degree of controversy and commentary.

The federal government and private citizens employed Section 2 during the decade following its enactment to remove the more readily identifiable impediments to minority access to the electoral process such as the poll tax, literacy tests, white candidate slating, and other discriminatory barriers to minority access. Over the course of time these barriers were eliminated from the electoral landscape and the courts began to turn their attention to claims of "minority vote dilution," that is, that the operation of certain redistricting plans or at-large election systems, combined with past and present social and economic conditions, caused minorities to suffer a "diminution" in their collective voting strength and thus their relative opportunity to participate in the electoral process, even though the direct barriers to participation had been removed.

A. Vote Dilution

The Supreme Court first considered the viability vel non of minority group vote dilution claims in the case of *Whitcomb v. Chavis*, which involved a claim by black citizens that the use of a multi-member state legislative districting scheme unconstitutionally diluted their voting strength. Evaluating the plaintiffs' dilution claim under the original version of Section 2 which

simply mirrored the Fifteenth Amendment's prohibition of state electoral practices or procedures which "deny or abridge the right to vote on account of race or color," the Court applied a "results" test which did not burden a Section 2 plaintiff with proving that the state "intended" to discriminate on the basis of race. The Court gave credence to the "vote dilution" theory advanced by the plaintiffs, holding the appropriate inquiry to be whether the lack of success of minority candidates, in relation to their proportionate share of the general population, was attributable to the minority electorate having less opportunity than other voting groups "to participate in the political process and to elect legislators of their choice." Finding that the plaintiffs failed to demonstrate an actionable "vote dilution" claim under the Fourteenth Amendment, the *Whitcomb* Court held that absent evidence of a lack of access to the political system, the lack of proportionate representation was insufficient, in itself, to establish a constitutional violation. While the Court recognized that the at-large electoral scheme caused the voting power of the minority electorate to be "cancelled out," as measured by the lack of proportionate success of minority candidates, the Court held that, without proof that the minority electorate had "less opportunity" than other similar groups in the electoral scheme to participate in the electoral process, because of their status as the "minority" electorate, an actionable claim could not be stated under the Equal Protection Clause. The proof showed that there were "strong differences" between the minority electorate and nearby communities in terms of housing conditions, income and educational levels, rate of unemployment, juvenile crime, and welfare assistance and that the minority electorate voted heavily Democratic, while the district's white majority electorate regularly voted for the Republican candidates, usually resulting in the defeat of the minority-preferred candidates. Not finding any structural impediments to minority access

to the political process, the Court concluded that the failure of the minority electorate to have legislative seats in numbers equal to its proportionate share in the general population emerged "more as a function of losing elections than of built-in bias against" a minority electorate.

Thus, in *Whitcomb*, the Supreme Court assessed the plaintiff's minority vote dilution claim by scrutinizing impediments to access of the minority electorate to the political process, and ultimately determined that although there was an obvious lack of proportionate representation, the losses experienced by the minority candidates were not attributable to the candidate's status as the "minority preferred candidate" but rather were the function of race-neutral choices by the majority electorate, that is, the party affiliation of the candidates involved in a given election.

Two years later, in *White v. Regester*, the Supreme Court again confronted a minority vote dilution challenge to a multi-member districting scheme, but this time determined that the operation of the electoral scheme impermissibly "diluted" the minority electoral strength. The Court reiterated the standard established in *Whitcomb*, that a minority group must prove "that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." In *White*, the Supreme Court for the first time applied a "totality of the circumstances" test to the minority's vote dilution claim and found that the past and present acts of discrimination against the minority electorate, conjoined with the operation of the multi-member districting scheme, impermissibly diluted the minority electorate's voting strength. According to the Court, the "fundamental" aspect of the plaintiff's minority vote dilution claim consisted of proof that the minority electorate was actively and effectively excluded from the slating, nominating, and electoral processes. Thus, although the Court found

that the more objective attributes of the multi-member electoral scheme, such as the majority vote requirement and the multi-member district itself, were not "in themselves improper nor invidious," they exacerbated the effect of the truly invidious and discriminatory efforts existing at other points in the electoral process which combined to exclude or minimize minority access to the electoral process.

In 1980, the Supreme Court rejected the "results" test of *White* and *Whitcomb*, substituting an "intent" test to be applied in deciding minority vote dilution claims under Section 2 and the Fourteenth and Fifteenth Amendments. In *City of Mobile v. Bolden*, the Supreme Court determined that proof of an invidious purpose by the government in the adoption and maintenance of the challenged electoral scheme was essential to a minority vote dilution claim brought under Section 2 and the Constitution. The Court found that an analysis of the *Zimmer v. McKeithen* factors, which were devised to give definition to the "totality of the circumstances" test of *White v. Regester*, were "relevant," but insufficient to establish the existence of a "discriminatory purpose" behind the government's continued maintenance of the electoral scheme.

Congress reacted quickly to the *Bolden* decision in 1982 by amending Section 2 to provide that electoral procedures and practices that "result in" the denial or abridgement of the minority electorate's access to the electoral processes are violative of Section 2 of the Act. The legislative history accompanying the 1982 amendments to Section 2 expressly states that Congress intended to "codify" the results test employed in *Whitcomb* and *White*. The Senate report makes clear that by amending Section 2 Congress intended to encompass "minority vote dilution claims" within the proscriptions of the section, while broadening the potential scope of

the Act by specifically rejecting the *Bolden* intent test in favor of the results test applied in *White* and *Whitcomb*. According to the Senate Report, a proper application of the results test requires courts to "distinguish between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not." The Report expands upon the results test of *Whitcomb* and *White* by listing various factors which the courts should apply in assessing vote dilution claims. Thus, in addition to assessing the relative access of the minority electorate to the political processes by examining the success rates of minority candidates for political office, the Report directed courts to examine the actual voting practices of the minority and majority electorates, which the Report referred to as "racial bloc voting": an inquiry not found in either *White* or *Whitcomb*. According to the Report, a finding that "race" was the predominant determinate of political preference within a given electoral scheme was essential to a successful Section 2 vote dilution claim.

B. Elements of a Vote Dilution Claim

The *Thornburg v. Gingles* decision was the Supreme Court's first occasion to construe amended Section 2. The Court essentially clarified the elements of an actionable minority vote dilution claim under amended Section 2 by devising a three-part set of preconditions which the Court deemed to be necessary, but not in and of themselves sufficient, to establish a minority vote dilution claim. First, the minority electorate must demonstrate that they are sufficiently numerous and geographically compact to constitute a majority-minority single member district. Second, the minority electorate must be "politically cohesive." Third, there must be a showing that the majority electorate consistently votes as a block so as to regularly result in the defeat of the minority-preferred candidate. The first two *Gingles* preconditions are essentially "remedy

oriented" in the sense that the minority electorate must retain the attributes of a distinct political group within the general electorate, and that they are sufficiently large to form an effective voting majority in a proposed reconfigured single member districting scheme. The third precondition, that is, "white bloc voting," was elevated by the *Gingles* Court to a central and essential role within the minority vote dilution inquiry. Proof of the third precondition involves a two-step process of identifying the "minority-preferred candidate" and then an examination of the majority voting patterns in relation to the success or the non-success of the minority-preferred candidate.

In making this assessment and reaching the ultimate determination of whether or not there is vote dilution, the court should use the Senate Report factors, those factors identified in the legislative history of Section 2, *Johnson v. DeGrandy*[5]. Moreover, the vast majority of the Circuits agree that the focus of Section 2 is not on whether minorities are able to elect other minorities to office, but whether minority voters are able to elect minority-preferred candidates to office. In that regard the trial court may give appropriate weight and consideration to whether and to what extent minority-preferred candidates who were white as well as those who were African-American have been elected to office in the jurisdiction in question.[6]. In making the requisite searching analysis of the present political reality of an electoral system under challenge in a Section 2 vote dilution case, moreover, the cause of or explanation for the defeat or success of minority-preferred candidates is also relevant in the totality of circumstances inquiry.[7]. Failure to establish any of the "necessary preconditions" is fatal to a plaintiff's §2 claim.

1. Senate Report Factors

As the Supreme Court noted in *Gingles*, the Senate Judiciary Report which accompanied

the 1982 Voting Rights Act Amendments elaborated on the nature of §2 violations and the proof required to establish those violations, specifying certain "objective factors" and enhancing factors which typically may be relevant to a §2 claim.

The Senate Judiciary Committee in its report accompanying amended Section 2 identified nine factors, gleaned from *White, Whitcomb* and other pre-amendment vote dilution cases, considered to be relevant in determining whether or not there has been a violation.

In elaborating on the nature of a Section 2 violation and the proof required to establish such a violation, the Senate Report specified certain “objective factors” and “enhancing factors” that typically may be relevant to a Section 2 claim. These factors were culled from *White v. Regester*, *supra*, and the decision of the Fifth Circuit Court of Appeals in *Zimmer v. McKeithen*[8]. These Senate Report factors necessarily call for evidence of the circumstances of the local political landscape, and include, but are not necessarily limited to, the following:

(1) The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) The extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) If there is a candidate slating process, whether the members of the minority group

have been denied access to that process;

(5) The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) Whether political campaigns have been characterized by overt or subtle racial appeals;

(7) The extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors which may be probative include:

(8) Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

(9) Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The list of Senate Report factors is neither comprehensive nor exclusive, and "there is no requirement that any particular number of factors be proved, or that a majority point one way or another." *Thornburg v. Gingles*[9].

Rather than engaging in a mechanical application of the *Gingles* preconditions and the Senate Report factors, the courts are obliged to consider all evidence reflective of the extent to which minority voters are currently able to participate in the political process and to elect candidates of their choice.

2. Special Circumstances Doctrine

The Special Circumstances Doctrine can be traced to language that appears in the third

Gingles precondition of legally significant white racial bloc voting, by which Plaintiffs are required to show that "the white majority votes sufficiently as a bloc to enable it–in the absence of special circumstances, such as a minority candidate running unopposed, ...usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*[10]. Since minority electoral success can and is often invoked as a defense to a vote dilution claim, the doctrine of special circumstances is often invoked by plaintiffs in order to discount or nullify the probative value of evidence of minority electoral success in order to improve their ability to establish a Section 2 violation.

These fundamental principles were reaffirmed in *Growe v. Emison*. Justice Scalia spoke for a unanimous Court when he described the interrelationship between the *Gingles* preconditions:

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.... And, the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population.... Unless these points are established, there neither has been a wrong nor can be a remedy.

On the practical side, *Gingles* also addresses the nature of evidentiary proof considered relevant to identifying "minority preferred candidates" and the nature and extent of "white bloc voting." The Court noted that the trial court "relied principally" on extreme case analysis and bivariate ecological regression statistical evidence in assessing "how" the minority and majority electorates voted in particular elections. The Court observed that the statistical techniques essentially yielded "estimates" of the voting patterns of the respective electorates, including precinct-level estimates of the percentages of members of each race who voted for minority

candidates over the span of dozens of electoral contests. The *Gingles* Court approved the trial court's evaluation of the presented statistical data, which included a consideration of the existence and strength of any "correlation" between the race of the voter and the selection of certain candidates, whether the revealed correlation was "statistically significant," and whether the differences in minority and majority electorate voting patterns was "substantively significant."

III. Racial Gerrymandering under the 14th Amendment: Appearances Do Matter

The process of revising voting district boundaries, either as a remedy for a Section 2 vote dilution violation or as a consequence of the need to reapportion the numerical size of voting districts consistent with the one-person, one-vote principle, will typically involve the consideration and application of "traditional race-neutral districting principles" by legislatures. These traditional criteria – district compactness, non-separation of communities of interest, minimization of boundary changes and incumbency protection – will generally guide redistricting decisionmaking. There are occasions, however, where the race of voters may be included in the applied redistricting criteria (as when fashioning a Section 2 remedy) or where legislators are simply "conscious" of race during the districting process but do not use race as a criterion in any real sense. Yet the use of "race" as the "predominant" consideration renders the resulting districting scheme constitutionally suspect as a racial classification under the 14th Amendment's Equal Protection Clause. Differentiating between the use of race in redistricting in its more benign form and the use of race which results in the creation of a racial classification within the meaning of the 14th Amendment is a "delicate task."

The central mandate of the Equal Protection Clause is "racial neutrality in government decisionmaking." This mandate prohibits purposeful discrimination against individuals on the basis of race. In 1993, it was applied to prohibit racial gerrymandering of a congressional district in *Shaw v. Reno*[11]. The Court, speaking through Justice Sandra Day O'Connor, drew the line between (1) impermissible racial gerrymandering by which voters are deliberately segregated into districts on the basis of race without compelling justification, and (2) permissible race-conscious state decisionmaking. As the Court put it, "we believe that reapportionment is one area in which appearances do matter." In invalidating a serpentine North Carolina congressional district with boundaries drawn predominantly on the basis of race, the Court said:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group–regardless of their age, education, economic status, or the community in which they live–think alike, share the same political interests and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.... By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.[12]

Shaw v. Reno has been characterized by many in the civil rights community as a judicial backlash against majority-minority districts. It was much more than that. The Court did indeed call into question those majority-minority districts that, despite being race-neutral on their face, were drawn predominantly on the basis of race, subordinating traditional non-racial districting criteria, in a manner that could not rationally be understood as "anything other than an effort to

separate voters into different districts on the basis of race."[13] Justice O'Connor emphasized that the Black electorate is not monolithic. She correctly equated the North Carolina redistricting plan aimed at maximizing black voting strength to "political apartheid," and reasoned that a plan grounded on purposeful segregating of minority voters in majority-minority districts would only "reinforce 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."[14] On the contrary, African-Americans are not monolithic in their views on a wide variety of such hot button issues as affirmative action. Indeed, "many are strongly in favor of affirmative action, of course, but others are ambivalent ..., and still others are strongly opposed."[15]

In a series of decisions following *Shaw v. Reno*, the Court applied the exacting "strict scrutiny" standard of review when evaluating the constitutionality of redistricting plans challenged as racial gerrymanders, to which it declined to accord traditional judicial deference accorded the legislative decisionmaking process, a cornerstone of federalism. While acknowledging that the need to address a Section 2 vote dilution violation through redistricting constitutes a "compelling governmental interest," the Court has found on only one occasion that the districting scheme under "strict scrutiny" review was "narrowly tailored" to serve the articulated "compelling governmental interest." Given the rarity that a challenged redistricting scheme will survive the rigors of strict scrutiny, the central and deciding focus will usually involve the question of whether race "predominated" the redistricting effort. Although the relevant evidence may sometimes reveal direct proof of the decisionmaker's motivation to achieve certain racial proportions within the districting scheme at the expense of other race-

neutral criteria, most often the chief evidence of the subordination of race-neutral criteria is circumstantial; that is, the extent to which the resulting districts are irregular or noncompact in shape.

In *Shaw v. Hunt*[16], the Court held that a state's reapportionment scheme will not survive strict scrutiny if it is proven to be predominantly based upon race without sufficient regard to, or in subordination of, traditional districting criteria and is not shown to be narrowly tailored to serve a compelling state interest. In *Lawyer v. Department of Justice,* the Court made it clear that it would nonetheless make every effort not to preempt the role of legislative bodies performing their task of redistricting and reapportionment and would continue to call for traditional judicial deference to that role by giving the state or local government body "the opportunity to make its own redistricting decisions so long as it is practically possible," provided the government body chooses to that opportunity.

The Court adopted a mixed motive analysis in *Bush v. Vera*[17], applying the mixed-motive formulation of *Mount Healthy City Board of Education v. Doyle*[18], to determining whether race has predominated over or trumped other non-racial traditional districting principles such as party affiliation.

Justice O'Connor's concurring opinion in *Bush v. Vera* was seen by many as a more accurate and comprehensive statement of the law that the majority opinion. Justice O'Connor said that compliance with §2's results test is a compelling state interest that can co-exist in principle and practice with *Shaw v. Reno* and its progeny. One of state's goals in creating the three Congressional districts in question was to produce majority-minority districts, but other goals, particularly incumbency protection, played a role in drawing the district lines; the lower

court's determination that race was the predominant factor in the drawing of the districts had to be sustained. According to Justice O'Connor, "[t]he district court had ample bases on which to conclude both that racially motivated gerrymandering had a qualitatively greater influence on the drawing of district lines than politically motivated gerrymandering, and that political gerrymandering was accomplished in large part by the use of race as a proxy." Moreover, the State of Texas in its §5 submission explained the drawing of one of the districts in exclusively racial terms, and this was coupled with an admission contained in legislative e-mail communications with the Department of Justice "written at the end of the redistricting process that incumbency protection had been achieved by using race as a proxy." Such evidence was bolstered by other objective evidence strongly suggesting the predominance of race in the district plans and demographic maps. As Justice O'Connor noted, "political considerations were subordinated to racial classifications in the drawing of many of the most extreme and bizarre district lines….The fact that racial data were used in complex ways, and for multiple objectives, does not mean that race did not predominate over other considerations. The record discloses intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles. District 30's combination of a bizarre, non-compact shape and overwhelming evidence that that shape was essentially dictated by racial considerations of one form or another is exceptional...."

Leading scholars and litigators in the voting rights field have placed great weight on Justice O'Connor's concurring opinion in *Bush v. Vera* concurring opinion, distilling from her

concurrence the following helpful principles for state and local government entities involved in the redistricting process.[19]

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 (compactness, minority cohesion, and white bloc voting) are satisfied.

Third, state's interest in avoiding §2 liability is compelling governmental interest.

Fourth, district drawn to avoid §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 §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.

IV. Background and Purpose of Section 5, as amended in 2006

Originally enacted in 1965, Section 5 of the VRA essentially "freezes" voting practices and procedures which were in place in certain "covered" jurisdictions at the time of Section 5's enactment. As such, Section 5 is "status quo" legislation which requires any change in voting practices and procedures to be reviewed under a "non-retrogression" standard and precleared by the Attorney General or the United States District Court for the District of Columbia before they are deemed effective. The covered jurisdiction has the burden of demonstrating that the proposed voting change does not have the purpose or effect of retrogressing the electoral position of racial minorities.

Section 5 of the Voting Rights Act of 1965, as amended, imposes substantial "federalism costs" on covered states and political subdivisions, requiring them to preclear any voting change or change in voting laws, practices or procedures that those jurisdictions seek to administer. The Fifteenth Amendment permits such an intrusion into state sovereignty. Preclearance under Section 5, when required, entails a certain amount of federal intrusion into state and local policymaking. It may be administratively requested through a formal submission to the Attorney General of the United States, or judicially through a declaratory judgment action, provided the action is brought in the United States District Court for the District of Columbia.

A. Section 5 retrogression test

§5 has much more limited purpose than §2. In jurisdictions covered by Section 5, the dual and significantly different requirements of nonretrogession and non-dilution must be satisfied. Section 5 is designed to combat retrogression, which requires a comparison of a jurisdiction's new voting plan with its existing plan and implies that the jurisdiction's existing plan is the benchmark against which the affected voting change is measured. See *Bossier Parish II*[20]; *Bone Shirt v. Hazeltine*[21]. There is no single statistical measure of whether a proposed voting change has a retrogressive purpose or effect. Although non-retrogression often means maintaining the number of effective majority-minority districts and minority "influence" districts within the proposed scheme as compared to the benchmark plan, the courts and the DOJ are directed to examine the totality of the circumstances germane to the presence *vel non* of an invidious purpose or retrogressive effect, including the ability of minority voters to elect candidates of their choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a non-retrogressive voting plan. The Court has adhered to an

analytical framework for identifying legislative purpose based on multiple factors set forth in *Village of Arlington Heights v. Metropolitan Housing Redevelopment Corp*[22]*; Washington v. Davis*[23] (claim of invidious racial discrimination in violation of the Equal Protection Clause is not automatically established by proof of a racially disproportionate impact).

B. Scope of Section 5: Limited to covered jurisdictions

Section 5 applies to specific covered jurisdictions under a statutory trigger. It provides a centralized review procedure through the United States Justice Department's Civil Rights Division and the United States District Court for the District of Columbia by which covered jurisdiction must first submit and obtain federal approval for changes in voting, electoral systems and practices before those changes can become effective. Its purpose is much more limited than §2. Section 5 is distinct from Section 2, particularly for covered jurisdictions, in that compliance with Section 2 is neither necessary nor sufficient to obtain preclearance from DOJ or the D.C. District Court.

C. Relevance of Section 2 evidence to prove retrogressive intent or discriminatory purpose under Section 5

Discriminatory effects of dilution under Section 2 are relevant to a determination of whether a given voting change has a discriminatory purpose or effect under Section 5. *Reno v. Bossier Parish (I) School Board*.[24]

The most significant interplay between Section 2 and Section 5 is seen in the redistricting process. That interplay usually takes place in a field of political litigation that imposes heavy demands upon Article III judges and captures the attention of elected officials who comprise legislative bodies and other governmental entities made up of single-member districts and multi-

member districts.

The redistricting process is essentially about reallocating political power through (1) equalizing district population under the one person, one vote standard of the Fourteenth Amendment, and (2) complying with the non-retrogression command of § 5 for covered jurisdictions, and the non-dilution standard of §2 for all jurisdictions.

The traditional alliance between the Justice Department's Civil Rights Division and private plaintiffs has been the subject of judicial scrutiny, most notably in *Miller v. Johnson*[25], where the Supreme Court rejected race-based redistricting efforts grounded on a black maximization agenda and an attempt to create "safe" minority seats in several of Georgia's congressional districts.

The Court retreated somewhat from its rejection of redistricting based predominantly on race when it was faced with a similar effort to create "reliably Democrat" seats in *Cromartie v. Hunt*[26]**,** despite a strong correlation between race and political affiliation. Its strict scrutiny analysis focused in part on the Dole Compromise, a disclaimer of any right to proportional representation, set forth in §2 of the Voting Rights Act, as amended in 1982.

The Court examined the construction of the First Congressional District in *Cromartie v. Hunt.* First, it noted that the state in its remedial plan continued to use race as the predominant factor in creating the majority-minority First District. Second, as a consequence, strict scrutiny had to apply, so that the state could then survive the constitutional challenge only by showing the District was narrowly tailored to achieve a compelling governmental interest. Third, according to the Court, §2 directs courts to examine the totality of circumstances to ascertain whether the political processes are equally open to all citizens and allows the courts to consider the extent of

minority electoral success, but under the Dole Compromise disclaims any right of proportional representation. Fourth, once the §2 *Gingles* preconditions are met, the Court must then consider the Senate Report factors. Fifth, the state defendants presented sufficient evidence, according to the Court, to establish that it had a compelling reason, that is, a strong basis in evidence, to address race in constructing the remedial First District. Accordingly, race, while a predominant factor in composing the First District, was not impermissibly used in establishing the district's borders. A compelling state interest was shown to exist in obtaining §5 preclearance, and the district was narrowly tailored to meet that interest.

1. Key Section 5 decisions

Allen v. State Board of Elections[27]: The Supreme Court held that Section 5 should apply not only to changes in electoral laws but to any practices that might dilute minority voting strength.

Beer v. United States[28]: The Supreme Court's holding in *Beer* set forth the non-retrogression standard in the following words:

> A legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of Section 5. We conclude...that such an ameliorative new legislative apportionment cannot violate Section 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the constitution.[29]

The retrogression standard's application was further broadened in *City of Lockhart v. United States*[30], wherein the Supreme Court upheld preclearance of an electoral change that did not improve the position of minority voters, stating:

> Although there may have been no improvement

> in [minority] voting strength, there has been no retrogression either. Thus, in *City of Lockhart*, since the new electoral change did not "increase the degree of discrimination against blacks," it was accordingly entitled to be precleared under Section 5 of the Voting Rights Act.

It was on this point that Justice Thurgood Marshall dissented in *City of Lockhart*, chastising the majority for reducing "Section 5 to a means of maintaining the status quo," insofar as it held that Section 5 could only forbid electoral changes that increased discrimination. Justice Marshall's criticism of the majority was that such a view of the retrogression standard would permit a jurisdiction to adopt "a discriminatory electoral scheme, so long as the scheme is not more discriminatory than its predecessor," a view and approach that Justice Marshall condemned as "inconsistent with both the language and purpose" of Section 5 of the Voting Rights Act.

In *Lopez v. Monterey County (Lopez I)*[31], the Supreme Court held that where California had enacted legislation effecting changes in the method for electing county judges, Monterey County was nonetheless required to seek Section 5 preclearance before it could give effect to those changes. This is true even though the county arguably was just implementing a state law without exercising any independent discretion. Monterey County had adopted and implemented six judicial consolidation ordinances without seeking Section 5 preclearance. The Court reasoned that "Congress designed the preclearance procedure to forestall the danger that local decisions to modify voting practices will impair minority access to the electoral process and will accomplish this by giving exclusive authority to pass on the discriminatory effect or purpose of an election change to the Attorney General or the United States District Court for the District of Columbia."

Following remand and a second appeal, the issue before the U. S. Supreme Court was whether Monterey County was required to pursue Section 5 preclearance for state-sponsored and legislatively authorized voting changes that it sought to administer. The Supreme Court in *Lopez II*[32], held that a covered political subdivision seeks to administer a voting change and thus is required to seek Section 5 preclearance of a voting change (1) even where it exercises no independent discretion in giving effect to a state-mandated voting change, and (2) even where the voting change it implements is required by the superior law of a non-covered state.

In holding that Section 5's preclearance requirement does not require a covered jurisdiction to exercise discretion or a policy choice, the Supreme Court noted that Congress had enacted the Voting Rights Act with its trigger phrase "seek to administer," without limiting the Section 5 preclearance requirement to discretionary actions of a covered jurisdiction.

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On the contrary, according to the Court, Section 5 reaches non-discretionary acts by covered jurisdictions that seek to comply with a state’s superior law. Moreover, to the extent that

a partially covered state enacts legislation that affects covered local government entities such as cities or counties, Section 5 preclearance is required. In this regard the Supreme Court noted that it as well as the Justice Department had assumed that Section 5 preclearance was required whenever a non-covered state effects voting changes in covered counties, at least as far back as *United Jewish Organizations v. Carey*[34]. In numerous instances Section 5 cases had been decided based on the assumption that laws enacted by a partially-covered state must be precleared before they can take effect in covered political subdivisions, citing *Shaw v. Reno*[35], *Johnson v. DeGrandy*[36], and *United States v. Onslow County*[37].

Finally, the Supreme Court accorded deference to the Attorney General's interpretation of Section 5, noting that Section 5's preclearance requirement had consistently been applied to a covered county's non-discretionary efforts to implement a voting change required by state law, even though the state itself was not a covered jurisdiction.

In *Reno v. Bossier Parish School Board (Bossier Parish I)*[38], the Court held that §5 preclearance of a covered jurisdiction's voting standard, practice or procedure may not be denied solely on the basis that it violates §2 of the Voting Rights Act. The Court rejected the Attorney General's position that §2 of the Voting Rights Act is effectively incorporated into §5, but concluded nonetheless that §2 evidence of a redistricting plan's dilutive impact may be relevant even though it is not dispositive of a §5 inquiry.

The relationship between Section 2 of the Voting Rights Act and Section 5 was explored in depth by the United States Supreme Court in *Bossier Parish(I).* In holding that Section 5 preclearance of a covered jurisdiction's voting standard, practice or procedure may not be denied solely on the basis that it violates Section 2 of the Voting Rights Act, the Court rejected the

Attorney General's long-held position that Section 2 is effectively incorporated into Section 5. The Court concluded nonetheless that Section 2 evidence of a redistricting plan's dilutive impact may be relevant even though it is not dispositive of a Section 5 inquiry. In conducting an inquiry into a covered jurisdiction's motivation in enacting voting changes and in considering such evidence according to the majority, the analytical framework of *Arlington Heights v. Metropolitan Housing Development Corp.*[39], should be looked to for guidance.[40]

The opening line of Justice O'Connor's majority opinion in *Bossier Parish(I)* promised much: "Today we clarify the relationship between §2 and §5 of the Voting Rights Act of 1965...." The Court rejected the Justice Department's position that §2 violations may form the basis for denying §5 preclearance, a position which "would inevitably make compliance with §5 contingent upon compliance with §2." The Court further held that "Section 2 evidence" may be relevant to prove that a covered jurisdiction had retrogressive intent and that it enacted a redistricting plan or other electoral change with a discriminatory purpose:

> The fact that a plan has a dilutive impact ... makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance...is a liberal one" and one we think is met here.

In *Reno v. Bossier Parish School Board (Bossier Parish II)*[41], the Court rejected the Justice Department's efforts to blur the distinction between §2 and §5 by shifting the focus of §5 from non-retrogression to vote dilution and by changing the §5 benchmark from a jurisdiction's existing plan to a hypothetical, undilutive plan. The Court refused to extend §5 to discriminatory

but non-retrogressive vote-dilution purposes, criticizing the Justice Department's reading of the §5 preclearance provision as one that "would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts,... perhaps to the extent of raising concerns about §5's constitutionality...." The majority opinion in *Bossier Parish II* emphasized that "proceedings to preclear apportionment schemes and proceedings to consider the constitutionality of apportionment schemes are entirely distinct. §2 and §5 are different in their structure, purpose and application, and impose different duties upon state and local government bodies. With regard to the limited meaning that §5 preclearance has in the vote-dilution context, Justice Scalia speaking for the majority in *Bossier Parish II* emphasized that preclearance

> does not represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than it what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of §5, but must be attacked through the normal means of a §2 action. As we have repeatedly noted, in vote-dilution cases §5 prevents nothing but backsliding, and preclearance under §5 affirms nothing but the absence of backsliding," citing *Bossier Parish I*, 520 U.S. at 478, *Miller v. Johnson*, 515 U.S. 900, 926 (1995), and *Beer v. United States*, 425 U.S. 130, 141 (1976)].

Pouring Old Poison into New Bottles

In a lengthy opinion concurring in part and dissenting in part with the majority in *Bossier Parish II*, Justice Souter was joined by Justices Stevens, Ginsburg and Breyer, in complaining that Congress did not intend to let state and local governments "pour old poison into new bottles." Justice Souter's fundamental complaint was that the majority's constricted

interpretation of §5 would require the Justice Department to approve a redistricting plan with a known discriminatory effect, leaving too much wiggle room for discrimination and mischief. Justice Souter warned that such a narrow statutory construction on Section Five would virtually eliminate "the most important power of the act, in that it requires local officials to create a lawful plan in the first place, and, at least, negotiate with minority interests if it does not meet muster in preclearance."

Brenda Wright, managing attorney at the National Voting Rights Institute, observed that if the Supreme Court's interpretation of Section 5's purpose prong in *Bossier II* had been applied during Section 5's first 35 years,

> Congressman John Lewis of Georgia probably would not have won election to the U.S. Congress in 1986. In the early 1980's, Georgia enacted a discriminatory congressional redistricting plan that fragmented the Black population in the Atlanta area. The Georgia legislator who headed the redistricting committee openly declared his opposition to drawing so-called Negro districts, except that he did not use the word "Negro"; he used the racial epithet. Because of the clear evidence of racism behind the plan, the Justice Department objected even though the plan was not retrogressive. Georgia then withdrew the district and the result was that Congressman Lewis was able to win election. But under the Bossier Parish (II) decision, the Department of Justice would have been obliged to approve Georgia's original discriminatory plan.[42]

It was as if the Court was just warming up when it required the Justice Department to preclear proposed voting changes that had a clear discriminatory purpose. The Supreme Court's decision three years later in *Georgia v. Ashcr*oft[43], marked a major departure from the *Beer* retrogression standard. Up until 2003 retrogression had been defined as a failure to preserve the ability of minority voters to elect candidates of their

choice. *Beer* held that in evaluating submitted voting changes under Section 5, the retrogression standard ensured that "the ability of minority voters to participate in the political process and to elect candidates of choice is not diminished by the voting change."[44] Stated differently, the *Beer* retrogression standard had been interpreted up until 2003 to mean that covered state and local governments had to protect existing minority electoral gains and were prohibited from taking actions that would lower the percentage of minority voters in a given majority-minority district.

Some commentators criticized the *Ashcroft* decision as a retreat from the goal of pursuing full participation by racial minority groups in the political process, replacing a clear standard with an unclear one that equated minority influence with election of minority-preferred candidates, inviting and shielding vote dilution. Others described the Court's majority opinion as a "perversion of retrogression," stating that

> [t]here is no way that the Court can with a straight face use totally different analyses in Section 5 (retrogression) and Section 2 (totality of the circumstances) cases, while at the same time using a Section 2 analysis to restrict the effectiveness of Section 5. That, however, is what the Court did in *Ashcroft*.[45]

The *Ashcroft* decision was not without its supporters, however, particularly those who saw no particular harm in a decision that allowed unpacking of some majority-minority districts that did not dilute minority voters' electoral influence.[46] Professor Carol M. Swain has taken the position that *Georgia v. Ashcroft* was a sensible decision that allowed politicians greater latitude to create influence districts and to forge coalition districts by unpacking majority-minority districts and dispersing minority voters in what had been relatively safe majority districts, thereby allowing for the creation of more

opportunities for minorities to form coalitions and exert influence on politicians outside their own racial and ethnic groups. Moreover, the unpacking of majority-minority districts in traditionally Democratic districts would not bar the election of qualified minority politicians with consistently proven abilities to garner white crossover votes. According to Professor Swain, *Ashcroft*

> was a good decision that would have benefited minority voters by making it easier for them to elect a slate of politicians who shared their policy views. *Ashcroft* gave legislators an opportunity to craft districts that enhanced the electoral prospects of Democrats rather than focusing on the reelection prospects of minority incumbents and it empowered minority voters by acknowledging the changes that had taken place in race relations across the South and particularly in Georgia.[47]

2. Impact of VRARA of 2006

In the hearings preceding passage of the VRARA, the House Subcommittee on the Constitution, House Judiciary Committee, found that it was necessary to extend Section 5, one of the temporary provisions of the VRA set to expire in 2007, but it also necessary to "fix" provisions of Section 5 to clear up erroneous statutory interpretations by the U.S. Supreme Court in *Ashcroft* and *Bossier Parish II*.[48]

Bossier Parish II generated much criticism from the civil rights community and past and present Justice Department attorneys. Its impact on the VRA's strength was addressed during the Congressional hearings on the renewal of Section 5, the primary concern being that it weakened Section 5's ability to prevent covered jurisdictions from enacting discriminatory voting practices. One proponent remarked "I think that *Bossier(II)* is indeed like a cancer, eating away at the Voting Rights Act."[49]

Bossier Parish II was also attacked as a misconstruction of the plain meaning of the discriminatory purpose test, draining the "purpose" test of any practical meaning in the preclearance process. Proponents told the House Subcommittee that the plain meaning of the word 'purpose' encompassed “any and all discriminatory purposes, not merely a purpose to cause retrogression," but that if Section 5’s purpose prong only covered a "retrogressive" purpose, then a jurisdiction whose elected body never had minority representation “could continue to adopt new redistricting plans, intentionally designed to freeze out minority voting strength, and Section 5 would provide no protection.”[50]

Before it was amended by the VRARA, Section 5’s purpose test would only apply if by chance a covered “jurisdiction were to intend to cause a retrogression in minorities' electoral opportunity, but somehow messes up and adopts a change that, in fact, is not retrogressive. This is highly unlikely to occur, and in fact, in the nearly 5 years since *Bossier Parish (II)* was decided, the Justice Department has reviewed approximately 76,000 voting changes and no such incompetent retrogressor has appeared.”[51]

The VRARA modified Section 5 to restore the pre-*Bossier Parish II* discriminatory purpose standard. The new subsection (c) to Section 5 added reads as follows: "The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose."[52]

According to a representative of the NAACP Legal Defense and Educational Fund, Inc., "this modification would allow the DOJ, or the reviewing three-judge panel, to interpose objections or deny declaratory judgments in situations where sufficient evidence of discriminatory intent exists such that the submitting jurisdiction cannot meet its Section 5 burden."[53]

The modification to Section 5 also accomplished another important goal. *Bossier Parish II* was founded on the Court's interpretation of statutory language. In a similar manner, the Court in *Bossier Parish I* had used Congress's failure to clarify Section 5's statutory language to justify its decision that the effects prong was limited to "retrogressive" effects. The legislative history now makes it clear that the VRARA's modification to Section 5 was intended to avoid any implication that Congress ratified *Bossier II* by aligning the purpose prong with constitutional standards.[54]

While this amendment was seen by proponents at an important fix to Section 5, the *Beer* retrogression doctrine was not removed, and a realistic tactical decision had to be made over what battles were winnable in light of the 2006 composition of Congress, particularly with Section 5 set to expire in 2007. Proponents were "stuck" with the *Beer* analysis "and the convoluted DOJ regulations incorporating the *Beer* analysis," prompting some to complain "[i]t is sad, however, that Congress did not go further and eliminate the *Beer* analysis so that the DOJ, the District court and community activists could use Section 5 instead of resorting to more costly Section 2 litigation."[55]

The VRARA's modification to Section 5 also corrected what proponents saw as "the unwarranted shift in statutory interpretation" as a result of the *Ashcroft* decision by restoring the ability to elect standard.[56]

The VRARA added new subsections (b) and (d) to Section 5 that provided:

(b) Any voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees

section forth in section 1973b(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

This amendment to Section 5 was designed to eliminate the "totality of the circumstances" test and the justification (or “excuse”) for removing dilution of minority voter strength from the Section 5 analysis and require the Justice Department to interpose objections to vote-dilutive plans submitted under Section 5.[57]

V. VRARA after the 2010 Census: A Peek into the Future

LULAC v. Perry[58], was the first voting rights opinion issued by the Roberts Court, in the absence of Justice Sandra Day O’Connnor and with the votes of a new Chief Justice and Justice Alito. Six highly fractured opinions in *LULAC v. Perry* reflected the widely divergent views of the nine Justices. These opinions also provided us with a window of opportunity to evaluate how the Voting Rights Act and its 2006 reauthorization, the VRARA, will fare during the next decade.

This case focused on Republican-led Texas Legislature’s mid-decade congressional redistricting plan that, *inter alia*, dismantled a Congressional district that was previously represented by an Hispanic. The action of the state legislature was alleged to have deprived Hispanics of the ability to elect the candidate of their choice. Specifically, the challenged redistricting plan replaced a judicially created plan crafted just a few years before with one that shifted over 8 million Texans into new districts. Many of the districts in their new form were less compact, communities of interest were fragmented, and the redistricting plan was motivated by a

predominantly partisan purpose. Moreover, a majority African-American district was cracked without offsetting the loss in black voters' ability to elect preferred candidates elsewhere.

In a 132-page decision consisting of six separate opinions, reminiscent of *Bakke* decades earlier, one can identify four key holdings of the case:

First, the Texas state legislature's decision to override a valid, court-drawn redistricting plan mid-decade was not an unconstitutional political gerrymander.

Second, sufficient evidence showed minority cohesion and majority bloc voting among Latino voters in the redrawn congressional district 23.

Third, a newly-drawn congressional district in which Latinos were barely a majority did not offset the loss of a potential Latino opportunity district as result of redistricting.

Finally, the totality of the circumstances showed the redistricting plan for district 23 constituted vote dilution in violation of Section 2 of the Voting Rights Act.

Was politics driving the redistricting process in *LULAC v. Perry*? Following its 2003 plurality decision in *Vieth*, and the evident inability to muster a majority that would hold partisan gerrymandering challenges were nonjusticiable political questions, the Supreme Court was understandably without a principled basis to determine how to measure impermissible partisan effect in *LULAC v. Perry*. The Court's reaction in 2006 to cries of political gerrymandering was the judicial equivalent of a yawn. One example suffices. During oral argument, when counsel for one of the appellants complained that the only reason the redistricting plan as issue was passed "was to help one political party gain more seats in the Congress at the expense of the other," Justice Scalia replied: "Wow. That's a surprise."

Chief Justice Roberts, writing in a separate opinion, echoed concern over the

consequences of VRA-driven race-based districting and how such a process has supplanted if not become the equivalent to minority electoral opportunity. Of such racial sorting, the Chief Justice objected to giving the courts any further role in "rejiggering the district lines under §2."

> I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district. It's a sordid business, this divvying us up by race."

Notwithstanding the fractured opinions in *LULAC v. Perry*, the collective positions of the nine Justices do provide insight into how the Roberts Supreme Court, following the decennial census scheduled for April 2010, will interpret and apply key concepts and elements of the Voting Rights Act, as amended and extended. These are some of the key areas to watch:

1. Geographical Compactness: The *Gingles* preconditions provide a roadmap that aids in the evaluation of the potential effectiveness of majority-minority districts. The focus is on whether the minority community is numerous and sufficiently geographically compact, with internal consistency and cohesion in its voting choices, to enable it as the majority of the population to elect minority-preferred candidates, even in the presence of legally significant white racial bloc voting. The §2 compactness inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries; the compactness inquiry under §2 embraces different considerations from the compactness inquiry in the equal protection context, the latter referring to the compactness of the contested district rather than the compactness of the minority population, with evaluation of the contours and relative smoothness of district lines to determine whether race was the predominant factor in drawing those lines, a district is rendered noncompact for §2 purposes if it combines two communities of

interest that are separated by enormous geographical distance and contain populations with disparate needs and interests, with differences in socioeconomic status, education, employment, health and other characteristics." A district that reaches out to grab small and isolated minority communities is not reasonably compact, and a district that combines two far-flung segments of a racial group with disparate interests does not provide the opportunity that §2 requires or that the first *Gingles* precondition of geographical compactness contemplates." "The mathematical possibility of a racial bloc does not make a district compact." Justices Souter and Ginsburg would hold that the *Gingles* precondition of compactness is satisfied by showing that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party, defined as the party tending to win in the general election,

2. Minority Electoral Opportunity: Ensuring minority groups an equal opportunity to participate in the political process and to elect representatives of their choice is critical to advancing the ultimate purposes of §2; Justices Scalia, Thomas, Alito and Chief Justice Roberts rejected the claim in *LULAC v. Perry* that the state intended to minimize Latino voting power. They would sanction as constitutional the state legislature's political gerrymandering by removing voters from a district because they voted for Democrats and against the Republican incumbent, even if it so happened that the most loyal Democrats were black Democrats and the state was conscious of that fact. They would also uphold the state legislature's political and nonracial objective, finding no prohibited racial classification if district lines merely correlated with race because they were drawn on the basis of political affiliation, which corresponds with race.

3. Minority Influence Districts: It is possible to state a §2 claim for a racial group that

makes up less than 50% of the population, provided it can be shown that voters in that group constitute a sufficiently large minority to elect their candidate of choice with the assistance of crossover votes; the mere fact that African-Americans have influence in a district does not suffice to state a §2 claim; the opportunity to elect representatives of their choice requires more than the ability of minority voters to influence the outcome between some candidates, none of whom is their candidate of choice; the presence of influence districts where minority voters may not be able to elect a candidate of choice but can play a substantial role in the electoral process relevant to a §5 analysis and a relevant consideration under §5 of the Voting Rights Act, but the failure to create an influence district does not run afoul of §2 ; Justices Souter and Ginsburg would hold that a §2 vote dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, that replacing a majority-minority district with a coalition district with minority voters making up fewer than half constitutes impermissible retrogression under §5, that protection of the minority voting population in a coalition district should be protected much as a majority-minority bloc would be;

4. Candidates of Choice: The fact that African-Americans voted for an Anglo Democrat candidate in primary and general elections could signify he is their candidate of choice; without a contested primary, such a fact, assuming the presence of racial bloc voting, could also be interpreted to show that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially in an open primary system; the fact that African-American voters preferred an Anglo Democrat to Republicans who opposed him does not make him their candidate of choice; the ability of African-American voters to aid in an Anglo Democrat’s election in a district does not make that district an African-

American opportunity district for purposes of §2, and §2 does not protect that kind of influence;

5. Communities of Interest: The recognition of nonracial communities of interest reflects the principle that a State may not assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls; legitimate yet differing communities of interest should not be disregarded in the interest of race; "[t]he practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals." In some cases members of a racial group in different areas that are in close proximity, such as rural and urban communities, can share similar interests and form a compact district, but cannot be made a remedy for a §2 violation elsewhere "if the only common index is race and the result will be to cause internal friction."

6. Proportionality: Proportionality, whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area, is a relevant factor in the totality of circumstances; when a vote dilution claim is framed in statewide terms, as where racially polarized voting and possible submergence of minority votes throughout a state, proportionality should be looked at and decided on a statewide basis; proportionality is always relevant evidence in determining vote dilution, but never itself dispositive; placing undue emphasis on proportionality risks defeating the goals underlying the Voting Rights Act; the role of proportionality is not to displace an intensely local appraisal of a challenged district or to allow a state to trade off the rights of some against the rights of others; proportionality provides some evidence of whether the political processes leading to nomination or election in the state or political subdivision are not equally open to participation. There is no magic parameter for determining proportionality, and "rough proportionality" must allow for

some deviations; Chief Justice Roberts and Justice Alito would adhere to the standard announced in *DeGrandy* that a finding of proportionality can defeat §2 liability even if a clear Gingles violation has been made out.

VI. Practice Pointers for Legislative Personnel Involved in the Redistricting Process

Cromartie v. Hunt provides a good list of potential topics to discuss with legislators about to embark on the redistricting process once the Census 2000 results come in.

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

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

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

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

•Fifth, consideration should be given to the rigorous *Daubert* standard when legislators are trying to decide whether and to what extent experts should be retained and utilized during the legislative decision-making process. Indeed, there are experts upon experts in the field of

statistical analysis, demographics, evaluation of exogenous and endogenous electoral evidence, racial bloc voting analysis, race-predominance analysis and many other discrete evidentiary subcategories. It is not premature for a legislative body or committee to make a preliminary assessment of a redistricting expert's reasoning, methodology and credibility during that legislative process. An early *Daubert* assessment of experts whose reports, findings and conclusions may be central to any viable redistricting plan, may indeed provide valuable evidentiary support at a trial years later.

Lawyer v. Department of Justice teaches us, moreover, that a legislative body seeking to engage in race-conscious districting can navigate through the process without running afoul of the constitutional prohibition against predominantly race-based districting. It can do this by developing the requisite legislative history sufficient to satisfy the "strong showing" of necessity required for race-based remedial action, followed by a bona fide declaratory judgment action through which the legislative body can seek to establish a great likelihood of a §2 violation in the absence of affirmative governmental race-conscious districting.

In this process, a number of practical evidentiary considerations that may come into play during the legislative redistricting process. That process should be conducted with a constant awareness of the fact that the entire legislative history will likely be the focus of pretrial discovery in the event a subsequent racial gerrymandering challenge or an action under §2 or §5 of the Voting Rights Act is mounted. Relevant legislative evidence may include the following:

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

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

3. Clear, consistent and unambiguous reference to traditional race-neutral criteria and standards such as compactness, contiguity, incumbency protection, partisan political interests, respect for political subdivision boundaries and preservation of non-racial communities of interest in the redistricting process;

4. Relevant newspaper articles, television interviews and other forms of recorded media coverage, whether on the national, state or local level, that identify or describe the principal goals and objectives of the redistricting process, the balanced use of race along with other non-racial factors in making boundary line changes, and other public expressions of legislative purpose bearing on the issue of whether and to what extent race predominated or was merely one of many factors in the drawing of boundaries of a given district.

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[1] S. Rep. No. 97-417, 2d Sess., p. 4 (1982), 1982 U.S. Code Cong. & Admin. News 177.

[2] Holder v. Hall, 512 U.S. 874, 883 (1994) (plurality opinion). See generally *United States v. Blaine County, Montana*, 363 F.3d 897, 906-07 (8th Cir. 2004) (In a landmark decision upholding the constitutionality of Section 2, the 8th Circuit declined to hold that Congress was required " to find evidence of unconstitutional voting discrimination by each of the fifty states in order to apply section 2 nationwide. Finally, even if nationwide evidence were a prerequisite to national utilization of section 2, Congress had before it sufficient evidence of discrimination in jurisdictions not covered by section 5 to warrant nationwide application."… Thus, we conclude that Congress did not exceed its Fourteenth and Fifteenth Amendment enforcement powers by applying section 2 nationwide." The 8th Circuit also provided a helpful comparison and contrast of Section 5 and Section 2 in their scope, burden of proof, remedial purpose, evidentiary predicate and the federalism costs exacted from state and local jurisdictions: "[u]nlike section 5 of the VRA, section 2 does not engage in such a pervasive prohibition of constitutional state conduct. The

two sections of the VRA are dramatically different in scope. Section 5 is an extraordinary measure, which requires covered jurisdictions to submit every change in their voting procedures to the Department of Justice for preclearance. Section 5 thus places the burden of proof on the state or locality, not on the party challenging the voting procedure. … Because section 5 imposes such a significant burden on state and local governments, Congress had reason to limit its application to jurisdictions with a recent history of pervasive voting discrimination. Section 2 is a far more modest remedy. The burden of proof is on the plaintiff, not the state or locality. This burden is significant; Congress heard testimony that section 2 cases are some of the most difficult to litigate because plaintiffs must usually present the testimony of a wide variety of witnesses--political scientists, historians, local politicians, lay witnesses--and sift through records going back more than a century. [8] In contrast to section 5, section 2's results test makes no assumptions about a history of discrimination. Plaintiffs must not only prove compactness, cohesion, and white bloc voting, but also satisfy the totality-of-the-circumstances test." Id. at 905-06.)

[3] *South Carolina v. Katzenbach*, 382 U.S. 301, 308 (1966).

[4] *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997),

[5] 512 U.S. 997 (1994)

[6] *Lewis v. Alamance County*, infra at 610-11

[7] *Lewis v. Alamance County, i*nfra at 615 n.12

[8] 485 F.2d 1297 (5th Cir. 1973)(*en banc*)

[9] 478 U.S. at 45, quoting S. Rep. No. 417, 97th Cong., 2nd Sess. 29, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 207

[10]478 U.S. 30, 51(1986)

[11] 509 U.S. 630 (1993)

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

[13] *Shaw v. Reno*, 509 U.S. at 649.

[14] *Shaw v. Reno*, 509 U.S. at 647.

[15]*Puckett v. City of Louisville*, 991 F. 2d 796 (6th Cir. 1993), citing Thomas Sowell, "Affirmative Action: A Worldwide Disaster," Commentary, Vol. 88. No. 6, December 1989, and Shelby Steele, The Content of Our Character: A New Vision of Race In America (1990).

[16]517 U.S. 899 (1996)

[17]517 U.S. 952 (1996)

[18]429 U.S. 274 (1977)

[19] Mark Packman, *That's Some Catch, That Catch-22*, Census 2000: Strategies and Considerations for State and Local Government (ABA 2000)

[20] 528 U.S. at 478

[21] 461 F. 3d 1011, 1022 (8th Cir. 2006)

[22] 429 U.S. 252, 267 (1977)

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[24] 520 U.S. 471, 486 (1997)

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[27] 393 U.S. 544, 565-66 (1969)

[28] 425 U.S. 130, 141 (1976)

[29] 425 U.S. at 141.

[30] 460 U.S. 125 (1983)

[31]519 U.S. 9 (1996)

[32]525 U.S. 266 (1999)

[33]In *Mississippi Democratic Party v. Barbour*, ____F. Supp. 2d ____, 2007 WL_____(N.D. Miss. 2007), the district court upon invalidating the state primary statute and directing the state legislature to enact certain changes in the primary system, noted that "federal courts do not need preclearance from the Justice Department to determine the constitutionality of an election procedure," citing *Connor v. Johnson*, 402 U.S. 690, 692 (1971), which held that a district court's interim remedial decree is not within the reach of Section 5. Slip op. at 26.

[34] 430 U.S. 144 (1977)

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[36] 512 U.S. 977 (1994)
[37] 683 F. Supp. 1021 (1988)
[38] 520 U. S. 471 (1997)
[39] 429 U.S. 252, 267 (1978)
[40] Circumstantial evidence of discriminatory intent underlying a challenged electoral practice may be found by the convergence of different racial impact, the historical background of the practice revealing a series of official actions taken for invidious purposes, the specific sequence of events leading up to the challenged decision, procedural or substantive departures from normal decision-making, and statements from the legislative or administrative history that reflect on the purpose of the decision. Id. at 267.
[41] 528 U.S. 320 (2000)
[42] David H. Harris, Jr. and Trish Hardy, *A Good Fix But Not the Cure – Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*, 29 N.C. Cent. L. J. 224, 239 (2007) (hereinafter "A Good Fix"), citing Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 109th Cong. 25-26 (2006)
[43] 539 U.S. 461 (2003)
[44] *A Good Fix*, supra at 240.
[45] *A Good Fix*, supra at 241.
[46] Carol M. Swain, *Focus on the Voting Rights Act: Reauthorization of the Voting Rights Act: How Politics and Symbolism Failed America*, 5 Geo. J.L & Pub. Pol'y 29 (2007) (hereinafter "*Politics and Symbolism*").
[47] *Politics and Symbolism, supra* at 34-35.
[48] *A Good Fix* at 230.
[49] *A Good Fix* at 238, 246 n 116.
[50] *A Good Fix* at 246n 119-120.
[51] *A Good Fix* at 230, 246-47n 121.
[52] *A Good Fix* at 246 n166.
[53] *A Good Fix* at 246 n167.
[54] *A Good Fix* at 246 n168-170.
[55] *A Good Fix* at 246-47.
[56] *A Good Fix* at 247 n171.
[57] *A Good Fix* at 247 n.172.
[58] 126 S. Ct. 2594, 2623 (2006)

Ben Griffith's federal & state civil litigation practice focuses on representation of state & local governments, agencies, boards & officials in the areas of election law, voting rights, civil rights, public sector insurance coverage, premises security & construction defect litigation, & environmental law. He chairs IMLA's International Committee & is an IMLA Local Government Fellow and IMLA State Chair. He is Immediate Past Chair of the ABA Section of State and Local Government Law, a member of the ABA Standing Committee on Election Law, and has served as President of the National Association of County Civil Attorneys, President of the Mississippi Association of County Board Attorneys, and Chair of IMLA's Counties and Special Municipal Districts Department. Board Certified in Civil Trial Advocacy by the National Board of Trial Advocacy, he earned his Juris Doctor in 1975 from the University of Mississippi Law Center, and is a partner in the Cleveland, MS law firm of Griffith & Griffith. He served as county board attorney for 21 years and serves as board attorney for a 17-county water management district, a position held since 1989. He and his wife, Kathy, are the parents of two children, Clark, age 27, and Julie, age 25.