4. RACIAL AND LANGUAGE MINORITIES

Introduction

More than a century ago, the U.S. Supreme Court described the right to vote as fundamental because it is "preservative of all rights."^217 Almost 100 years later, Justice Black wrote, "[o]ther rights even the most basic are illusory if the right to vote is undermined."^218 Unfortunately, for a large number of American citizens the right to vote remained illusory until, almost a century after the ratification of the 15th Amendment, Congress passed the Voting Rights Act of 1965. The act primarily protected the right to vote as guaranteed by the 15th Amendment. It was also designed to enforce the 14th Amendment and Article 1, Section 4, of the Constitution.221

The Voting Rights Act is one of the most successful civil rights statutes ever passed by Congress. The act accomplished what the 15th Amendment to the U.S. Constitution and numerous federal statutes had failed to accomplish—it provided minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination.

The act contains two principal sections, Section 2 and Section 5. Section 2 was originally a restatement of the 15th Amendment and applies to all jurisdictions. It prohibits any state or political subdivision from imposing a "voting qualification or prerequisite to voting or standard, practice or procedure ... in a manner which results in the denial or abridgement of the right to vote on account of race or color."^222

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^219 "The right of citizens of the United States shall not be denied or abridged by the United States, or by any state on account of race, color or previous condition of servitude," U.S. CONST. amend. XV, § 1.


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Section 5, on the other hand, applies only to certain jurisdictions covered under the act. A jurisdiction covered under Section 5 is required to preclear any changes in its electoral laws, practices or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia. 223

The two sections work independently of each other. A change that has been precleared under Section 5 still can be challenged under Section 2.

The act has been amended four times since 1965.

1. The 1970 amendments instituted a nationwide, five-year ban on the use of tests and devices as prerequisites to voting. 224

2. In 1975, the ban on tests was made permanent and the coverage of the act was broadened to include members of language minority groups. 225

3. In 1982, in response to judicial opinions discussed below, amendments made it clear that an intent to discriminate was not required for a claim under Section 2 of the act. 226

4. In 2006, amendments again responded to judicial opinions, making it clear that broad intent to discriminate was grounds for denial of preclearance under Section 5, and that Section 5 was intended to preserve minority voters' ability to elect candidates of their choice, not merely to influence elections. 227

In each of those four years, Section 5 was set to expire, but Congress extended it, most recently until 2032. 224

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225 Act of Aug. 6, 1975, Pub. L. No. 94-73, Title II, secs. 203, 206, 207, 89 Stat. 400, 401-02 (codified as amended at 42 U.S.C. §§ 1973a), "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section;" 1973b(f)(2), "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." 1973d; 1973k; 1973l(c)(3), "The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaska Native or of Spanish heritage".


In the 1990s, the Department of Justice encouraged states subject to Section 5 preclearance to draw redistricting plans that created new districts where members of a racial or language minority group (primarily African Americans or Hispanics) were a majority of the population. These new "majority-minority" districts were intended to protect the states from liability under Section 2 for failing to draw districts that the minority group had a fair chance to win. As states drew the plans, they discovered that the Justice Department had little concern that majority-minority districts be compact. In some cases, the department refused to preclear a plan unless the state "maximized" the number of majority-minority districts by drawing them wherever pockets of minority population could be strung together. As the plans were redrawn to obtain preclearance, some of the districts took on bizarre shapes that caused them to be labeled "racial gerrymanders."

The racial gerrymanders were attacked in federal court for denying White voters their right to equal protection of the laws under the 14th Amendment. The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy in Georgia, and held that a racial gerrymander must be subjected to "strict scrutiny" to determine whether it was "narrowly tailored" to achieve a "compelling state interest" in complying with Section 2. Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed "traditional districting principles."

As the Supreme Court refined its rulings on racial gerrymandering, it made clear that a challenge to a district as a racial gerrymander will not succeed unless it shows that race was the predominant factor in its creation. A racial-gerrymander challenge will fail if race was a factor, but the predominant purpose was to advance the cause of a party, as in the creation of a safe Democratic district by including Black voters because they more reliably support Democratic candidates.

This chapter provides an explanation of how the law of race and redistricting developed. It sets forth the legal standards that will govern plan drafters as they attempt to accommodate the conflicting demands of minority groups, the Justice Department, and the U.S. Supreme Court after the 2010 census.

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Section 2 of the Voting Rights Act—General Protection of Voters’ Rights

Applicability

Section 2 of the Voting Rights Act prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any U.S. citizen’s right to vote on account of race, color or status as a member of a language minority group. The 1982 amendments codified a “totality of circumstances” standard to be used for determining whether a challenged practice results in an abridgment of the right to vote. Currently, a violation of Section 2 is established if:

[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of ... [a racial, color, or language minority class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected ... is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Generally, Section 2 cases have involved claims that the political process was not equally open to certain minorities because of the use of multimember districts, packing minorities into a single district, or fracturing minorities into several districts.

Multimember districts. The voting strength of a minority group can be lessened by placing it in a larger multimember or at-large district where the majority can elect a number of its preferred candidates and the minority group cannot elect any of its preferred candidates. The validity of multimember districts has been challenged in numerous vote dilution cases, both before and after the 1982 amendments. Courts continue to hold that multimember districts are not per se unconstitutional. However, an at-large and multimember election system may violate Section 2 if it results in a denial of equal opportunity to participate in the electoral process. In examining the “totality of the circumstances,” courts may look to districting lines for independent indicators of discriminatory intent.

Packing. “Packing” occurs when a minority group is concentrated into one or more districts so that the group constitutes an overwhelming majority in those districts, thus minimizing the number of districts in which the minority could elect candidates of its choice. Packing often is accomplished by drawing district lines to follow

\[37\] See note 261, infra.
\[38\] United States v. Masengo County Comm’n, 731 F.2d 1546, 1565 (11th Cir.1984).
\[39\] Id. at 1574.

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racially segregated housing patterns. In *Rybicki v. State Board of Elections* (*Rybicki II*), the court held that, over time, any rigid adherence to well-defined lines of racial division can result in packing and vote dilution. Although the court did not find that it was wrong *per se* to consider racial housing patterns when drawing district lines, the court encouraged districting that moved away from Black-White boundaries, finding that apparent tracing of racial divisions presented a suspect circumstance.

**Fracturing.** “Fracturing” occurs when a group of minority voters is broken off from a concentration of minority voters and added to a large majority district. This submerges the minority voters in the majority district. In what became the seminal case, the district court in *Gingles v. Edmisten* considered a claim by Black citizens that a North Carolina redistricting plan fractured or submerged the strength of minority voters. Plaintiffs claimed that the North Carolina plan made use of multimember districts to submerge the Black vote in areas with substantial White voting majorities. The plan also used single-member districts to fracture concentrations of Black voters into separate voting minorities. The court held that, in light of the lingering effects of official discrimination and the substantial racial polarization in voting, the creation of multimember districts resulted in the submergence of Black voters. This submergence inhibited the ability of minority voters to participate in the political process. The court also held that the plan’s single-member districts unlawfully diluted Black voting strength by fracturing concentrations of Black voters.

**Judicial Interpretation of Section 2 of the Voting Rights Act and the 1982 Amendments**

**An overview.** In the 1980 case of *City of Mobile v. Bolden*, the Supreme Court rejected earlier cases that measured the effects of particular voting practices and ruled that plaintiffs must prove an intent to discriminate in order to prove a vote dilution claim. This decision substantially increased the burden that plaintiffs had to meet. Congress disapproved of the *Bolden* decision and in 1982 amended Section 2 of the Voting Rights Act to codify the factors analyzed in the pre-*Bolden* court decisions. Thus, the focus shifted from discriminatory intent to the discriminatory effects or “results.”

The Supreme Court first considered the amended Voting Rights Act in *Thornburg v. Gingles*. In *Gingles*, the Court announced three preconditions that a plaintiff first must establish to prove a Section 2 claim—the size and geographic compactness of the minority population, its political cohesion, and whether the majority usually voted as a bloc to defeat the minority group’s preferred candidate. Then the courts would look at the “totality of the

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242 Id. at 1155.
244 590 F. Supp. at 374.
245 Id. at 374-375.
circumstances" to determine if the practice results in a dilution of electoral power. In numerous cases since 1986, the Supreme Court has attempted to clarify the Gingles factors.

**Bolden and the 1982 amendments.** In *City of Mobile v. Bolden*,248 Black residents had charged that Mobile’s practice of electing commissioners at large diluted minority voting strength, thus violating the 14th and 15th amendments and Section 2 of the Voting Rights Act. The plurality opinion stated that “racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.”249 The Court concluded that the plaintiffs had failed to prove a violation of Section 2 of the Voting Rights Act in that Congress did not intend Section 2 to have any effect different from that of the 15th Amendment itself.250

Congressional response to *Bolden* was swift. The House Judiciary Committee originated the move to amend Section 2 of the Voting Rights Act. The House Judiciary Committee report found the intent standard inappropriate and indicated that the proper judicial focus should be on election outcomes, not on discriminatory intent.251 The House Judiciary Committee set forth a results standard that would ban any voting procedure that would “result” in a denial or abridgment of the right to vote on account of race or color.252 The House of Representatives stated that the results test was to parallel the “effects” test of the remedial Section 5.253 To avoid the establishment of a race-based entitlement to representation, the House added a disclaimer against proportionality.254 The Senate Judiciary Committee recommended a revised version of the bill, which eventually was adopted. It retained the results focus of the House proposal but codified the “totality of circumstances” language from *White v. Regester*,255 a 1973 case involving multimember state legislative districts in Texas, as the standard:

$§$ 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *City of Mobile v. Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.256

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249 Id. at 62.
250 Id. at 60-61.
252 Id. at 48.
253 Id. at 29.
254 Id. at 48.
In reporting its findings, the Senate Judiciary Committee found that the Court in *Bolden* had broken with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory intent. The committee concluded that "[i]t is his intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial injury [sic] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."\(^{257}\)

The Senate Judiciary Committee added further guidance by including as a part of the Section 2 legislative history a nonexclusive list of factors for courts to consider. These factors, basically an enumeration of those articulated in the 1973 case of *Zimmer v. McKeithen*,\(^ {258}\) include:

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

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

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

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

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

6. Whether political campaigns have been characterized by overt or subtle racial appeals; and

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.\(^ {259}\)

\(^{257}\) *Id.* at 16.


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Thornburg v. Gingles. Between 1982 and 1986, numerous lower court decisions upheld the constitutionality of the amendments. Many cases dealt with the use of multimember districts where the courts held that multimember districts were not per se a violation of Section 2.  

The Supreme Court first interpreted the 1982 amendments to Section 2 in Thornburg v. Gingles. In that case, the plaintiffs challenged the 1982 North Carolina redistricting plans for one multimember state senate district, one single-member state senate district, and five multimember state house districts. Pursuant to Section 5 of the act, the plans had been precleared by the Department of Justice. The plaintiffs claimed that the plans impaired the ability of Blacks to elect representatives of their choice in violation of the 14th and 15th amendments as well as Section 2 of the Voting Rights Act.

Justice Brennan, writing for the majority in Gingles, gave an exhaustive analysis of the legislative history of Section 2. Brennan rejected, with no dissent, the earlier test of intent to discriminate and affirmed that a court, in deciding whether a violation of Section 2 has occurred, is to determine if "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."  

To answer this question, Justice Brennan indicated that a court "must assess the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors." The factors to be considered in determining the "totality of circumstances" surrounding an alleged Section 2 violation were similar to those mentioned in McKeithen and in the 1982 Senate legislative history:

1. The extent of the history of official discrimination touching on the minority group participation in the democratic process;
2. Racially polarized voting;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, antiselected provisions, or other voting practices that enhance the opportunity for discrimination;
4. Denial of access to the candidate slating process for members of the class;
5. The extent to which the members of the minority group bear the effects of discrimination in areas such as education, employment and health that hinder effective participation;

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260 United States v. Marengo County Comm'n, 731 F.2d 1546 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984); Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984); Rybicki v. State Bd. of Elections (Rybicki I), 574 F. Supp. 1082 (N.D. Ill. 1982); 574 F. Supp. 1147 (N.D. Ill. 1983) (Rybicki II).

261 United States v. Marengo County Comm'n, 731 F.2d 1546 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984); Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984).


264 Id. at 44, quoting S. Rep. No. 417, 97th Cong. 2d Sess. 27 (1982).
6. Whether political campaigns have been characterized by racial appeals;

7. The extent to which members of the protected class have been elected;

8. Whether there is a significant lack of responsiveness by elected officials to the particular needs of the group; and

9. Whether the policy underlying the use of the voting qualification, standard, practice or procedure is tenuous.\(^{265}\)

In a footnote to the plurality opinion, Justice Brennan indicated that two of the objective factors used to evaluate vote dilution claims—racial polarization and the electoral success of Black candidates—are essential to minority vote dilution claims.\(^{266}\)

In addition to a review of "objective" factors, the Gingles Court developed a new three-part test that a minority group must meet in order to establish a vote dilution claim under Section 2. The test requires that a minority group prove that:

1. It is sufficiently large and geographically compact to constitute a majority in a single-member district;

2. It is politically cohesive; and

3. In the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.\(^{267}\)

The Gingles Court held that all but one of the challenged 1982 multimember districts were characterized by racially polarized voting; a history of official discrimination in voting matters, education, housing, employment and health services; and campaign appeals to racial prejudice. Those factors, in concert with the use of multimember districts, impaired the ability of geographically insular and politically cohesive groups of Black voters to participate equally in the political process and to elect candidates of their choice.\(^{268}\)

With respect to one of the multimember districts, a majority of the Supreme Court voted to reverse the lower court, holding that, as a matter of law, the lower court had ignored the continued success of Black voters in the district. This success resulted in proportional representation inconsistent with the allegation that the ability of Black voters in that district was unequal to that of White voters in electing representatives of their choice.\(^{269}\)

Justice Stevens, speaking for Justices Marshall and Blackmun, dissented from the majority in this matter and discounted the continued electoral success of minority-favored candidates in the district since 1972. Instead, he

\(^{265}\) 478 U.S. at 36-37.

\(^{266}\) Id. at 48, n. 15.

\(^{267}\) Id. at 50-51.

\(^{268}\) 478 U.S. at 80.

\(^{269}\) Id. at 77.
would have accepted other district court findings regarding this district and other state legislative districts for the years involved, deferring to the knowledge of the judges of the lower court who are "well-acquainted with the political realities of the State."\footnote{Id. at 107.}

**Post-Gingles judicial interpretations.** Since the seminal case of *Thornburg v. Gingles* in 1986, the interpretation of Section 2 has evolved in later Supreme Court cases.

**Application to Single-Member Districts: What is the Proper Population?—*Gowen v. Emison.*** In the 1990s, the U.S. Supreme Court expounded on the *Gingles* tests. In *Gowen v. Emison,*\footnote{507 U.S. 25 (1993).} the Supreme Court specifically ruled that the *Gingles* preconditions for a vote dilution claim apply to single-member districts as well as to multimember or at-large districts.\footnote{For the procedural history of *Gowen,* see chapter 7.} The Court had previously held that multimember districts and at-large districts pose greater threats to minority-voter participation than single-member districts.\footnote{*Gingles,* 478 U.S. at 47.} The Court found that it would be peculiar to hold challenges to the more dangerous multimember districts to a higher threshold than challenges to single-member districts.\footnote{507 U.S. 25, 40.} The reasons for the *Gingles* preconditions also applied to single-member districts. "Unless these points are established, there neither has been a wrong nor can be a remedy."\footnote{Id.} The *Gowen* Court found that there was no evidence of the second or third *Gingles* conditions, i.e., minority cohesion or majority bloc voting. Thus, having failed to meet the *Gingles* preconditions, the Supreme Court found that there was no need to create a majority-minority district.

**A State’s Right to Draw Majority-Minority Districts Not Required by Section 2—*Voinovich v. Quilter.*** In *Voinovich v. Quilter,*\footnote{507 U.S. 146 (1993).} decided a week after *Gowen,* the Supreme Court again found that a federal court had overstepped its boundary. Pursuant to the Ohio Constitution, a reapportionment board proposed a plan for the state. The plan included eight majority-minority districts. Suit was filed in federal court alleging that the plan illegally packed Black voters into a few districts where they constituted a super majority. Plaintiffs alleged that some Black voters should have been dispersed to create "influence" districts in which they would not constitute a majority, but could, with White crossover votes, elect candidates of their choice.

The district court rejected the plaintiffs' claims that Section 2 of the Voting Rights Act requires that such "influence" districts be created whenever possible. However, the district court went on to find that Section 2 prohibits the "wholesale creation of majority-minority districts" unless necessary to remedy a violation of Section 2. The district court therefore ordered that the reapportionment board redraw the plan or demonstrate that it was remediating a Section 2 violation. The board revised the plan to create only five majority-minority districts and created a record that it believed justified their creation. The district court concluded that the board had not
proven a violation of Section 2 and ordered that the primary elections be rescheduled. The U.S. Supreme Court stayed this order and heard the appeal.

The Supreme Court disagreed with the ruling of the district court that Section 2 prohibits the creation by the state of majority-minority districts absent a violation of Section 2. A state is free to draw districts however it wants, so long as it does not violate the U.S. Constitution or the Voting Rights Act. Although a federal court cannot order the creation of majority-minority districts absent a violation of federal law, a state is free to do so. Further, by requiring the state to prove a violation of Section 2 to justify its plan, the Supreme Court found that the district court had committed error by shifting the burden of proof for a Section 2 violation from the plaintiffs to the state.

In deciding the issue before the Court, the Supreme Court first noted that it had not ruled on whether influence dilution claims are viable under Section 2. The Court again found that it was not necessary to decide that issue in this case. The Court held that, assuming such claims are valid, they must meet the Gingles preconditions. Because the district court specifically found that Ohio does not suffer from racially polarized voting, the plaintiffs could not prove a violation of Section 2 of the Voting Rights Act.

Maximumization Not Required; Proportionality Not a Safe Harbor—Johnson v. DeGrandy. A year after the Grove and Voinovich decisions, the Supreme Court again struck down changes required by a district court. In Johnson v. DeGrandy, plaintiffs objected to the legislative redistricting plan in Florida because it was possible to draw additional districts in Dade County that would have Hispanic majorities. The state argued that, because the number of majority-minority districts was proportionate to the number of minorities in the population, there could be no vote dilution. The district court found that all three Gingles preconditions had been established and that a violation of Section 2 must be found because additional Hispanic majority-minority House districts could be drawn without diluting Black voters' strength. The Court ordered a remedial plan with two additional majority-minority districts.

The Supreme Court first declined to decide whether the plaintiffs had established the first prong of the Gingles test—whether Hispanics were sufficiently numerous and geographically compact to be a majority in additional single-member districts. The state argued that, because a large percentage of the Hispanic population in the region were not citizens, several districts in the plaintiffs' proposed plan would not have sufficient Hispanic citizens of voting age to elect candidates of their choice without crossover votes from other ethnic groups. Thus, although Hispanics may constitute a majority of the population—and even a majority of the voting age population—they may not constitute a majority of the voting age population eligible to vote.

Rather than deciding this issue, the Supreme Court focused on the "totality of the circumstances" as articulated in Gingles. The district court had seemed to hold that, if the three prongs of Gingles are proven, and the totality of the circumstances shows that there is a history of discrimination against members of a minority group, Section 2 requires that the maximum number of majority-minority districts be created. The Supreme Court disagreed. It specifically rejected a rule that would require a state to maximize majority-minority districts: "Failure to maximize cannot be the measure of Section 2."278

278 512 U.S. at 1017.

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The Supreme Court also rejected an absolute rule that would bar Section 2 claims: if the number of majority-minority districts is proportionate to the minority group’s share of the relevant voting age population. The Court found that offering states a “safe harbor” might lead to other misuses, such as creating a majority-minority district in an area in which racial bloc voting was not present so that one would not have to be drawn in an area that needed one. Rather, the Court considered the totality of the circumstances. Examining the totality of the circumstances, the Court found that, since Hispanics and Blacks could elect representatives of their choice in proportion to their share of the voting age population and since there was no other evidence of either minority group having less opportunity than other members of the electorate to participate in the political process, there was no violation of Section 2.

Minority-Group Compactness. Role of Section 2 in Influence Districts. LULAC v. Perry. In *League of United Latin American Citizens (LULAC) v. Perry,* the Supreme Court considered a mid-decade congressional redistricting in Texas. It ruled that for a state legislature to redraw in mid-decade a plan drawn by a federal court, even if the legislature’s primary purpose was partisan advancement, did not violate the Equal Protection Clause as a partisan gerrymander. However, the Supreme Court held that it was a violation of Section 2 for the state legislature to dismantle an effective Hispanic district by reducing the district from one in which the Hispanic percentage was more than 50 percent of citizen voting age population (CVAP) to one that had more than 50 percent Hispanic voting age population but less than 50 percent VAP if only citizens were counted. The Supreme Court said the dismantling of the district was not justified by the creation of a majority CVAP Hispanic district elsewhere in Texas made up of two Hispanic communities widely separated by geography. The purpose of changing the district was to protect a Hispanic incumbent who was threatened by increasing opposition by Hispanic voters. The Supreme Court found that the substitute district failed the first *Gingles* precondition, that of a minority community large and geographically compact enough to form a majority in the district. The Supreme Court framed its compactness analysis this way: Although for a racial gerrymandering claim the focus should be on compactness in the district’s shape, for the first *Gingles* prong in a Section 2 claim the focus should be on the compactness of the minority group. In a challenge to another district, the Supreme Court denied a Section 2 challenge to the dismantling of a 25.7 percent Black minority in an “influence district” because it said Section 2 protects the opportunity of minorities to elect representatives of their choice, not merely to influence elections.

In *Bartlett v. Strickland,* the Supreme Court finally delineated the meaning of “majority” in the first *Gingles* prong. The case was an appeal from a decision of the North Carolina Supreme Court, which had held that a pair of state House districts that divided a county were drawn in violation of the state constitution’s prohibition on unnecessary splitting of counties in legislative district plans. The state defended by saying the legislature believed splitting the county was necessary to comply with Section 2 of the Voting Rights Act by drawing an effective minority district. The district in question was 42.37 percent Black in total population and 39.09 percent Black in voting age population. The State Supreme Court said that, to justify a departure from the state constitution’s Whole County Provision to comply with Section 2, the legislature would have to draw a district in which the minority group was a numerical majority—more than 50 percent—of the voting age citizen population. In the plurality opinion of the Court in the 5-4 decision, Justice Kennedy rejected the state’s assertion that the first *Gingles* prong can be satisfied by what the state called an “effective minority district” in which the minority is less than 50 percent of voting age population. Reviewing the terminology of minority districts, the Court said the

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274 *No. 05-204, 548 U.S. 399 (2006).*

275 *No. 07-689 (U.S. Mar. 9, 2009).*

276 N.C. CONSTATE., art. II, §§ 3(3), 5(3).
spectrum runs from “majority-minority district,” in which the minority group has a numerical, working majority of voting age population, to “influence districts,” in which the minority can influence the outcome of an election even if its preferred candidate cannot be elected. The Strickland court said Section 2 had been held in Voinovich to require majority-minority districts and held in LULAC not to require influence districts. In between those on the spectrum, the Court said, lay “crossover” districts, in which the minority group is not a numerical majority of the voting age population, but is potentially large enough to elect its preferred candidate by persuading enough majority voters to cross over to support the minority’s preferred candidate. The Court said a crossover district is sometimes misleadingly called a “coalitional” district, a term the Court said should be reserved for districts in which more than one minority group, working in coalition, can form a majority. The Strickland court cited the need for a bright-line rule for Section 2 to avoid the consequences of “extending racial considerations even further into the districting process.” It compared its limitation to that of the Court in Johnson v. DeGrandy in rejecting a requirement for maximization of minority districts. The Strickland court cautioned that its ruling concerned the Gingles precondition for considering an “effects” violation of Section 2, and insisted that its decision did not add a precondition to consideration of a discriminatory “purpose” violation. The dissents in Strickland were strongly worded, particularly the terse one from Justice Ginsburg, essentially inviting Congress to overrule the Court’s interpretation of Section 2. The Strickland court did not discuss the state Supreme Court’s inclusion of U.S. citizenship in the majority-minority formula.

Racial Gerrymandering—Shaw v. Reno and related cases. Although not brought as a Section 2 case, the decision in Shaw v. Reno283 (Shaw I) affected later Section 2 cases. In Shaw I, the Supreme Court held that, under the 14th Amendment, “redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race” must meet the strict scrutiny standard of other legislation that makes distinctions based on race.283 The Supreme Court remanded to the district court a challenge to a North Carolina congressional district for a determination of whether it was narrowly tailored to further a compelling governmental interest. Later, in Miller v. Johnson (1995),284 the Supreme Court held that a Georgia congressional district need not have a bizarre shape to be considered a racial gerrymander. If race was the predominant, overriding factor, the district would be subject to strict scrutiny. In order to survive strict scrutiny, the district must be narrowly tailored to serve a compelling state interest.

Two decisions of the Supreme Court later in the 1990s assumed, without deciding, that complying with Section 2 is a compelling state interest. First, in Shaw v. Hunt,285 the Supreme Court again considered congressional districts in North Carolina. The state attempted to justify its redistricting plan in part by the need to avoid liability under Section 2. The district court upheld the plan under strict scrutiny, because it was narrowly tailored to serve the state’s interest in complying with Sections 2 and 5 of the Voting Rights Act. The Supreme Court reversed. It held that, in order to survive strict scrutiny, the state’s action must “remedy the anticipated violation or achieve compliance to be narrowly tailored.”286 A district that is not “reasonably compact” cannot remedy a perceived Section 2 violation because it fails to satisfy the first threshold requirement of the Gingles standard.

284 Id. at 644 (1993).
286 Id. at 915-16.
Thus, the bizarre shape of the district in North Carolina could not be justified by the need to avoid liability under Section 2.

Later, in *Bush v. Vera*, the Supreme Court upheld a decision by the district court in Texas that three congressional districts were not narrowly tailored to avoid Section 2 liability. The Court found that the bizarre shapes of the districts "defeat any claim that the districts were narrowly tailored to serve the state's interest in avoiding liability under Section 2, because Section 2 does not require a state to create, on predominately racial grounds, a district that is not 'reasonably compact.'" Thus, the courts struck down Texas' attempt to create three new majority-minority districts.

Finally, in *Easley v. Cromartie*, the Supreme Court upheld a redrawn version of the minority district rejected in *Shaw v. Hunt*. It said a racial gerrymandering claim cannot succeed, even if race was a factor in drawing the district, if the predominant purpose was to advance the cause of a party, as in the creation of a safe Democratic district by including Black voters because they more reliably support Democratic candidates.

*Shaw, Miller, Vera and Cromartie* are discussed in more detail later in this chapter under "Racial Gerrymandering."

**The Use of Statistical Evidence to Prove Racial Polarization**

Under *Gingles’* three-part test, proof of legally significant racially polarized voting is an indispensable element of a Section 2 vote dilution claim. Racially polarized voting (also referred to as racial bloc voting) exists when the race of a candidate affects the way in which a voter votes. Since it is generally unknown how members of each race vote for particular candidates, parties to a Section 2 claim and the court are forced to rely on various statistical techniques to estimate how minority voters and majority voters voted in a challenged electoral district. Testimony by witnesses who are familiar with local politics and voting behavior generally is presented in conjunction with statistical evidence to corroborate or contradict statistical findings.

The most commonly employed statistical techniques for measuring racially polarized voting are homogeneous precinct (or extreme case) analysis and bivariate regression analysis. These two statistical measurements were endorsed, but not mandated, by the Supreme Court in *Gingles*.

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288 517 U.S. at 979.
293 478 U.S. at 53 n. 20.
Homogeneous precinct analysis. A "homogeneous precinct" is defined as a precinct that has at least a 90 percent minority group population or at least a 90 percent majority population. Homogeneous precinct analysis isolates racially segregated precincts, determines how members of the predominant race in each of these precincts voted, and uses the results to estimate the voting behavior of other members of that race throughout the challenged electoral district. Although popular in vote dilution cases as an easily comprehensible statistical technique, homogeneous precinct analysis is rarely used alone to estimate racially polarized voting. Among the disadvantages cited for exclusive reliance on homogeneous precinct analysis are its dependence on small, potentially underrepresentative precinct samples and its assumption that majority and minority voters who live in racially mixed (i.e., nonhomogeneous) precincts will vote the same way as members of their race in the homogeneous precincts voted.

Bivariate regression analysis. Bivariate regression analysis often is used to complement the results of a homogeneous precinct analysis. Bivariate regression analysis examines the relationship between the racial composition of a precinct and the percentage of votes a candidate receives from that precinct. The resulting correlation derived from the aggregated precinct data is used to estimate the voting behavior of individual voters throughout the challenged electoral district. Bivariate regression analysis relies on both homogeneous and racially mixed precincts for its data. Unlike homogeneous precinct analysis, bivariate regression analysis takes into account the potential of minority voters in racially mixed precincts to vote differently from minority voters in homogeneous precincts.

The Gingles Court avoided establishing any mathematical formula for determining when racial polarization exists. According to the Court, the amount of White bloc voting necessary to defeat the minority bloc vote plus White crossover votes will vary from district to district, depending on factors such as the percentage of registered voters in the district who are minorities, the size of the district, the number of seats open and the candidates running in a multimember district, the presence of majority vote requirements, designated posts, and prohibitions against bullet voting.

The Court made clear that each challenged district must be individually evaluated for racially polarized voting, and that it is improper to rely on aggregated statistical information from all challenged districts to show racial

295 See, e.g., Gingles, 590 F. Supp. 345, 367-368 n. 29. See also Engstrom, supra, at 372.
296 Jacobs and O'Rourke, "Racial Polarization," 3 Journal of Law & Politics 295, 323 (Fall 1986); Engstrom, supra, at 372.
297 Bivariate regression analysis also is referred to as ecological regression, linear regression, correlation and regression, and various other names.
299 478 U.S. at 56 n. 24 and accompanying text. Subsequent attempts in lower courts to mathematically quantify the existence of racially polarized voting also have been rejected. See, e.g., McNeil v. Springfield, 658 F. Supp. 1015, 1029 (C.D. Ill. 1987) (rejecting expert opinion that racial polarization exists only where 90 percent or more of a population votes consistently for candidates of a particular race).
polarization in any particular district. The Court also noted that showing a pattern of bloc voting over a period of time is more probative of legally significant racial polarization than are the results of a single election. The number of elections that must be studied varies, depending primarily upon how many elections in the challenged district fielded minority candidates. Studies of elections involving almost exclusively White candidates, even where those studies show that a majority of Blacks usually vote for winning candidates, have been rejected in favor of studies of elections involving head-to-head candidacies between minorities and Whites.

Minority District Terminology

In determining whether voters can establish a violation of Section 2 of the Voting Rights Act or whether an electoral change or procedure is entitled to preclearance under Section 5 of the act, the courts have employed several different terms. Among the most-frequently used are "majority-minority districts," "effective minority districts," "crossover districts," "coalitional districts," and "influence districts." The U.S. Supreme Court discussed the application of Section 2 to those districts in Bartlett v. Strickland, summarized on page 62.

Majority-Minority Districts

A majority-minority district in the voting rights context is a district in which the majority of the population is either African American, Hispanic, Asian or Native American. In Bartlett v. Strickland, the U.S. Supreme Court said Section 2 does not require the drawing of a majority-minority district in which the minority group is less than 50 percent of the district's voting age population.

\[\text{Id. at 59 n. 28.}\]

\[\text{Id. at 57.}\]

\[\text{Id. at 57 n. 25. The lower court in Gingles relied on statistical evidence from 53 primary and general elections covering the 1978, 1980 and 1982 elections, in which Black candidates ran for seats in the challenged House and Senate districts.}\]


\[\text{No. 07-689 (U.S. Mar. 9, 2009).}\]

National Conference of State Legislatures
Table 5. Majority-Minority Districts in Each State  
(Total Population)  

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National Conference of State Legislatures
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Notes:

1. Although courts use voting age population to identify a majority-minority district, NCSL was unable to locate voting age data for the 1990s districts. To keep the data comparable, this table shows total population for both decades.

2. District boundaries for the 2000s are those used in the 2006 election and provided by the states to the Census Bureau.

3. The Maryland House of Delegates in the 2000s has 13 legislative districts with a majority Black population. Ten districts elect three delegates each, one district elects two delegates, and two districts elect one delegate. This table lists the number of Maryland delegates elected from a majority-minority district, not the number of districts.

Sources: Totals for the 1990s are from *The Almanac of State Legislatures*, 1994; totals for the 2000s are from NCSL, 2009.

**Effective Minority Districts**

An effective minority district is one that contains sufficient population to provide the minority community with an opportunity to elect a candidate of its choice. In early voting rights litigation, a rule of thumb developed (in light of statistical analysis) that a district needed to contain a minority population of 65 percent in order to provide minority voters an opportunity to elect candidates of their choice. In more recent cases, courts generally have recognized that the minority percentage that is necessary to provide minorities an opportunity to elect their candidate of choice varies by jurisdiction and minority group.

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53 See United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Ketchum v. Byrne, 740 F.2d 1398, 1416 (7th Cir. 1984).


National Conference of State Legislatures
A district in which minority voters have elected their preferred candidates is considered an effective minority district, even if the district contains less than a majority of the minority population. Jurisdictions are not required to create majority-minority districts in areas where minority voters have been successful in electing their preferred candidates. “Only if apportionment ... has the effect of denying a protected class the opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.”\textsuperscript{307} If minority voters were able to elect candidates of their choice from a district, minority plaintiffs would be unable to establish legally significant racial bloc voting that usually defeats the minority's preferred candidate.\textsuperscript{308}

On the other hand, a majority-minority district is not necessarily an effective minority district.\textsuperscript{309} In \textit{Bartlett v. Strickland},\textsuperscript{310} the Supreme Court ruled that Section 2 can require the drawing of an effective minority district only if the minority group is more than 50 percent of the district's voting age population.

\textbf{Crossover Districts}

The Court in \textit{Bartlett v. Strickland} described a “crossover district” as a species of “effective minority district.” A crossover district is one in which the minority group is not a numerical majority of the voting age population, but is potentially large enough to elect its preferred candidate by persuading enough majority voters to cross over to support the minority’s preferred candidate. The Court said this should not be confused with another species of effective minority district, the “coalitional district.”

\textbf{Coalitional Districts}

The Court in \textit{Bartlett v. Strickland} described a “coalitional district” as another species of “effective minority district.” A “coalitional district” is one in which more than one minority group, working in coalition, can form a majority to elect their preferred candidates.

\textbf{Influence Districts}

An influence district is a district in which the minority community, although not sufficiently large to elect a candidate of its choice, is able to influence the outcome of an election and elect a candidate who will be responsive to the interests and concerns of the minority community. Although, as noted below, several courts have discussed the value of influence districts, the U.S. Supreme Court in \textit{League of United Latin American Citizens (LULAC) v. Perry}\textsuperscript{311} ruled that Section 2 did not protect an influence district in that case. The Court in \textit{Bartlett v. Strickland}

\begin{footnotesize}
\footnote{\textit{Voinovich v. Quilter}, 507 U.S. 146, 155 (1993).}
\footnote{\textit{Gingles}, 478 U.S. at 50-51.}
\footnote{No. 07-689 (U.S. Mar. 9, 2009).}
\footnote{No. 05-204, 548 U.S. 399 (2006).}
\end{footnotesize}
cited LULAC as authority that influence districts are not protected by Section 2. The Court in Georgia v. Ashcroft recognized influence districts as an acceptable way to satisfy the Section 5 retrogression standard, but in response, Congress amended Section 5 to state that the ability to elect candidates of their choice was what Section 5 was intended to protect.

In Armour v. Ohio, the Court found that the minority community of Youngstown, Ohio, although too small to constitute a majority in a state House district, had been illegally fragmented. The Court ordered the creation of a district containing an African American population of approximately 35 percent. According to the Court:

Defendants go to great lengths to demonstrate that based upon racial voting patterns plaintiffs will not be able to elect a black candidate without a majority of black voters in the redrawn district. However, defendants misapprehend the requirements of the Voting Rights Act. The issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a candidate of their choice. We believe that they can. In a reconfigured district, plaintiffs will constitute nearly one-third of the voting age population and about half of the usual Democratic vote. Therefore, the Democratic Party and its candidates will be forced to be sensitive to the minority population by virtue of that population’s size .... We find that plaintiffs could elect a candidate of their choice, although not necessarily of their race, in a reconfigured district.

The courts that have recognized the validity of an influence claim have focused on whether the minority community has sufficient numbers to elect a candidate who will be responsive to their interests and concerns.

A Note on the Difficulty of Determining Minority Percentages of Different Populations

Measuring minority voting strength is complicated by the absence of reliable data on the race or ethnicity of voters and the diversity of state laws on voter registration and voting in primaries. The complexity is illustrated by the difference between two states that have been in the thick of recent redistricting litigation, North Carolina and Texas. In North Carolina, voters are asked when registering what is their party affiliation, their race, and their ethnicity (the two ethnic choices being Hispanic and Non-Hispanic). Voters in Texas are asked none of those questions, so none of that information is known about registered voters except by indirect means. Data is collected by Texas precinct of the number of registered voters who have recognized Hispanic surnames. In North Carolina registered Democrats may cast primary votes only in the Democratic primary, and Republicans only in the Republican primary. Voters who choose not to designate a party on their voter registration application may vote in the primary of any party that chooses to allow them in, and since 1996 both major parties have done so. So North Carolina has a semi-closed primary system. Texas, where voters do not register by party, perforce has an open primary system. Data on party identification in Texas is sometimes measured by the size of the vote in each party's primary.

In addition, consideration of the citizen voting age population is frustrated by the lack of any but sample data from the Census about U.S. citizenship. Citizenship is a question that has been asked only of Census respondents.

314 Id. at 1060.
who received the long form in 2000 and those who will receive the American Community Survey in the 2010 cycle. The Census Bureau does not consider that data to be reliable below the tract level.

Racial Gerrymandering

Introduction

"[R]acial gerrymander—the deliberate and arbitrary distortion of district boundaries ... for [racial] purposes."315 Racial gerrymandering exists where race for its own sake and not other redistricting principles is the legislature’s dominant and controlling rationale in drawing its district lines and the legislature subordinates traditional race-neutral districting principles to racial considerations.

The racial gerrymander is not a new phenomenon. It was first used to circumvent application of the 15th Amendment and perpetuate racial discrimination in the South after the Civil War. As early as the 1870s, minorities in Mississippi were packed into a single district to limit their representation in Congress. In 1960, the boundary of the city of Tuskegee, Ala., was redefined “from a square to an uncouth twenty-eight-sided figure” to exclude only Blacks from the city.316

During the redistricting rounds following the 1990 decennial census, racial gerrymandering made an about-face. It was used to increase minority representation, not limit it. Several states—including Georgia, Louisiana and North Carolina—believed they had an obligation to maximize the number of minority districts, especially after the Voting Rights Section of the Department of Justice refused to preclear initial plans from those states on the ground that alternative proposals had been presented that included additional minority districts. State legislators responded to these rejections by adopting new plans that created additional minority districts. The Justice Department precleared the new plans.

In several states, suits were filed in federal district court challenging the constitutionality of the new redistricting plans on the ground that they violated the Equal Protection Clause of the 14th Amendment. The first of the suits to reach the Supreme Court was Shaw v. Reno,317 challenging the North Carolina congressional plan. Justice O’Connor, in the opening sentence of the Court opinion, wrote: “This case involves two of the most complex and sensitive issues this Court has faced in recent years: 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.”318

The Supreme Court, painfully aware of the history of racial discrimination, had recognized in earlier cases the necessity of considering the effects of a redistricting scheme on a minority group in order to protect the members of the group from plans that would have a discriminatory purpose or have the effect of reducing minority voting strength—protections guaranteed by the 14th Amendment. In order to balance these competing constitutional guarantees, the Court had held that “the Fourteenth Amendment requires state legislation that expressly

316 Shaw I, 509 U.S. at 640 (internal quotation marks omitted).
318 509 U.S. at 633.
distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. This “race-based districting” demands close judicial scrutiny.

The Supreme Court rendered opinions in several cases involving racial gerrymandering challenges to state redistricting efforts in the wake of the 1990 census, including Shaw v. Reno, United States v. Hays, Miller v. Johnson, Bush v. Vera, Shaw v. Hunt (Shaw I), Lawyer v. Dept. of Justice, Hunt v. Cromartie and Easley v. Cromartie. In its opinions in those cases, the court attempted to balance the competing constitutional guarantees that: 1) no state shall purposefully discriminate against any individual on the basis of race; and 2) members of a minority group shall be free from discrimination in the electoral process. In balancing the constitutional guarantees, the Court set forth procedures to follow in evaluating racial gerrymander challenges to redistricting plans.

A plaintiff challenging the constitutionality of a redistricting plan on racial grounds must have standing and must prove that the plan was racially gerrymandered. Once the plaintiff proves that a district was racially gerrymandered, the Court, applying strict scrutiny, must determine whether the state had a compelling governmental interest in creating the majority-minority district and whether the district was narrowly tailored to achieve that interest.

**Standing**

The Supreme Court has addressed the issue of “standing” (an individual’s right to bring an action in court) in racial gerrymandering cases. In United States v. Hays, the Supreme Court spelled out the elements necessary for standing.

It is by now well settled that “the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and

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319 Id. at 643.
320 Id. at 630.
the conduct complained of ... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision ... " In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power ....

...

... Any citizen able to demonstrate that he or she, personally, has been injured by that kind of racial classification has standing to challenge the classification in federal court ....

...

... Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature’s reliance on racial criteria, and therefore has standing to challenge the legislature’s action .... On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.329

An individual will have standing if the individual resides in a racially gerrymandered district or presents evidence that he or she, personally, has been injured by the racial classification.

Proof of Racial Gerrymander

Consideration of race. Although the Supreme Court has held several redistricting plans unconstitutional because of racial gerrymandering, the Court has made it clear that race-conscious redistricting is not always unconstitutional. "This Court never has held that race-conscious state decision making is impermissible in all circumstances."330

The Court has said that, if a minority district were created through a process that adhered to traditional districting principles such as compactness, contiguity, respect for political subdivisions, and maintaining communities of interest, or other race-neutral criteria such as incumbent protection, the plan would not be found to purposefully distinguish between voters on the basis of race and would not be held unconstitutional.331

A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decision making in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible discrimination.332

329 Id. at 742-45 (footnotes, citation and internal quotation marks omitted).


332 509 U.S. at 646.
As the Court said in *Miller v. Johnson*:

The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process .... '[D]iscriminatory purpose' .... implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected or reaffirmed a particular course of action at least in part because of, not merely 'in spite of,' its adverse effects ....” The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can “defeat a claim that a district has been gerrymandered on racial lines.”

**Race the dominant motive.** In *Bush v. Vera*, the Court stated that, “[f]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were ‘subordinated’ to race.”[334] “[R]ace must be ‘the predominant factor motivating the legislature’s [redistricting] decision.’”[335]

Three principal categories of evidence are used to determine whether legitimate districting principles were subordinated to race: 1) district shape and demographics, 2) testimony and correspondence directly stating the legislative motives for drawing the plan, and 3) the nature of the redistricting data used by the legislature.

**Bizarre shape.** The shapes of the minority districts have played an important part in the Supreme Court’s decisions. “[R]eapportionment is one area in which appearances do matter.”[336] A significant part of the evidence the Court relied on to find racial gerrymandering in *Shaw II, Miller* and *Bush* was the irregular shape of the constructed districts, along with demographic data. The Court held that “redistricting legislation that is so bizarre on its face that it is ‘unexplainable on grounds other than race,’ ..., demands the same close scrutiny that we give other state laws that classify citizens by race.”[337] “The plaintiff’s burden is to show, either through circumstantial

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535 Id.


evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.\textsuperscript{338}

\textit{Testimony and correspondence.} The second category of evidence the courts consider is direct evidence of the legislature's motive. Testimony of state officials, legislators and key staff involved in the drafting process played a significant role in the courts' findings in \textit{Shaw II, Bush and Miller}. In addition, testimony received by the legislature in public hearings and alternative plans presented during the redistricting process will be evaluated to determine legislative motive. Last, the courts will consider the state's preclearance submission under Section 5 of the Voting Rights Act and other documents and testimony concerning the submission—including letters to and from the Department of Justice—to determine the state's motives behind the plan.

\textit{Use of racial data.} The third category of evidence considered by the court is the type and detail of data used by the state. The court has recognized the power redistricters have "to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed."\textsuperscript{339} When racial data is available at the most detailed block level, and other data such as party registration, past voting statistics, and other socioeconomic data is only available at the much higher precinct ("Voting Tally District") or tract level, a red flag is raised.

The use of sophisticated technology and detailed information in the drawing of majority minority districts is no more objectionable than it is in the drawing of majority majority districts. But ... the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria ... \textsuperscript{340}

\textit{Consideration of race in order to achieve a partisan objective.} In \textit{Easeley v. Cromartie},\textsuperscript{341} its final decision concerning the 1990s round of congressional redistricting for North Carolina, the Supreme Court expanded on its rule that, where racial and partisan motives intertwine, race must not predominate. The Court said the lower court ruled erroneously that race predominated where the legislature put Black voters into a district to make it more Democratic. Voter registration data by party was available, as was voter registration by race. The Supreme Court said the lower court should have taken into account evidence that Black Democrats were more reliable in voting for Democratic candidates than White Democrats. It could be concluded that the predominant motivation for drawing the district was to make a more reliable Democratic district by increasing its percentage of the more reliable Democratic voters, i.e., the Black ones.\textsuperscript{342}

In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party

\begin{itemize}
\item \textsuperscript{338} 515 U.S. at 916.
\item \textsuperscript{339} \textit{Bush v. Vera}, 517 U.S. 952, 961 (1996).
\item \textsuperscript{340} 517 U.S. at 962-63.
\item \textsuperscript{341} 532 U.S. 234 (2001).
\item \textsuperscript{342} Id.
\end{itemize}
attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance. 343

Strict Scrutiny

Compelling state interest. Once the court determines that traditional districting principles were subordinated to race and that race was the predominant factor used in districting, the court, applying strict scrutiny, must determine whether the state has a compelling interest in creating a majority-minority district using race as a predominant factor.

Just what is a compelling state interest that justifies classifying citizens on the basis of race in districting legislation? A common thread that runs through the racial gerrymandering cases is the assertion that a state has a compelling governmental interest in eradicating the effects of past discrimination and in complying with the requirements of sections 2 and 5 of the Voting Rights Act.

Remediating past discrimination. In order for its interest in remediating past or present discrimination to be a compelling state interest, a state must satisfy two conditions: First, the state "must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." 344 "Second, the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative-action program.'" 345

Complying with Section 2 of the Voting Rights Act. A claimed violation of Section 2 of the Voting Rights Act could provide the compelling governmental interest the state needs to create a race-based district. "To prevail on such a claim, a plaintiff must prove that the minority group is 'sufficiently large and geographically compact to constitute a majority in a single-member district;' that the minority group 'is politically cohesive;' and that 'the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.'" 346

A majority-minority district created to comply with Section 2 of the Voting Rights Act would not necessarily be a racially gerrymandered district. The minority group must be geographically compact in order for Section 2 requirements to apply. If a compact district were drawn with the minority group a majority of the voting age population in the district, the district would not be a racial gerrymander.

Complying with Section 5 of the Voting Rights Act. The third assertion of a compelling state interest is compliance with Section 5 of the Voting Rights Act. The Supreme Court, after lengthy consideration of the role the Department of Justice played in these cases, made it clear that the test for Section 5, as decided in Beer v. United

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343 Id. at 258.
345 Id. at 910.
346 Id. at 914, citing Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).
Racial and Language Minorities

*States,* 347 was nonretrogression, not maximization of minority districts as urged by the Department of Justice. "We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issue.* 348 "There is no indication Congress intended such a far-reaching application of Section 5, so we reject the Justice Department's interpretation of the statute and avoid the constitutional problems that interpretation raises." 349

Narrowly tailored. When a state asserts it has a compelling governmental interest in creating a race-based district, the court will apply "strict scrutiny" to determine whether the plan is narrowly tailored to achieve the compelling governmental interest. A state "must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve [that] compelling interest." 350

When a compelling state interest exists, "the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored." On the other hand, any state action based on race must not go too far. As the Court said in *Shaw I,* "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." 351

Traditional Districting Principles

As the preceding discussion shows, race cannot be the primary consideration in forming districts "without regard for traditional districting principles." 352 "[R]ace for its own sake and not other districting principles [cannot be] the legislature's dominant and controlling rationale in drawing its district lines." 353 The state cannot rely on race "in substantial disregard of customary and traditional districting principles. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind." 354 "[W]e begin with general findings and evidence regarding the redistricting plan's respect for traditional districting principles ..." 355 What "traditional districting principles" are and why they are important are explained in chapter 5.

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349 *Id.* at 927.
352 *Id.* at 642 (1993).
354 *Id.* at 928 (O'Connor, J., concurring).

National Conference of State Legislatures
Section 5 of The Voting Rights Act: Preclearance Requirements

Historical Background

When the Voting Rights Act was adopted in 1965, Section 5 was considered one of the primary enforcement mechanisms to ensure that minority voters would have an opportunity to register to vote and fully participate in the electoral process free of discrimination. The intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to effectively disenfranchise Black voters.

Despite numerous laws passed by Congress between 1957 and 1964 and "despite the earnest efforts of the Department of Justice and of many federal judges, these ... laws [did] little to cure the problem of voting discrimination." As noted by the Court in *South Carolina v. Katzenbach*, election officials and states either defied or evaded court orders, "switched to discriminatory devices not covered by the federal decrees or ... enacted difficult new tests designed to prolong the existing disparity between White and Negro registration."

Before passage of Section 5, the federal government, through the Civil Rights Division of the Department of Justice, undertook the arduous and time-consuming task of filing individual suits against each discriminatory voting law. This approach proved unsuccessful in increasing Black voter registration. Section 5, which gives extraordinary power to the federal government, was the means "designed by Congress to banish the blight of racial discrimination in voting, which had infected the electoral process in parts of our country for nearly a century."

Although Section 5 is a temporary provision of the Voting Rights Act, Congress has extended its coverage each time expiration has been imminent. Most recently, in 2006 Congress extended Section 5 so that it would cover all redistricting cycles through 2031. A that time, Section 5 will automatically expire unless Congress again extends its coverage.


\[358\] Id. at 314.

\[359\] Before passage of Section 5, only 29 percent of Blacks were registered to vote in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia, compared to 75.4 percent of Whites. In Mississippi, only 6.7 percent of Blacks were registered. By 1967, two years after passage of the Voting Rights Act, more than 52 percent of Blacks were registered to vote in these states. Bernard Grofman, Lisa Handley and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York: Cambridge University Press, 1992) 23.

\[360\] *Katzenbach*, 383 U.S. at 308.


\[363\] Id.
Statutory Preclearance Requirements

Section 5 of the Voting Rights Act requires covered jurisdictions to submit changes in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" to either the U.S. Department of Justice or the U.S. District Court for the District of Columbia for preclearance before the change can be implemented.\(^\text{364}\) Section 4(b) of the original act created the first criteria for determining whether a jurisdiction was subject to Section 5. According to that provision, a jurisdiction was "covered," and therefore subject to the preclearance requirements, if:

1. The jurisdiction maintained on Nov. 1, 1964, a test or device as a precondition for registering or voting; and

2. Either (a) less than 50 percent of the voting age population was registered to vote on Nov. 1, 1964, or (b) less than 50 percent of the voting age population voted in the November 1964 presidential election.\(^\text{365}\)

Some states were covered in their entirety. In other states only certain counties were covered.\(^\text{366}\)

In 1970, Congress extended the preclearance requirements for an additional five years.\(^\text{357}\) The 1970 amendments also expanded the coverage test. The new test covered jurisdictions that were covered under the old test plus jurisdictions that:

1. Maintained on Nov. 1, 1968, any test or device, and

2. In which (a) less than 50 percent of the voting age population was registered to vote on Nov. 1, 1968, or (b) less than 50 percent of the voting age population had voted in the November 1968 presidential election.\(^\text{368}\)

In 1975, Congress extended the preclearance requirements for an additional seven years (through the 1980 redistricting cycle).\(^\text{359}\) The 1975 amendments added to the list of prohibited tests and devices the conduct of registration and elections in only the English language if more than 5 percent of the voting age population in the


\(^{365}\) Pub. L. No. 89-110, sec. 4(b), 79 Stat. 437, 438 (1965) (codified as amended at 42 U.S.C. § 1973b(b) (2006)). The original jurisdictions subject to preclearance were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and parts of North Carolina. See infra Table 6.

\(^{366}\) Pub. L. No. 89-110, sec. 5, 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973c (2006)) (providing that Section 5 applies to "a State or political subdivision"). This coverage formula was devised by Congress to target southern states that had a history of racial discrimination in the election process. See Grofman, et al., supra, 16-17.


\(^{369}\) Id. at sec. 4 (42 U.S.C. § 1973b(b)). As a result of the 1970 amendments, three counties in New York City—New York, Kings and the Bronx—and parts of New Hampshire became subject to Section 5. See infra Table 6.


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jurisdiction belonged to a single language minority group (including Alaskan natives, Native Americans, Asian Americans and people of Spanish heritage). The 1975 amendments also required the use of bilingual election materials and assistance if 5 percent of the jurisdiction’s voting age citizens were of a single language minority and the illiteracy rate of that language minority group was greater than the national average. Finally, the coverage test was extended to include jurisdictions that:

1. Maintained on Nov. 1, 1972, any test or device, and
2. In which (a) less than 50 percent of the citizens of voting age were registered to vote on Nov. 1, 1972, or (b) less than 50 percent of the citizens of voting age had voted in the November 1972 presidential election.

The 1982 and 2006 amendments each extended the preclearance requirement for an additional 25 years, but otherwise did not make any substantive changes to the coverage test of Section 5.

In all, 16 states or parts of states now are covered by Section 5 preclearance requirements, as shown in Table 6.

### Table 6. Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended

The Appendix to 28 C.F.R. Part 51 lists the jurisdictions subject to Section 5 preclearance. It provides:

The preclearance requirement of Section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The applicable date is the date that was used to determine coverage and the date after which changes affecting voting are subject to the preclearance requirement. Some jurisdictions, for example, Yuba County, California, are included more than once because they have been determined on more than one occasion to be covered under Section 4(b).

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171 Id. at 89 Stat. 402 (42 U.S.C. § 1973b (f)(4) (2006)).

172 Id. at sec. 202, 89 Stat. 401 (42 U.S.C. § 1973b(b)). As a result of the 1975 amendments, Alaska, Arizona, New Mexico, Texas and parts of California, Florida, Michigan and South Dakota were covered under the act. See infra Table 6.


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The following political subdivisions in States subject to statewide coverage are also covered individually:

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Note:

Three political subdivisions in Virginia (Fairfax City, Frederick County and Shenandoah County) have “bailed out” from coverage pursuant to Section 4 of the Voting Rights Act. The United States consented to the declaratory judgment in each of those cases. Some jurisdictions, for example, Yuba County, California, are
included more than once because they have been determined on more than one occasion to be covered under section 4(b).


**Scope of Coverage**

**Judicial Decisions.** In *Allen v. State Board of Elections*, the U.S. Supreme Court broadly interpreted Section 5 to cover all actions necessary to make a vote effective. The Court said:

> We must reject a narrow construction that appellees would give to § 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race ...

> The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.

The Court reasoned that unless Section 5 were afforded a broad interpretation, elected officials would likely develop new ways to avoid the effect of the legislation. Thus, the Court rejected the argument that Section 5 covers only state enactments that prescribe who can register to vote without covering state rules relating to other aspects of the electoral process, such as the qualification of candidates or state decisions on which offices must be elective.

Until 1992, federal courts interpreted *Allen* to mean that Section 5 covered all “transfers of decisionmaking power that had a potential for discrimination against minority voters.” However, in *Presley v. Etowah County Comm’n*, the Supreme Court narrowed the scope of Section 5 by ruling that Section 5 does not cover transfers of decision making power involving elected officials.

*Presley* involved two consolidated cases from Etowah and Russell counties in Alabama. In both counties the responsibilities of elected officials had changed. Etowah County, under a 1986 consent decree following the filing of a Section 2 suit, agreed to expand the size of its county commission from four to six and eliminate the at-large electoral system in favor of six single-member districts. As a result of the consent decree, the county elected

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374 Id.
375 Id. at 565-68.
376 Id. at 563-71.
378 Id. at 510.
379 Id. at 495-96.
its first African American to the county commission. In 1987, the four holdover commission members, over
the opposition of the two newly elected commissioners, adopted a common fund resolution. The common
fund resolution provided that individual commissioners would no longer individually control the allocation of
funds in their district. Instead, the funds were placed in a common fund and the commission as a whole would
determine how to allocate the funds. The commission failed to submit the common fund resolution for
preclearance.

In Russell County, a county commissioner was indicted in 1979 on charges of corruption in county road
operations. Following the indictment, the Russell County Commission passed a resolution—the "unit
system"—delegating control over road maintenance to the county engineer, an official appointed by the entire
board. In 1985, Russell County increased the size of its county commission and replaced the at-large election
system with elections on a district-by-district basis, resulting in the county's first two African American
commissioners. Although the change in the commission's size and method of election were submitted for
preclearance, the unit system was not.

In Presley, the plaintiffs alleged that the common fund resolution and unit system should have been submitted
for preclearance and asked the Court to enjoin the resolutions until they received preclearance.

The Court, in an opinion by Justice Kennedy, rejected the plaintiffs' argument that the common fund resolution
and unit system were subject to preclearance. Without overruling Allen, the Court held that only changes with
a direct relation to voting and the election process are subject to preclearance. According to the Court:

Covered changes must bear a direct relation to voting itself . . . . The changes in Etowah and
Russell Counties affected only the allocation of power among governmental officials. They had
no impact on the substantive question whether a particular office would be elective or the
procedural question how an election would be conducted. Neither change involves a new

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282 Id. at 496.
283 Id. at 497.
284 502 U.S. at 497.
285 Id.
286 Id. at 497-98.
287 Id. at 498.
288 Id.
289 502 U.S. at 499.
290 Id.
291 Id. at 500.
292 Id. at 510.
“voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting.”

In *Riley v. Kennedy*, the Supreme Court further clarified the scope of Section 5 by specifying what constitutes a change "with respect to voting." Before 1985, the governor of Alabama filled mid-term vacancies for county commissions by appointment. In 1985, however, the state Legislature passed a "local law" providing for special elections for mid-term vacancies in Mobile County. The new election procedure received Section 5 clearance. After the first special election occurred, the Alabama Supreme Court invalidated the 1985 local law as contrary to the Alabama Constitution. In 2005, the next time a mid-term vacancy occurred, the governor attempted to fill the seat by appointment. The plaintiffs challenged the appointment, arguing that the state was again required to gain Section 5 preclearance to return to the practice of gubernatorial appointment of vacant county commission seats.

The U.S. Supreme Court rejected the plaintiffs' argument. The Court noted that a law which is "a 'temporary misapplication of state law' ... is not in 'force or effect,' even if actually implemented by state election officials." Because the Alabama Supreme Court invalidated the special-election procedure after the first special election, the 1985 local law was never in force or effect, and the return to gubernatorial appointments therefore did not constitute a change in election procedures. Because covered states only need submit changes to election procedures for Section 5 preclearance, Alabama was not required to again seek preclearance.

**Administrative Guidance.** The Supreme Court decisions regarding the scope of Section 5 are binding in all judicial and administrative preclearance proceedings. In addition to those judicial decisions, the administrative regulations promulgated by the Department of Justice will likely be followed in administrative preclearance proceedings and are afforded strong persuasive effect in judicial preclearance proceedings. In *Reno v. Bossier Parish*...

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393 *Id.* (quoting 42 U.S.C. § 1973c (2006)).
395 *Id.*, slip op. at 11, 128 S.Ct. at 1982.
396 *Id.*, slip op. at 4, 128 S.Ct. at 1978.
397 *Id.*
398 *Id.*, slip op. at 5, 128 S.Ct. at 1978.
399 No. 07-77, slip op. at 5, 128 S.Ct. at 1978-79.
400 *Id.*, slip op. at 6-7, 128 S.Ct. at 1979.
401 *Id.*, slip op. at 7.
402 *Id.*, slip op. at 15, 128 S.Ct. at 1984 (quoting *Young v. Fordice*, 520 U.S. 273, 282 (1997)).
403 *Id.*, slip op. at 15-16, 128 S.Ct. at 1982.
404 *Id.*, slip op. at 15-19.

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Schenck v. Proctor, 466 U.S. 552, 560 (1984), the Supreme Court said that it would “normally accord the [regulations] great deference.”

The Department of Justice regulations are helpful because they provide specific examples of voting changes that would be subject to the Section 5 preclearance requirements. According to the regulations, changes requiring preclearance include, but are not limited to:

1. Any change in qualifications or eligibility for voting;
2. Any change concerning registration, ballot ing and the counting of votes, and any change concerning publicity for or assistance in registration or voting;
3. Any change with respect to the use of a language other than English in any aspect of the electoral process;
4. Any change in the boundaries of voting precincts or in the location of polling places;
5. Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections);
6. Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system);
7. Any change affecting the eligibility of people to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or to remain holders of elective offices;
8. Any change in the eligibility and qualification procedures for independent candidates.
9. Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices);
10. Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum; and
11. Any change affecting the right or ability of people to participate in political campaigns that is effected by a jurisdiction subject to the requirement of Section 5.

496 Id. In Bassoier Parish I, the Supreme Court actually disregarded an administrative regulation, but only because the regulation was an unreasonable interpretation of the statute. Id. at 483–85.
Substantive Standards for Preclearance

To obtain preclearance, a jurisdiction has the burden of establishing that any voting change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color" or membership in a language minority group.\textsuperscript{408} Thus, the jurisdiction must satisfy two prongs to achieve preclearance: 1) the purpose prong, and 2) the effect prong. When reviewing an administrative request for preclearance, the Department of Justice uses the same standard that would be used by a court in a declaratory judgment action for judicial preclearance.\textsuperscript{409}

Judicial Decisions

Effect Prong. In \textit{Beer v. United States},\textsuperscript{410} the U.S. Supreme Court held that a redistricting plan satisfies the effect prong if the electoral change does not lead to retrogression in minority voting strength.\textsuperscript{411} The Court reasoned that "the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."\textsuperscript{412} Retrogression means "a decrease ... in the absolute number of representatives which a minority group has a fair chance to elect."\textsuperscript{413} Retrogression is measured by comparing minority voting strength under the new plan with minority voting strength under the immediately preceding plan.\textsuperscript{414}

\textit{Beer} concerned the apportionment of city council districts in New Orleans.\textsuperscript{415} When the case was decided, African Americans comprised 45 percent of the population of New Orleans.\textsuperscript{416} Two of the council members were elected at large; the five remaining members were elected from single-member districts that had last been redrawn in 1961.\textsuperscript{417} After the 1961 redistricting, in one district African Americans were a majority of the population but only about half of the registered voters.\textsuperscript{418} In the other four districts, Whites were both a majority of the

\textsuperscript{409} 28 C.F.R. § 51.52 (2008).
\textsuperscript{410} 425 U.S. 130 (1976).
\textsuperscript{411} Id. at 141.
\textsuperscript{412} Id.
\textsuperscript{413} \textit{Ketchum v. Byrne}, 740 F.2d 1398, 1402 n.2 (7th Cir. 1984).
\textsuperscript{414} Id. at 1417.
\textsuperscript{415} 425 U.S. at 133.
\textsuperscript{416} Id. at 134.
\textsuperscript{417} Id. at 134-35.
\textsuperscript{418} Id. at 135.
population and a majority of registered voters.\textsuperscript{419} No district had ever elected an African American.\textsuperscript{420} After the 1971 redistricting, African Americans were a majority of the population and majority of the registered voters in one district.\textsuperscript{421} In a second district, African Americans were a majority of the population but not a majority of registered voters.\textsuperscript{422} In the other three districts, Whites were both a majority of the population and a majority of registered voters.\textsuperscript{423}

Following the Department of Justice’s denial of preclearance, the city filed a declaratory judgment action.\textsuperscript{424} The Court noted that the 1970 council redistricting plan for New Orleans increased the number of African American majority districts from one to two and approved the redistricting plan.\textsuperscript{425} The Court reasoned that:

\[\text{[A] legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly save the “effect” of diluting or abridging the right to vote on account of race within the meaning of Section 5. We conclude, therefore, 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.}\textsuperscript{426}

The retrogression standard was reaffirmed and its application broadened by the Supreme Court in \textit{City of Lockhart v. United States}.\textsuperscript{427} In \textit{Lockhart}, the Court precleared an electoral change that did not improve the position of minority voters. “Although there may have been no improvement in [minority] voting strength, there has been no retrogression either.”\textsuperscript{428} The Court applied the \textit{Beer} rule that when a “new plan [does] not increase the degree of discrimination against blacks, it [is] entitled to § 5 preclearance.”\textsuperscript{429}

Justice Thurgood Marshall, dissenting in \textit{Lockhart}, argued that “[b]y holding that § 5 forbids only electoral changes that increase discrimination, the Court reduces § 5 to a means of maintaining the status quo.”\textsuperscript{430}

\begin{align*}
\textsuperscript{419} & \text{id.} \\
\textsuperscript{420} & 425 U.S. at 135. \\
\textsuperscript{421} & \text{id.} \\
\textsuperscript{422} & \text{id.} \\
\textsuperscript{423} & \text{id.} \\
\textsuperscript{424} & \text{id. at 133-38} \\
\textsuperscript{425} & 425 U.S. at 141-42 \\
\textsuperscript{426} & \text{id. at 141.} \\
\textsuperscript{427} & 460 U.S. 125 (1983). \\
\textsuperscript{428} & \text{id. at 135.} \\
\textsuperscript{429} & \text{id. at 134.} \\
\textsuperscript{430} & \text{id. at 137 (Marshall, J., dissenting).}
\end{align*}
According to Justice Marshall, the Court’s view “is inconsistent with both the language and the purpose” of Section 5 because it would permit “the adoption of a discriminatory election scheme, so long as the scheme is not more discriminatory that its predecessor.”\(^{431}\)

The Supreme Court again affirmed the retrogression standard in 1997 in *Reno v. Bossier Parish School Board (Bossier Parish I).*\(^{432}\) In that case, the Department of Justice argued that a redistricting plan that violates the dilutive effect test of Section 2 necessarily fails the discriminatory effect prong of Section 5 and therefore should always be denied preclearance.\(^{433}\) The Supreme Court disagreed, reasoning that incorporating the Section 2 test into Section 5 would replace the retrogression standard with a dilution standard.\(^{434}\) Citing “more than 20 years of precedent,” the Court reaffirmed the retrogression standard for the effect prong.\(^{435}\)

In the 2000 decade, there was a brief interlude in which it appeared that breaking up majority-minority districts into influence districts would be recognized as a way of satisfying the retrogression standard. The Supreme Court in *Georgia v. Ashcroft*\(^{436}\) suggested that additional influence districts would be more beneficial to minorities than majority-minority districts. Though that case dealt primarily with Section 5 rather than Section 2, Justice O’Connor in her 5-4 majority opinion revealed a leaning toward influence districts:

Thus, a court must examine whether a new plan adds or subtracts “influence districts” where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process. In assessing the comparative weight of these influence districts, it is important to consider “the likelihood that candidates elected without decisive minority support would be willing to take the minority’s interests into account.”\(^{437}\) In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.\(^{437}\)

Congress, in renewing Section 5 in 2006, addressed *Georgia v. Ashcroft* and its attitude toward influence districts by stating that Section 5’s purpose is “to protect the ability of such citizens to elect their preferred candidates of choice.”\(^{438}\)

*Purpose Prong.* Judicial guidance as to what constitutes discriminatory purpose has historically been scarce. In *Reno v. Bossier Parish School Board (Bossier Parish II)*, the Supreme Court ruled that discriminatory purpose only

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\(^{431}\) Id.

\(^{432}\) 520 U.S. 471, 480 (1997).

\(^{433}\) Id.

\(^{434}\) Id.

\(^{435}\) Id.


\(^{437}\) Id. at 482.

encompasses intent to cause retrogression and not discriminatory intent generally. Thus, a voting change "motivated by racial animus" could achieve Section 5 preclearance so long as the change was not intended to decrease minority voting strength.

In 2006, in an amendment known as the "Bossier fix," Congress added two subsections to Section 5 that purport to supersede Bossier Parish II and broaden the definition of discriminatory purpose. The new provision says, "The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose." Theoretically, this definition is more expansive than the Court's interpretation in Bossier Parish II, which limited discriminatory purpose to retrogressive intent. While no court has determined whether the amendment successfully superseded Bossier Parish II, it is likely that a lower showing of discriminatory intent than mere retrogressive intent will now be sufficient to deny preclearance to a jurisdiction.

Administrative Guidance. The Supreme Court decisions regarding the substantive standards for Section 5 preclearance are binding in all judicial and administrative preclearance proceedings. As noted above, the administrative regulations promulgated by the Department of Justice will likely be followed in administrative preclearance proceedings and are afforded strong persuasive effect in judicial preclearance proceedings.

The Department of Justice regulations adopt the retrogression standard:

A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively.

In addition, these regulations are especially helpful because they list several factors that should be considered when determining whether the submitted electoral change satisfies the intent and effect prongs. General factors to be considered include:

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Id., (to be codified at 42 U.S.C. § 1973c(c)).

See Bossier Parish I, 520 U.S. at 483 (1997).

28 C.F.R. § 51.54(a) (2008). Previously, a Department of Justice regulation stated that administrative preclearance would be denied if the submitted change violated Section 2 of the Voting Rights Act. However, the Department of Justice repealed that rule in May 1998 following the Supreme Court’s ruling in Bossier Parish I. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 498 (Jan. 6, 1987) (codified at 28 C.F.R. § 51.55(b)(2)); repealed by Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended; Revision of Procedures, 63 Fed. Reg. 24108, 24109 (May 1, 1998) (codified at 28 C.F.R. § 51.55(b)).

28 C.F.R. §§ 51.57–51.61 (2008). The regulations also make it clear that this list of factors is non-exhaustive.

Id.

1. The extent to which a reasonable and legitimate justification for the change exists;

2. The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;

3. The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;

4. The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change;

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

6. The extent to which minorities have been denied an equal opportunity to influence elections and the decision making of elected officials in the jurisdiction;

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

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

With respect to redistricting plans, the regulations suggest considering these additional factors:

1. The extent to which malapportioned districts deny or abridge the right to vote of minority citizens;

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

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

4. The extent to which minorities are overconcentrated in one or more districts;

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

6. The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and

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

With respect to changes in electoral systems, the regulations suggest considering these additional factors:

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1. The extent to which minority voting strength is reduced by the proposed change;

2. The extent to which minority concentrations are submerged into larger electoral units; and

3. The extent to which available alternative systems satisfying the jurisdiction's legitimate governmental interests were considered.

With respect to annexation plans, the regulations suggest considering these additional factors:

1. The extent to which a jurisdiction's annexations reflect the purpose or have the effect of excluding minorities while including other similarly situated people;

2. The extent to which the annexations reduce a jurisdiction's minority population percentage, either at the time of the submission or, in view of the intended use, for the reasonably foreseeable future; and

3. Whether the electoral system to be used in the jurisdiction fails fairly to reflect minority voting strength as it exists in the post-annexation jurisdiction.

**Procedures for Preclearance**

A jurisdiction can seek either judicial or administrative preclearance of a voting change.\(^{450}\) If, however, the Department of Justice interposes an objection to a submitted electoral change, the jurisdiction still can seek judicial preclearance. Due to the cost and time involved in obtaining judicial preclearance, most jurisdictions seek preclearance from the Department of Justice. To facilitate the process for obtaining preclearance, the Department of Justice now allows online submissions.

**Judicial preclearance.** To obtain preclearance from the U.S. District Court for the District of Columbia, a jurisdiction must file a declaratory judgment action.\(^{451}\) The Department of Justice serves as the opposing party in the declaratory judgment action. Upon filing the action, the jurisdiction has the burden of proving that the proposed electoral change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group.\(^{452}\)

**Administrative preclearance.** Submission. The Department of Justice requests that any "[c]hanges affecting voting should be submitted as soon as possible after they become final."\(^{453}\) The guidelines specify certain required
contents of a submission. \textsuperscript{454} The guidelines also detail certain supplemental material that a jurisdiction should provide.\textsuperscript{455}

Required contents of a submission include:

1. A copy of the proposed and existing law;

2. An explanation of the difference between the prior and proposed situations with respect to voting;

3. The name, title, address and telephone number of the person making the submission;

4. The identification of the person or body responsible for making the change and the mode of decision;

5. A statement identifying the authority under which the jurisdiction undertook the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change;

6. The date of adoption and the date the change is to take effect;

7. A statement that the change has not yet been enforced or administered or an explanation of why the statement cannot be made;

8. A statement of the reasons for the change and the anticipated effect of the change on members of racial or language minority groups;

9. Any past or present litigation involving the change;

10. A statement that the prior practice and the applicable procedure has been precleared, a statement that preclearance was not required, or an explanation of why the statement cannot be made; and

11. Other information that the attorney general determines is required for an evaluation of the purpose or effect of the change.\textsuperscript{456}

For redistricting plans and annexations, the Department of Justice also requires the following information.

1. Demographic information, including the total population, voting age population, any population estimates and number of registered voters in the affected area before and after the change by race and language minority group;

2. Maps showing prior and new boundaries of voting units and precincts; location of racial and language minority groups; natural boundaries or geographic features that influenced the selection of boundaries of the prior or new units; and the location of prior and new polling places and registration sites;

\textsuperscript{454} 28 C.F.R. § 51.27 (2008).

\textsuperscript{455} 28 C.F.R. § 51.28 (2008).

\textsuperscript{456} 28 C.F.R. §51.27 (2008).
3. With respect to annexations, the present and expected future use of the annexed land; an estimate of expected population by race and language group when the anticipated development is completed; and a statement that all prior annexations subject to preclearance have been submitted or a statement that identifies which annexations have not been submitted for preclearance;

4. Previous primary and general election returns, including name and race of each candidate; position sought by each candidate; number of votes received by each candidate by voting precinct; outcome of each contest; and the number of registered voters, by race and language group, for each precinct. Information with respect to elections held within the past 10 years will normally be sufficient;

5. Evidence of public notice and participation, including the opportunity for the public to be heard; the opportunity for interested parties to participate in the decision to adopt the proposed change; and an account of the extent to which the participation, especially by minority group members, in fact took place;

6. Evidence that the submission has been made available to the public and that the public has been informed about the availability of the submission; and

7. Minority group contacts, including name, address, telephone number, and organizational affiliation, if any.\textsuperscript{457}

The Department of Justice encourages interested individuals to comment on submitted plans.\textsuperscript{458} The comments received by the Department of Justice are not required to be publicly released. The Department of Justice will comply with the request of any individual that his or her identity not be disclosed to anyone outside the Department of Justice, to the extent permitted by the Freedom of Information Act.\textsuperscript{459} Note, however, it is the policy of the Department of Justice not to introduce the comments and identity of individuals who request confidentiality as evidence in litigation over the plan, unless the individual waives his or her prior request for confidentiality or the disclosure is required by the court.

\textit{Procedure}. The Department of Justice, through the U.S. Attorney General, has 60 days in which to interpose an objection to a preclearance submission.\textsuperscript{460} The Department of Justice can request additional information within the period of review and following receipt of the additional information, the Department of Justice has an additional 60 days to review the additional information.\textsuperscript{461} A change, either approved or not objected to, can be implemented by the submitting jurisdiction. Without preclearance, proposed changes are not legally enforceable and cannot be implemented.

\textsuperscript{457} 28 C.F.R. § 51.28 (2008).

\textsuperscript{458} 28 C.F.R. § 51.29 (2008). "The communications should be mailed to the Chief, Voting Section, Civil Rights Division, Department of Justice, P.O. Box 66128, Washington, D.C. 20035-6128. The envelope and first page should be marked: Comment under Section 5 of the Voting Rights Act." § 51.29(b).

\textsuperscript{459} 28 C.F.R. § 51.29(d) (2008).

\textsuperscript{460} 28 C.F.R. § 51.9 (2008). However, a jurisdiction can request expedited consideration. 28 C.F.R. § 51.34(a).

\textsuperscript{461} 28 C.F.R. § 51.37 (2008).

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If the Justice Department approves a change, a letter is sent to the submitting jurisdiction informing it of the approval. If the Justice Department objects to the proposed change, the submitting jurisdiction has two methods of recourse. The submitting jurisdiction can seek a declaratory judgment in the U.S. District Court for the District of Columbia, or it can request reconsideration by the Justice Department. Although requests for reconsideration are not subject to the 60-day review period, Justice Department guidelines call for expeditious action.

**Effect of Preclearance on Section 2 Litigation**

Preliminary of an electoral change does not preclude a subsequent Section 2 challenge to the electoral change.\(^{462}\) In a number of cases, an electoral change that had been precleared under Section 5 has been held to violate Section 2.\(^{463}\)

**Application of Section 5 and Section 2 to Court-Ordered Plans**

The Supreme Court has held that redistricting plans prepared and adopted by a federal court that remedy voting rights violations are exempt from Section 5 review.\(^{464}\) On the other hand, in *McDaniel v. Sanchez*, the Court held that a court-ordered remedy that reflects "the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—[is subject to] the preclearance requirement of the Voting Rights Act."\(^{465}\) Court-ordered plans that are exempt from Section 5 review still must meet Section 2 requirements.\(^{466}\)

**Bail Out Provisions**

The Voting Rights Act does provide a mechanism wherein a jurisdiction could escape preclearance. Jurisdictions that want to escape preclearance could use a process set out in Section 4 of the act, commonly referred to as "bail out."\(^{467}\) A jurisdiction can bail out if it can demonstrate that, during the preceding 10-year period, it has

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\(^{462}\) "The Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction’s newly enacted voting ‘qualification, prerequisite, standard, practice or procedure’ may violate that section." *Bossier Parish I*, 520 U.S. at 485.


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complied with the Voting Rights Act and has undertaken efforts to ensure participation by minorities. This provision is rarely used.468

Conclusion

Since the Supreme Court’s decision in Gingles in 1986, the federal courts have examined a number of issues that were left unaddressed or were partially addressed in Gingles.

1. Can Minority Groups Be Aggregated? The first prong of the Supreme Court’s three-part test for determining whether vote dilution has occurred requires proof by the minority group that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Can two different minority groups be aggregated to meet this requirement? Courts have taken different approaches to that question. In League of United Latin American Citizens (LULAC) v. Midland Ind. Sch. Dist., the district court ruled that Hispanic and Black minority populations living within a geographically compact area must be aggregated for the purpose of determining whether the first prong of the test is met.470 The court then examined whether the two groups were politically cohesive under the second prong of Gingles’s three-part test and found that the two groups often voted as a coalition and shared similar political goals—an indication of political cohesiveness.471 In Romero v. City of Pomona, the district court ruled that Hispanics and Blacks could not constitute an effective single-member district because they were not politically cohesive.472 Although Romero used the second prong of the Gingles test to address the first prong, its decision apparently would have been the same had it evaluated the two minority groups in the same manner that they were evaluated in Midland.

2. Total Population or Eligible Voters? Several lower courts also have addressed whether the total minority population or only the eligible voting age minority population should be counted in determining whether the minority group can constitute an effective single-member district. Most have decided that an effective single-member district is measured by the number of eligible voting age minorities.473 The assertion by the lower court in Gingles v. Edmisten that “no aggregation of less than 50 percent of an area’s voting age population can possibly constitute an effective voting majority” was left undisturbed if not adopted by implication by the Supreme Court in Thornburg v. Gingles.474 This issue is of particular importance to Hispanic groups, whose population may include significant numbers of noncitizens who may not be counted if the jurisdiction requires

468 Id.

469 In 1976, New Mexico successfully petitioned the U.S. District Court for the District of Columbia for permission to bail out of preclearance. Several years later, New Mexico faced a Section 2 challenge to its 1982 redistricting. The resulting court order mandated that, for the 10-year period subsequent to the December 1984 order, New Mexico preclear any state legislative redistricting. More recently, Fairfax County, Va., has bailed out.


471 Id. at 606-607.


474 590 F. Supp. at 381 n. 3.
a voting-majority district. The Supreme Court in *Bartlett v. Strickland* \(^{475}\) finally addressed the issue squarely and concluded that a numerical majority of voting age population—more than 50 percent—is the threshold for a district required by Section 2.

3. How Much Weight Should Be Given to Other Factors (Multiple Regression Analysis)? In light of the Supreme Court's emphasis on racial polarization and minority electoral success in proving a vote dilution claim, lower courts have addressed the significance of other factors. Nearly all courts continue to make extensive findings based upon the Senate report factors, with emphasis on the factors of racial polarization, and continue to use the three-part test for minority vote electoral success. \(^{476}\) In particular, questions have arisen about the racial polarization factor and whether it is appropriate when examining racially polarized voting to look at other factors such as age, religion, party affiliation, education, etc., to determine whether “race” was the cause of a particular outcome in an election. Justice Brennan, writing for a plurality of the Court in *Gingles*, rejected the use of multiple regression analysis in determining racial polarization, stating that “the reasons black and white voters vote differently have no relevance to the central inquiry of Section 2.” \(^{477}\) Thus far, lower courts have adhered to the plurality opinion and have rejected defendants’ attempts to use multiple regression analysis to explain why White and minority voters may have voted differently. \(^{478}\)

4. When Are Candidates “Minority Supported?” Another unresolved question about racially polarized voting is the point at which candidates become “minority-supported” candidates for purposes of demonstrating political cohesiveness among minorities and minority bloc voting. The *Gingles* Court stated that political cohesiveness and minority bloc voting occur when a “significant number” of minorities tend to vote for the same candidate. \(^{479}\) Although most cases show evidence that more than 50 percent of Black voters prefer Black candidates in most primary and general elections, in at least one case, a Black candidate has been considered a “minority-supported” candidate with just less than 50 percent of the Black vote and in spite of the fact that two White candidates received a higher percentage of the Black vote. \(^{480}\) This is arguably inconsistent with Justice Brennan’s statement, writing in the plurality opinion, that “it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.” \(^{481}\)

5. How Does Section 2 Relate to Section 5? A final unresolved question is the relationship between Section 2 and Section 5 of the act. Enforcement of the Voting Rights Act has enjoined majority voters and has eliminated many discriminatory electoral and districting schemes. Section 5 applies only to covered

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\(^{475}\) No. 07-689 (U.S. Mar. 9, 2009).

\(^{476}\) See, e.g., *United States v. Marengo County Comm'n*, 731 F.2d 1546 (1st Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984).

\(^{477}\) *Gingles*, 478 U.S. at 63.


\(^{479}\) *Gingles*, 478 U.S. at 56. A minority-supported candidate does not necessarily have to be of the same race or language as the minority voter group, although the minority voter and his preferred candidate will generally be of the same race or language minority.


\(^{481}\) *Gingles*, 478 U.S. at 68.
jurisdictions.482 Section 2, on the other hand—which seeks to prevent a state or political subdivision from diluting voting strength—applies nationwide.

In 1982, when Congress amended Section 2, it reduced the burden of proof necessary for a plaintiff to establish a Section 2 violation. Before the 1982 amendments, a plaintiff had to show that the challenged electoral plan was intentionally designed to dilute the minority vote. The 1982 amendments eliminated the intent requirement and substituted the "results" test. This test enables plaintiffs to prove a Section 2 violation if they can demonstrate that, as a result of the challenged practice or structure, plaintiffs did not have an equal opportunity to participate in the political process and to elect candidates of their choice.483

When a covered jurisdiction attempts to change its electoral laws, it must first seek either preclearance from the Department of Justice or a declaratory judgment from the U.S. District Court for the District of Columbia. In Beer v. United States484 and City of Lockhart v. United States,485 the U.S. Supreme Court held that, as long as a proposed change does not lead to an actual retrogressive effect in minority voting strength, a declaratory judgment under Section 5 will be granted. In Reno v. Bossier Parish School Board (Bossier Parish I),486 the Supreme Court held that, if a plan is not retrogressive, a possible violation of Section 2 of the Voting Rights Act is not a sufficient reason to deny preclearance under Section 5. Three years later, in Reno v. Bossier Parish School Board (Bossier Parish II),487 the Supreme Court held that, under Section 5, a discriminatory purpose encompasses only intent to cause retrogression, not any other discriminatory intent. These interpretations of Section 5 were rejected by Congress in 2006, when it amended Section 5 to say that, "The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose."488 The Supreme Court has not yet confirmed that a violation of Section 2 now requires denial of preclearance under Section 5.

Table 7 lists major cases about racial and language minorities.

482 See Table 6, Covered Jurisdictions, supra p. ?.

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Table 7. Major Cases About Racial and Language Minorities

Major Cases About Section 2 of the Voting Rights Act


The Supreme Court invalidated a district that excluded Black voters, saying it violated the 15th Amendment, which prohibits denial or abridgement of right to vote on basis of race. This case was decided before the Voting Rights Act became law in 1965.

*White v. Regester*, 412 U.S. 755 (1973) (Texas)

The Supreme Court said that, under the Equal Protection Clause of the 14th Amendment, a state was justified in deviating from equal population of districts to remedy the history that the Black and Mexican-American communities had been "effectively excluded from participation in the Democratic primary selection process."


The Supreme Court ruled that to show a violation of the 15th Amendment requires showing not just a discriminatory effect, but also a discriminatory purpose. The Court noted that the 15th Amendment had equivalent language to Section 2 of the Voting Rights Act. The case spurred Congress in 1982 to amend Section 2 of the Voting Rights Act to declare that discriminatory effects would suffice for a Section 2 claim, and that discriminatory intent need not be proven.


The Supreme Court interpreted the new language of Section 2 concerning discriminatory effects. The Court enunciated when Section 2 requires the breakup of multi-member districts into minority single-member districts. It is a determination based on the totality of circumstances that the minority group has unequal access to the political process and to the ability to elect representatives of its choice. But there are three preconditions:

1. That the minority group is sufficiently large and compact that it can be drawn as a majority of a single-member district;
2. That the minority group is politically cohesive; and
3. That the majority usually votes as a bloc so as to defeat the minority’s choices for representative.


The Supreme Court held that the *Gingles* requirements for breakup of a multi-member district apply as well to a Section 2 claim against a single-member district.

The Supreme Court said a state is free to draw majority-minority districts, if doing so does not otherwise violate the law. A minority district does not have to be necessary to remedy Section 2 violations.


The Supreme Court upheld a plan where minority voters had formed effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting age population, even though more minority districts could have been drawn. The Court said Section 2 did not require maximization of minority districts. However, the Court issued caveats about the role of proportional representation: Proportionality is not an affirmative defense to a Section 2 claim, which needs to be pled; and proportionality does not always defeat a claim of vote dilution.

League of United Latin American Citizens (LULAC) v. Perry, No. 05-204, 548 U.S. 399 (2006) (Texas)

The Supreme Court said "influence districts" are not protected by Section 2. It said that, for the Hispanic minority in the case before the court, citizen voting age population was the proper measure for a district under Section 2. The Court also said the compactness precondition of Gingles refers not just to geographical compactness of the district, but also to compactness of the minority group.


The Supreme Court ruled that the compactness precondition of Gingles requires that the minority group must be drawable into a numerical majority—more than 50 percent of voting age population—in the district. Section 2 does not mandate the drawing of "crossover" districts, in which the minority can elect its preferred candidate with the help of some White voters. The Court did not discuss the question of citizenship in the context of an African American minority.

Major Cases About Racial Gerrymandering


The Supreme Court recognized a right to participate in a color-blind electoral process and a new claim of "racial gerrymandering." The Court said it is a legitimate Equal Protection claim to assert that a district is so extremely irregular on its face that it could rationally be viewed only as an effort to segregate races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification.


The Supreme Court said standing equals injury in fact, causal connection, and likely redress by the remedy sought. For a racial gerrymandering claim against a district, those criteria can be met only by a resident in the district.

The Supreme Court said that, even absent a bizarrely shaped district, an allegation that race was the Legislature's dominant and controlling rationale in drawing district lines was sufficient to state a racial gerrymandering claim.


The Supreme Court said the drawing of a district in which race was the predominant motivating factor is subject to strict scrutiny as racial gerrymandering. The district cannot be justified by Section 2 unless there is a strong basis in evidence that the district was reasonably necessary to avoid the result of denial or abridgements of equal right to vote. The district cannot be justified by Section 5 unless it was reasonably necessary to prevent retrogression. Increasing a minority percentage in a district is not justified as prevention of retrogression.


The Supreme Court said a state should be given the opportunity to make its own redistricting decision so long as that is practically possible and the state chooses to take the opportunity.


The Supreme Court upheld a minority district against a racial gerrymandering claim, saying that where racial identification correlates highly with political affiliation, the plaintiff in a racial gerrymandering case must show that the Legislature could have achieved its legitimate political objectives in alternative ways that were comparably consistent with traditional districting principles and yet would have brought about significantly greater racial balance.

Major Cases About Section 5 of the Voting Rights Act


The Supreme Court upheld Section 5 and certain other parts of the Voting Rights Act. It said those provisions were appropriate means for carrying out Congress' constitutional responsibilities under the 15th Amendment and were consonant with all other provisions of the Constitution.

Beer v. United States, 425 U.S. 130 (1976) (La.)

The Supreme Court announced "retrogression" as the standard for Section 5 review.


The Supreme Court said Section 5 covers all actions necessary to make a vote effective.


The Supreme Court said Section 5 does not cover transfers of decision-making power among elected officials.

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Reno v. Bossier Parish (Bossier II), 528 U.S. 320 (2000) (La.)

The Supreme Court said the "intent" language of Section 5 means intent to retrogress, not any intent to discriminate. (Reversed by 2006 amendment to Section 5, which said Section 5 covers any intent to discriminate.)


The Supreme Court said Section 5 protects districts in which minorities have influence, and the retrogression standard can be satisfied by breaking up effective minority districts into influence districts, in considering the plan as a whole. (Reversed in part by 2006 amendment to Section 5, which said Section 5 protects the ability of minorities not merely to influence elections but to elect candidates of their choice.)


The Supreme Court said Section 5 does not cover change from temporary misapplication of state law, saying such a law is not in force or effect.

Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder, No. 08-322, 557 U.S. ___ (2009) (Texas)

Plaintiff utility district challenged the preclearance requirement of Section 5 on the ground that it exceeded Congress's enumerated constitutional powers. The Supreme Court expressed serious doubt that Section 5's current burdens were justified by current needs, but avoided the constitutional issue by permitting the utility district to escape those burdens by "bailing out" of the preclearance requirement.