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REDISTRICTING LITIGATION IN THE NEXT MILLENNIUM

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> Redistricting, like reproduction, combines lofty goals, deep passions about identity and instincts for self-preservation, increasing reliance on technology, and often a need to "pull [and] haul" rather indelicately at the very end. And of course, it often involves somebody getting screwed.[1]

It is certain that the 2000 census will set the stage for an "ongoing passion play" of state and local government redistricting.[2] Indeed, the pendulum has swung. Those on the receiving end of a decade of Justice Department-inspired racial gerrymandering argue that it swings more equitably. Others argue that it swings too far to the right. They complain that the Supreme Court's doctrinal shifts portend an era of uncertainty, unpredictability and destabilization,[3] and that partisan realignment of the Southern States will translate into divided partisan control and inevitable "apportionment deadlock,"[4] requiring judicial rather than legislative resolution. Optimists, on the other hand, say the pendulum is approaching equilibrium only now.

Post-2000 retrogression analysis, moreover, will be a more complex process than ever before. As the U.S. Supreme Court places more and more distance between itself and the unbridled enthusiasm of the proponents of race-based redistricting that seemed to be *de rigeur* following the 1990 census, an unusual process is taking place. The embattled propo-

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1. Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998).

2. *See id.* at 731.

3. *See id.* at 734.

4. *Id.* at 741.

nents of racial classifications in the electoral process may be marching into state courts for refuge under the wings of a rejuvenated federalism and likely deference to state policy choices in the political arena, thus avoiding the federal judiciary and its perceived unsympathetic attitude toward racial politics. Indeed, as Professor Karlan noted in her analysis of the future of voting rights litigation presented at the ABA Annual Meeting in Atlanta this past August, there may soon be a "premium on racing to the state, rather than the federal, courthouse" in light of such Supreme Court guideposts as *Growe v. Emison*[5] and *Lawyer v. Department of Justice*.[6]

Markedly, the U.S. Supreme Court has been unable to end a term of court for the past seven years without at least one significant voting rights case still pending on the docket. For the case currently pending, *Reno v. Bossier Parish School Board*,[7] the Court has requested additional briefing on certain section 5 coverage issues, suggesting a blockbuster opinion when the Court reconvenes in October 1999.[8] This is not to say that the preceding term was all sweetness and light. The 1998 term witnessed a number of significant decisions disposing of racial gerrymandering claims, by ruling on the appropriateness of summary judgment in such cases[9] and by elaborating on the applicability of section 5's preclearance requirement to a covered jurisdiction located within a non-covered state.[10] Moreover, the courts of appeals, primarily of the Fifth and Eleventh Circuits, continue to grapple with such issues as applying proper legal standards for adjudicating racial gerrymandering claims, giving proper legal emphasis to minority electoral success, evaluating the *Gingles* preconditions (particularly the requirement of geographical

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5. 507 U.S. 25 (1993).

6. 521 U.S. 567 (1997).

7. 119 S. Ct. 2390, 2390 (1999) (restoring case to calendar for re-argument).

8. *See id.* The Court directed the parties to file supplemental briefs addressing the following questions:

> (1) Does the purpose prong of § 5 of the Voting Rights Act of 1965 extend to a discriminatory but non-retrogressive purpose? and
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> (2) Assuming *arguendo* that § 5 prohibits the implementation of a districting plan enacted with a discriminatory, non-retrogressive purpose, does the government or the covered jurisdiction bear the burden of proof in this issue?

Id.

9. *See* Hunt v. Cromartie, 119 S. Ct. 1545, 1550, 1552 (1999) (holding that summary judgment is inappropriate in the absence of uncontroverted evidence that a legislature had a radical motive when it drew district lines).

10. *See* Lopez v. Monterey County, 119 S. Ct. 693, 700-05 (1999) (holding that a covered county must seek preclearance under § 5 before implementing a proposal meeting the requirements of a non-covered state).

compactness), and dealing with many of the knotty problems of standing and assessment of civil rights attorney's fees in redistricting litigation involving dueling claims asserted under the Voting Rights Act and the Fourteenth Amendment's Equal Protection Clause.[11]

Recent appellate decisions shed light on the different approach taken by the federal courts when it comes to judicial redistricting as opposed to legislative and other local government redistricting controversies.[12] Some of these more recent cases are serving also as beacons for the litigators, for the plaintiff's side, as well as for the defense. After all, it will be these twenty-first century gladiators who soon will be grappling in the trenches with questions arising from the census undercount, the potential inaccuracy of the official census results, and the evidentiary standards for reconciling the many competing interests at stake in the allocation of political power.

I. RACIAL GERRYMANDERING LITIGATION: THE PARTY AIN'T OVER

In what many thought was the closing chapter in the *Shaw v. Reno*[13] litigation, the U.S. Supreme Court on May 17, 1999, held in *Hunt v. Cromartie*[14] that the district court in North Carolina had erred in granting

11. *See* Theriot v. Parish of Jefferson, 185 F.3d 477 (5th Cir. 1999); Goosby v. Town Bd., 180 F.3d 476 (2d Cir. 1999); Burton v. City of Belle Glade, 178 F.3d 1175 (11th Cir. 1999); Mallory v. Ohio, 173 F.3d 377 (6th Cir. 1999); Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848 (5th Cir. 1999); Solomon v. Liberty County Comm'rs, 166 F.3d 1135 (11th Cir. 1999); Perez v. Pasadena Indep. Sch. Dist., 165 F.3d 368 (5th Cir. 1999); Ruiz v. City of Santa Maria, 160 F.3d 543 (9th Cir. 1998); Brooks v. Miller, 158 F.3d 1230 (11th Cir. 1998); Bradley v. Work, 154 F.3d 704 (7th Cir. 1998); Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998); Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 142 F.3d 468 (D.C. Cir. 1998); Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998), *cert. denied*, 524 U.S. 954 (1998); Askew v. City of Rome, 127 F.3d 1355 (11th Cir. 1997); Hall v. Holder, 117 F.3d 1222 (11th Cir. 1997); Lewis v. Alamance County, 99 F.3d 600 (4th Cir. 1996). *See generally* Benjamin E. Griffith, *Annual Report of the Election Law and Reapportionment Subcommittees—Colorblind Jurisprudence: The Demise of Racial Rorschachism and Separatism*, 30 URB. LAW. 995 (1998).

12. *See* Davis v. Chiles, 139 F.3d 1414, 1420 (11th Cir. 1998); White v. Alabama, 74 F.3d 1058 (11th Cir. 1996); Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281, 1294 (11th Cir. 1995); Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994) (en banc); League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 869-71 (5th Cir. 1993)(en banc) (LULAC). *See generally* Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997); Spencer M. Taylor, *The Settlement of* White v. Alabama*: Judicial Intervention Into Alabama's At-Large Judicial Election Scheme*, 47 ALA. L. REV. 901 (1996); James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443 (1999).

13. 509 U.S. 630 (1993).

14. 119 S. Ct. 1545 (1999).

summary judgment for the plaintiffs, North Carolina residents, who alleged that the North Carolina General Assembly created the 1997 districting plan based on racially-motivated criteria.[15] The district court declared in *Hunt* that the burden was on the plaintiffs to show through direct or circumstantial evidence, or a combination thereof, that the state legislature had in fact "subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[16] Although the plaintiffs in *Hunt* had offered circumstantial evidence in support of their racial gerrymandering claim, the Supreme Court contended that even if evidence did tend to support an inference that the state drew the district lines with an impermissible racial motive, the plaintiffs had not presented any direct evidence of intent, and, according to the Court, "[t]he legislature's motivation is itself a factual question."[17] In the lower court, the state had presented evidence plausibly supporting a political explanation "somewhat better than [] a racial explanation."[18] The Court concluded that summary judgment was not appropriate under the facts.

Significantly, a former federal military judge who is viewed by many as the father of racial gerrymander litigation, Duke Law School Professor Robinson O. Everett, was lead counsel in *Hunt* as well as in *Shaw v. Reno,* and the subsequent remands and appeals that have contributed significantly to the body of case law in this area.[19] In preparation for the trial on remand in *Hunt,* which may take place in the fall of 1999, Professor Everett has advanced a powerful argument that the North Carolina Legislature created the First and Twelfth Congressional Districts, both majority-black, predominantly on the basis of racial motivation, as demonstrated by the circumstantial evidence.[20] As part of this evidence, Professor Everett notes the impossibility of creating "a geographically majority-black district in North Carolina" and notes that the First District's splitting of many cities and counties in order to create a majority black

15. *See id.* at 1548, 1552.

16. *Id.* at 1549.

17. *Id.* at 1550 (citing Shaw v. Hunt, 517 U.S. 899, 905 (1996) and Miller v. Johnson, 515 U.S. 900, 910 (1995)).

18. *Id.* at 1551-52.

19. *See id.* at 1547 (1999); *Hunt,* 517 U.S. at 900 (1996); Shaw v. Reno, 509 U.S. 630, 632 (1993).

20. *See* R. Everett, Racial Gerrymandering: The Last Decade and the Next Millennium, Address at the American Bar Association Presidential Showcase Program 12 (Aug. 9, 1999) (transcript available at the American Bar Association).

district is a strong indication of racial motive.[21] Unfortunately, points out Professor Everett, this splitting was done on the basis of an erroneous assumption that it was possible to create a majority-black, geographically compact district and on the basis of the Department of Justice's demand that the legislature create such a district.[22] Determining racial motivation in the creation of the Twelfth Congressional District, Professor Everett observes, is more difficult because over ninety-five percent of African-American registered voters in North Carolina register and vote as Democrats.[23] According to Everett, the shape and demographics of the Twelfth District will provide the primary evidentiary basis for proving that it is an illegal racial gerrymander, but the plaintiffs will offer additional evidence of a race-based motive as well.[24]

Professor Everett makes a strong case for the resolution of a number of related legal issues once *Hunt* is tried. One issue is whether *Shaw v. Reno* is limited to majority-minority districts.[25] There is no reason in equal protection case law, says Professor Everett, for such a limitation.[26] Another issue that the Supreme Court did not address in *Hunt* is whether a legislature is required, when crafting remedial districts, to replace racially gerrymandered districts, so that all "vestiges" of the racial gerrymander are eliminated.[27] A final issue that may be resolved at the trial of *Hunt* is whether the plaintiffs bear an inappropriately high evidentiary burden when they are required to prove that race was the state legislature's "'predominant motive'";[28] such a burden may be more than what is required by equal protection case law such as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*.[29]

The Supreme Court's decision in *Hunt* should have a significant impact on another case now pending before the United States Court of Appeals for the Fifth Circuit, *Chen v. City of Houston*.[30] One of the primary issues presented in *Chen* is determining the proper standard to be applied to a party who has the burden of proof in a summary judgment proceeding.[31] *Hunt* made it clear that it is usually inappropriate to resolve a ra-

21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.* at 13.
26. *See id.*
27. *See id.*
28. *Id.* at 13-14.
29. 429 U.S. 252 (1977); *see* Everett, *supra* note 20, at 14.
30. 9 F. Supp. 2d 745 (S.D. Tex. 1998), *appeal docketed*, No. 98-20440 (5th Cir. 1998).
31. *See id.* at 748, 754-63.

cial gerrymandering case on summary judgment, due mainly to the intensely factual nature of any inquiry into legislative motivation,[32] so the district court's grant of summary judgment for the defendant in *Chen*[33] may now be hanging in the balance—a balance that decidedly does not favor summary judgment in this type of litigation. As Douglas E. Markham, lead counsel for the *Chen* appellants, has pointed out, if the appellate court upholds the summary judgment motion granted by the *Chen* district it may encourage local government bodies to continue the course of creating undersized minority districts, gathering non-citizens unequally in districts, and continuing "to obscure racial motivations with well-presented, sanitized legislative histories and testimony," as was accomplished at the trial level by the City of Houston.[34]

A. Lopez (II) v. Monterey County

On January 20, 1999, the United States Supreme Court addressed for the second time Monterey County's unprecleared electoral system for electing county judges.[35] This is the kind of case that makes one want to ask "can I trade this job for what's behind door no. 2?"

Section 5 of the Voting Rights Act of 1965[36] imposes substantial "federalism costs" on covered states and political subdivisions by requiring them to preclear any change in voting qualifications, any change in the prerequistite to voting, and any change in the standard, practice, or procedure of voting that they seek to administer.[37] This preclearance, when required, entails a certain amount of federal intrusion into state and local policymaking; the Fifteenth Amendment permits such an intrusion into state sovereignty.[38] In order to obtain preclearance, a covered jurisdiction may choose the administrative route through a formal submission to the Attorney General of the United States, or it may choose the judicial route through a declaratory judgment action, provided the action is brought in the United States District Court for the District of Columbia.[39]

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32. *See* Hunt v. Cromartie, 119 S. Ct. 1545, 1550, 1552 (1999).

33. *See Chen*, 9 F. Supp. 2d at 763.

34. Douglas E. Markham, Local Government Redistricting After *Chen v. City of Houston*, Address Before the American Bar Association Presidential Showcase Program 19 (August 9, 1999).

35. *See* Lopez v. Monterey County, 119 S. Ct. 693, 696 (1999).

36. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973c (1994)).

37. *See* 42 U.S.C. § 1973c; *Lopez*, 119 S. Ct. at 703 (citing Miller v. Johnson, 515 U.S. 900, 926 (1995)).

38. *See Lopez*, 119 S. Ct. at 703.

39. *See* 42 U.S.C. § 1973c; *Lopez*, 119 S. Ct. at 697.

The extent of these "federalism costs" was recently highlighted in *Lopez* on its second visit (*Lopez II*) to the United States Supreme Court.[40] The *Lopez* litigation arose in a state, California, that has "not been designated as [a] historical wrongdoer[] in the voting rights sphere;" that is, California is not a covered state.[41] Although California is not a "covered" jurisdiction under section 5, it is a partially covered one, and Monterey, California, is covered.[42] As noted above, under section 5, a covered jurisdiction must seek preclearance, and the United States District Court for the District of Columbia may preclear a proposed voting change only if it can conclude that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race" or any other impermissible classification.[43]

In *Lopez I*,[44] the U.S. Supreme Court held that if California enacts legislation effecting changes in the method for electing county judges, Monterey County is required to seek section 5 preclearance before it can give effect to those changes.[45] This is true even though the county arguably is just implementing a state law without exercising any independent discretion. Previously, Monterey County had adopted and implemented six judicial consolidation ordinances without seeking section 5 preclearance.

Following remand and a second appeal,[46] the issue before the U.S. Supreme Court in *Lopez II* was whether Monterey County was required to pursue section 5 preclearance for state-sponsored and legislatively authorized voting changes that the county sought to administer.[47] The Court held that a covered political subdivision, when seeking to administer a voting change, is required to obtain section 5 preclearance for that change (1) even where it exercises no independent discretion in giving effect to a state-mandated voting change, and (2) even when the voting change it implements is required by the superior law of a non-covered state.[48]

In holding that section 5's preclearance requirement applies to a covered jurisdiction even if the jurisdiction does not exercise discretion or a

40. *See Lopez*, 119 S. Ct. at 696-701.
41. *Lopez*, 119 S. Ct. at 703.
42. *See id.* at 697, 699-700.
43. 42 U.S.C. § 1973c; *Lopez*, 119 S. Ct. at 697.
44. Lopez v. Monterey County, 519 U.S. 9 (1996).
45. *See id.* at 14-15, 19-20, 22, 25.
46. *See Lopez*, 119 S. Ct. at 696.
47. *See id.* at 701.
48. *See id.* at 696-701.

policy choice, the Court emphasized that Congress used the trigger phrase "'seek to administer'" in the Voting Rights Act to prevent limiting the preclearance requirement to discretionary actions of a covered jurisdiction.[49] On the contrary, according to the Court, section 5 reaches nondiscretionary actions by covered jurisdictions seeking to comply with a state's superior law.[50] The Court stressed that when a partially covered state enacts legislation that affects covered local government entities such as cities or counties, section 5 preclearance is required.[51] The majority pointed out that others agree with this interpretation, noting that the Justice Department received over 1300 submissions for preclearance from the seven partially covered states, who had assumed evidently that section 5 preclearance was required whenever a non-covered state effects voting changes in covered counties.[52] In numerous instances, as the Court acknowledges, section 5 cases are decided based on the assumption that laws enacted by a partially-covered state must be precleared before they can take effect in covered political subdivisions.[53] Finally, the Supreme Court deferred to the Attorney General's interpretation of section 5, which was in accord with the Court's interpretation, and found that section 5's preclearance requirement "applies to a covered county's nondiscretionary efforts to implement a voting change required by state law," even though the state itself is not a covered jurisdiction.[54]

Two years before *Lopez II*, the Supreme Court decided *City of Monroe v. United States*,[55] holding that "preclearance of a voting change included in a statewide law empowered a municipality to implement that change,"[56] even though the municipality had failed to preclear a change in its municipal charter to the same effect.[57] In *Lopez II*, California unsuccessfully argued that because *City of Monroe* permitted a municipality to give effect to a statewide law without being required to preclear the voting change at the municipal level, section 5's preclearance requirements could not be triggered unless the covered jurisdiction exercised

49. *See id.* at 701.

50. *See id.*

51. *See id.* at 701-02.

52. *See id.* at 702.

53. *See id.* (citing Johnson v. DeGrandy, 512 U.S. 997, 1001 n.2 (1994); Shaw v. Reno, 509 U.S. 630, 634 (1993); United States v. Onslow County, 683 F. Supp. 1021, 1024 (E.D.N.C. 1988)).

54. *Id.*

55. 522 U.S. 34 (1997).

56. *Lopez*, 119 S. Ct. at 704.

57. *See City of Monroe*, 522 U.S. at 37.

some discretion or policy choice.[58] The Supreme Court rejected this argument, noting that in *City of Monroe* the Attorney General had already precleared and approved the voting change as embodied in the statewide law.[59] Comparing *Lopez II* and *City of Monroe*, the voting change that the City of Monroe sought to enforce had already been precleared, in contrast to Monterey County's attempt to engage in the discretionless implementation of state law without first seeking section 5 preclearance.

In conclusion, the *Lopez II* Court leaves us with the rule that a non-covered county is required to seek section 5 preclearance before it can give effect to voting changes required by state law, even though the state itself is not a covered jurisdiction under section 5.[60]

B. Reno v. Bossier Parish (II) School Board

The United States Supreme Court explored in depth the relationship between sections 2 and 5 of the Voting Rights Act in *Reno v. Bossier Parish (I) School Board,*[61] which held that section 5 preclearance of a covered jurisdiction's voting standard, practice, or procedure may not be denied solely on the basis that it violates section 2 of the Voting Rights Act.[62] The *Bossier Parish I* Court rejected the Attorney General's position that section 2 is effectively incorporated into section 5, but concluded nonetheless, that section 2 evidence of a redistricting plan's dilutive impact may be relevant even though it is not dispositive of a section 5 inquiry.[63] Regarding relevant evidence in conducting an inquiry into a covered jurisdiction's motivation in enacting voting changes and in considering such evidence, the majority stressed that the analytical framework of *Arlington Heights* should be looked to for guidance.[64]

The opening line of Justice O'Connor's majority opinion in *Bossier Parish (I)* promised much: "Today we clarify the relationship between § 2 and § 5 of the Voting Rights Act of 1965 . . . ."[65] The Court rejected the Justice Department's position that section 2 violations may form the basis for denying section 5 preclearance, a position which, in the words of the Court, "would inevitably make compliance with § 5 contingent upon

58. *See Lopez*, 119 S. Ct. at 704.
59. *See id.*
60. *See id.* at 705.
61. 520 U.S. 471 (1997).
62. *See id.* at 485.
63. *See id.* at 483-85.
64. *See id.* at 487 (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1997)).
65. *Id.* at 474.

compliance with § 2."[66] The Court further held that "§ 2 evidence" may be relevant to prove that a covered jurisdiction had retrogressive intent and to prove that it enacted a redistricting plan or other electoral change with a discriminatory purpose:

> The fact that a plan has a dilutive impact . . . makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance . . . is a liberal one" and one we think is met here.[67]

Bossier Parish has come back for another visit to the high court. The Supreme Court has recently noted probable jurisdiction in two cases of great interest to state and local governments, *Reno v. Bossier Parish (II) School Board*[68] and *Price v. Bossier Parish School Board.*[69] These two cases were consolidated because they presented the same issue:[70] whether the Department of Justice should have approved the Bossier Parish, Louisiana, School Board's redistricting plan.

At the start of this litigation before the district court in 1995, the Department of Justice (DOJ or Justice Department) objected to the plan under section 5 of the Voting Rights Act of 1965 on the grounds that the School Board failed to meet its burden of proving that it enacted the redistricting plan without a racially discriminatory purpose.[71] DOJ asserted that the School Board failed to provide adequate explanations for the absence of black majority school board districts in the plan.[72] DOJ also relied on hearsay evidence that gave the impression that School Board members did not favor creation of such districts.[73] Finally, the Justice Department asserted that the School Board's plan would clearly violate section 2 of the Voting Rights Act and therefore, under Justice Depart-

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66. *Id.* at 477.

67. *Id.* at 486-87 (citation omitted).

68. 119 S. Ct. 899 (1999) (noting probable jurisdiction).

69. *Id.*

70. *See id.*

71. *See* Bossier Parish Sch. Bd. v. Reno, 907 F. Supp. 434, 440, 445-46 (D.D.C. 1995).

72. *See id.* at 449. The court explained:

> Defendant here, as it did in *Miller*, pursues a theory the result of which is that no political subdivision presented with a plan that provides for *x* number of majority-black districts can ever adequately explain its reasons for adopting a plan that provides for *x* minus *n* majority-black districts. The *Miller* court rejected this theory of section 5, and we will not resuscitate it here.

Id. at 450.

73. *See id.* at 448.

ment regulations, would violate section 5 as well.[74]

A three-judge court in the District of Columbia held that DOJ should have approved the plan.[75] The court reasoned that the Department had no authority under section 5 to object to redistricting plans that the Department believed violated section 2.[76] In addition, the Court declared that evidence that a plan violates section 2 is not admissible in a proceeding under section 5 to prove the existence of a discriminatory purpose.[77]

On appeal, the United States Supreme Court in *Bossier Parish I* vacated and remanded, agreeing with the district court that DOJ could not object to plans under section 5 merely because it believed they violated section 2, but disagreeing with the district court that section 2 evidence cannot be offered to prove discriminatory purpose under section 5.[78]

On remand, a three-judge court again ruled in favor of the School Board.[79] The court determined that section 5's prohibition on plans enacted with a discriminatory purpose basically proscribed only those plans adopted with a "retrogressive" intent, i.e., an intent to decrease the political power of protected minority groups, and, using the *Arlington Heights* factors, found no evidence of retrogression.[80] The Department of Justice and minority intervenors filed separate appeals to the Supreme Court and, as noted above, the Supreme Court has noted probable jurisdiction and has consolidated the two appeals.

Bossier Parish II presents a question of great significance for state and local governments subject to section 5 of the Voting Rights Act. If the Supreme Court affirms the district court and finds that section 5's purpose requirement applies only to plans adopted with a retrogressive intent, the state and local governments will have a much easier time complying with section 5 than they have had previously. If, on the other hand, the Supreme Court reverses and adopts the Department's position, state and local governments will continue to be subject to pressure from the Department to create additional minority districts.

On June 24, 1999, the Supreme Court restored *Bossier Parish II* to the calendar for re-argument, and requested the parties to file supplemental

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74. *See id.* at 441, 444.

75. *See id.* at 450.

76. *See id.* at 444.

77. *See id.* at 445 ("[S]ection 2 and its standards have no place in a section 5 preclearance action.").

78. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 483, 486 (1997).

79. *See* Bossier Parish Sch. Bd. v. Reno, 7 F. Supp. 2d 29, 30 (D.D.C. 1998).

80. *See id.* at 31-32.

briefs addressing whether the purpose prong of section 5 covers a discriminatory but non-retrogressive purpose, and if so, who bears the burden of proof.[81]

C. Ambivalent? Well, Yes and No

The hobby of predicting the Supreme Court's opinions, particularly in the face of multiple trips to the high court and post-argument requests for additional briefing, is right up there with high-wire acts *sans* safety net and other somewhat hazardous occupations. Bear in mind that the Supreme Court has "consistently interpreted" section 5's discriminatory purpose language in light of the evident statutory intent to prevent retrogressive electoral changes.[82] But, eventually this interpretation may be extended; the Justice Department argued in the initial brief that section 5 is not limited to changes in voting laws with a retrogressive purpose or effect, but that it also prohibits changes that have the purpose of diluting minority voting strength,[83] and the Supreme Court in *Bossier Parish I* "[left] open for another day the question whether the [section] 5 purpose inquiry ever extends beyond the search for retrogressive intent."[84] We will have to wait and see whether the Supreme Court is planning to extend the reach of section 5 to districting plans devoid of evidence of retrogression, but enacted with a discriminatory purpose.

In *Beer v. United States*,[85] which explores the standard of non-retrogression, the Justice Department was empowered to deny preclearance if a redistricting plan would lead to retrogression in the position of racial minorities, or to put it another way, if a redistricting plan was likely to cause fewer minority representatives to be elected than before. While *Beer* made it clear that the test for section 5 was non-retrogression, not maximization of minority districts, the Justice Department had urged in *Shaw v. Hunt*[86] that maximization of minority districts was also part of the test,[87] which is consistent with its position in *Bossier Parish I* and *II*. *Beer* set forth the non-retrogression standard in the following words:

> [A] legislative reapportionment that enhances the position of

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81. *See* Reno v. Bossier Parish Sch. Bd., 119 S. Ct. 2390, 2390 (1999); Price v. Bossier Parish Sch. Bd., 119 S. Ct. 2390, 2390 (1999).

82. *Bossier Parish*, 520 U.S. at 486-87.

83. *See* Brief for Appellant, Reno v. Bossier Parish Sch. Bd., Nos. 98-405 and 98-406, 1999 WL 133834, at *15, *16 (Mar. 5, 1999).

84. *Bossier Parish*, 520 U.S. at 486.

85. 425 U.S. 130 (1976).

86. 517 U.S. 899 (1996).

87. *See* 517 U.S. at 913.

> racial minorities with respect to their effective exercise of the electoral franchise can hardly have the "effect" of diluting or abridging the right to vote on account of race within the meaning of [section] 5. We conclude, 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.[88]

Thus, an electoral change that enhances minority voting is not retrogressive. *City of Lockhart v. United States*[89] further broadened the application of the retrogression standard. In *City of Lockhart*, the Supreme Court upheld preclearance of an electoral change that did not *improve*, but also did not diminish, the position of minority voters. The Court reasoned that "[a]lthough there may have been no improvement in [minority] voting strength, there has been no retrogression either,"[90] and because the new electoral change did not "increase the degree of discrimination against blacks,"[91] it is entitled to preclearance under section 5 of the Voting Rights Act.

It was on this point that Justice Thurgood Marshall dissented in *City of Lockhart*, chastising the majority for reducing "[section] 5 to a means of maintaining the status quo," insofar as it held that section 5 "forbids only electoral changes that *increase* discrimination."[92] Justice Marshall's criticism of the majority was that such a view of the retrogression standard would permit a jurisdiction to adopt "a discriminatory election scheme, so long as the scheme is not more discriminatory than its predecessor," a view and approach that Justice Marshall condemned as "inconsistent with both the language and purpose" of section 5.[93]

One may surmise that the Supreme Court is now struggling with an issue previously addressed, at least indirectly, by the United States District Court for the District of Columbia in *Busbee v. Smith*.[94] The district court held in *Busbee* that an electoral plan that is not retrogressive may nonetheless be denied section 5 preclearance if the submitting jurisdiction cannot prove an absence of discriminatory purpose.[95] The Supreme Court affirmed without opinion.[96] Given the lack of any clear delineation

88. *Beer*, 425 U.S. at 141.
89. 460 U.S. 125 (1983).
90. *Id.* at 135.
91. *Id.* at 134.
92. *Id.* at 137 (Marshall, J., dissenting in part).
93. *Id.*
94. 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).
95. *See id.* at 518.
96. *See* Busbee v. Smith, 459 U.S. 1166 (1983) (mem.).

of the precise factors necessary for the Justice Department to find such a discriminatory purpose, it may be that the Supreme Court's opinion in *Bossier Parish II* will provide just such clarification.

II. THE ROLE AND EVIDENTIARY IMPACT OF MINORITY ELECTORAL SUCCESS

On February 3, 1999, the Eleventh Circuit decided *Solomon v. Liberty County Commissioners*.[97] In that case, the district court upheld Liberty County's at-large system in the face of a section 2 vote dilution challenge, relying on the electoral success of a sole black county commissioner to support its finding of no vote dilution.[98] The Eleventh Circuit reversed and remanded, holding that such reliance on a single instance of minority electoral success was clearly erroneous.[99] First, explained the Court, the burden is upon the county, not the section 2 plaintiffs, to prove that the black commissioner's single instance of electoral success had probative value; second, given this burden on the county defendants to prove that the black candidate was "in fact, the black candidate of choice," by proffering only the election results the county defendants failed to meet that burden as a matter of law.[100] In speaking for the divided panel, Circuit Judge Hatchett reasoned:

> Unquestionably, mere proof of Jennings's race could not support a finding that he was the choice of black voters. Importantly, appellees did not proffer any statistical analysis at the second trial. Nor could appellees rely on pre-*en banc* statistical evidence concerning Jennings to show that he was the black candidate of choice. Even the original appellate panel considered that evidence to be of little value.[101]

After giving minimal weight to evidence of black electoral success in *Solomon*, the Eleventh Circuit buttressed its rejection of this evidence by citing precedent from the dawning years of what would come to be steadily increasing and substantial minority participation and access. For example, the court cited *NAACP v. Gadsden County School Board*,[102] a 1982 case in which a single black candidate was elected in an at-large school board election after the plaintiffs had filed their voting rights lawsuit; the Eleventh Circuit chastised the district court in the case for at-

97. 166 F.3d 1135 (11th Cir. 1999).
98. *See id.* at 1138.
99. *See id.* at 1146.
100. *Id.* at 1145.
101. *Id.* (citations omitted).
102. 691 F.2d 978 (11th Cir. 1982).

taching "inordinate significance" to this electoral evidence.[103] The Eleventh Circuit also cited and relied upon *United States v. Marengo County Commission*,[104] in which the court had, over fifteen years earlier, discounted the probative value of a black candidate's election and reelection to a county office in an at-large system.[105] The divided Eleventh Circuit relied additionally upon *McMillan v. Escambia County, Florida*,[106] to suggest that the court could appropriately disregard or "not even consider the at-large election of one black county commissioner during the pendency of litigation."[107]

The Eleventh Circuit's biggest surprise, however, was buried in footnote seven of *Solomon*.[108] The court in *Solomon* struggled to distinguish this evidentiary blockade of minority electoral success from its decision less than two years before in *Askew v. City of Rome*,[109] a *per curiam* decision in which the voters in Rome, Georgia elected a black candidate prior to litigation and the court required the section 2 plaintiffs to bear the burden of discounting minority electoral success.[110] In *Solomon*, Judge Hatchett examines this unique approach to evidentiary consistency in voting rights litigation, but his disregard of the holding and clear analysis in *City of Rome* is not persuasive. Indeed, when Judge Hatchett noted in footnote seven of the *Solomon* decision that "[a]t first blush, this case may appear to contradict *Askew v. City of Rome*,"[111] he could have stopped right there because of the difficulty in reconciling the two cases.

III. THE SEARCH FOR A GEOGRAPHICALLY COMPACT MAJORITY

A pair of cases recently decided by the Fifth Circuit focus on the geographical compactness prong of the test enunciated by *Thornberg v. Gingles*.[112] The first of these cases is *Perez v. Pasadena Independent School District*,[113] in which the Fifth Circuit holds that Hispanic citizens chal-

103. *See Solomon*, 166 F.3d at 1146.

104. 731 F.2d 1546 (11th Cir. 1984), *cert. denied*, 469 U.S. 976 (1984).

105. *See id.* at 1574-75.

106. 748 F.2d 1037 (5th Cir. 1984).

107. *Solomon*, 166 F.3d at 1146 (citing *McMillan*, 748 F.2d at 1045 n.20).

108. *See id.* at 1146 n.7.

109. 127 F.3d 1355 (11th Cir. 1997).

110. *Accord City of Rome*, 127 F.3d at 1374, 1380-1384; *see Solomon*, 166 F.3d at 1146 n.7.

111. *Solomon*, 166 F.3d at 1146 n.7.

112. 478 U.S. 30, 50-51 (1986) (detailing the test's criteria).

113. 165 F.3d 368 (5th Cir. 1999), *petition for cert. filed*, 67 U.S.L.W. 3684 (Apr. 29, 1999) (No. 98-17).

lenging the at-large voting system for electing school board members failed to prove the geographic compactness precondition set forth in *Gingles*.[114] Rejected at the trial court level, plaintiffs contended on appeal that the district judge had erroneously established a "bright line" rule, requiring the Hispanic residents to demonstrate that a majority of the citizen voting-age population in a proposed single member district was Hispanic.[115] At trial, the plaintiffs attempted to satisfy the *Gingles* test by arguing that the majority of the citizen voting-age population in the proposed district was Hispanic. The plaintiffs also pointed to the growing Hispanic population with a demographic composition similar to that of districts in which Hispanic candidates had been elected.[116] On appeal, the plaintiffs argued that the district court erred in finding that the majority of the citizen voting-age population in those proposed districts was not Hispanic, particularly in view of the evidence of future growth.[117]

The Fifth Circuit rejected this contention, noting that the trial court had correctly required the section 2 plaintiffs to demonstrate that Hispanics would represent a majority of voting-age citizens in a proposed district. According to its own formula, the lower court held that the plaintiffs did not satisfy this requirement by showing that the proposed districts contained an Hispanic voting-age population exceeding fifty percent.[118] The Fifth Circuit panel pointed out the plain language of section 2 and unequivocally required consideration of the citizen voting-age population of the group in "determining whether a minority group is sufficiently large and geographically compact to constitute a majority."[119]

Moreover, even if the plaintiffs had been able to show that Hispanics had the ability to elect candidates of their choice, they could not have satisfied the geographic compactness requirement set forth in *Gingles* if they comprised less than a majority of voting-age citizens in a proposed district. Faced with the plaintiffs' claim that Hispanics represented a growing percentage of the total population and that Hispanic candidates had succeeded in similar districts, the Fifth Circuit nonetheless concluded that "evidence that the group may succeed in electing preferred candi-

114. *See id.* at 370-71 (defining geographical compactness as the point when the minority group was sufficiently large and geographically compact to constitute a majority in a single-member district).

115. *See id.* at 372.

116. *See id.* at 373.

117. *See id.* (noting that only 60% of the Hispanic resident population in the school district are citizens, forcing the court to determine the proper percentage of Hispanics needed to constitute a majority).

118. *See id.* at 371-72.

119. *Id.* at 372.

dates cannot remedy its failure to meet the *Gingles* threshold."[120] In affirming the district court's judgment for defendants on the section 2 claim, the Fifth Circuit held that the district court properly weighed the evidence and adopted the 1990 census data as the most reliable. The Fifth Circuit also found that the plaintiffs' projections of growth of the Hispanic population were unreliable and that "the percentage of Hispanics voting in the [school district] and in elections in similar districts had remained essentially unchanged since 1990 [with the growth rate of] Hispanic voter registration [increasing] at a slower rate than the plaintiffs' Hispanic citizen growth projections."[121]

In the second case, *Valdespino v. Alamo Heights Independent School District*,[122] the Fifth Circuit again affirmed a district court's ruling. Minority voters failed to prove that their minority group exceeded fifty percent of the relevant population in the proposed district to meet the *Gingles* threshold requirement of geographical compactness.[123] In *Valdespino*, the proposed "demonstration district" did in fact "comprise a majority of Hispanic voting age citizens according to 1990 census data."[124] The school district responded that demographic changes between the 1990 census and the 1997 trial had eliminated that majority. As a result, the plaintiffs tripped over the "bright line" test of fifty percent Hispanic voting age citizens in their demonstration district, and failed to establish the *Gingles* threshold requirements for a section 2 violation.[125]

The Fifth Circuit panel held that a section 2 plaintiff's failure to establish any one of the *Gingles* threshold requirements was fatal,[126] and that unless all three factors were established, "there neither has been a wrong nor can be a remedy."[127] Harkening back to the *Gingles* requirement that plaintiffs demonstrate a "majority,"[128] the Fifth Circuit held the plaintiffs to the strict requirement that they carried the burden of showing that Hispanic citizens exceded fifty percent of the relevant population in their

120. *Id.* at 373.

121. *Id.*

122. 168 F.3d 848 (5th Cir. 1999), *petition for cert. filed*, 67 U.S.L.W. 3779 (Jun. 9, 1999) (No 98-1987).

123. *See id.* at 850.

124. *Id.*

125. *See id.* at 852 (quoting Campos v. City of Houston, 113 F.3d 544, 547 (5th Cir. 1997)); *see also* Growe v. Emison, 507 U.S. 25, 40-41 (1993); Rangel v. Morales, 8 F.3d 242, 249 (5th Cir. 1993); Overton v. City of Austin, 871 F.2d 529, 538 (5th Cir. 1989).

126. *See Valdespino*, 168 F.3d at 852.

127. *Id.* (quoting *Growe*, 507 U.S. at 40-41).

128. Thornburg v. Gingles, 478 U.S. 30, 50 (1996).

proposed "demonstration district."[129]

Turning to the school board's evidence countering the plaintiffs' census data, the Fifth Circuit upheld the district court's exclusion of the plaintiffs' proposed rebuttal evidence, finding that the parties were essentially in agreement about the standard to use in overcoming census data.[130] To evaluate whether the district court properly found that the school board's 1997 population data had overcome the 1990 census figures, the Fifth Circuit cited *Kirkpatrick v. Preisler*,[131] where the Supreme Court upheld a state's consideration of post-census population shifts in redistricting, provided its findings were "thoroughly documented and applied throughout the state in a systematic, not an *ad hoc*, manner."[132] The Fifth Circuit also noted that in *Karcher v. Daggett*,[133] the Supreme Court had said that "in reapportionment, a state cannot 'correct' census figures 'in a haphazard, inconsistent, or conjectural manner.'"[134]

The Fifth Circuit also discussed two of its earlier decisions. *Westwego Citizens for Better Government v. City of Westwego*[135] "opened the door to the use of non-census data when census data are not sufficiently probative of the voting-age proportion of a population."[136] Also, less than two weeks before *Valdespino*, in *Perez v. Pasadena Independent School District*,[137] the Fifth Circuit affirmed the district court's decision that the plaintiffs' population projection was too unreliable to overcome 1990 census data.[138]

Based on these Fifth Circuit decisions, the Fifth Circuit found in *Valdespino* that the district court did not clearly err in admitting the school district's evidence suggesting the inaccuracy of the census data in this case. Addressing the school district's demographic methodology, the Fifth Circuit reasoned that the data involved in this case were "relatively simple" and the manipulation entailed only "rudimentary arithmetic."[139] Further, the *Gingles* geographical compactness issues in this case "do not involve any complicated statistical formulae or tests of significance that

129. *Valdespino*, 168 F.3d. at 853.
130. *See id.* at 853, 855.
131. 394 U.S. 526 (1969).
132. *Id.* at 535.
133. 462 U.S. 725 (1983).
134. *Valdespino*, 168 F.3d at 854 (citing *Karcher*, 462 U.S. at 732 n.4).
135. 906 F.2d 1042 (5th Cir. 1990).
136. *See Valdespino*, 168 F.3d at 854 (citing *Westwego*, 906 F.2d at 1045 n.3).
137. 165 F.3d 368 (5th Cir. 1999).
138. *See id.* at 371.
139. *Valdespino*, 168 F.3d at 854.

might bedazzle or bamboozle an unwary district court."[140]

On this basis, the Fifth Circuit panel pronounced that the defendant school district's expert provided a clear and convincing demonstration of "sufficient post-census demographic changes to erode the Hispanic majority in the Plaintiffs' demonstration district,"[141] utilizing a methodology much more sophisticated than the "crude straight-line population projection that was rejected in *Perez*."[142]

The Fifth Circuit also found that the district court properly rejected the section 2 plaintiffs' proposed rebuttal evidence concerning post-census populations on the ground of unfair surprise because the plaintiffs failed to supplement their expert disclosures as required by local rules.[143]

In sum, the Fifth Circuit concluded that it was proper for the district court to saddle the section 2 plaintiffs with the burden of proving a majority of Hispanics among voting age citizens resided in their "demonstration district," and that the district court properly found that the defendant school board presented sufficient evidence to show that demographic changes occurred in the seven years since the 1990 census.[144]

IV. STANDING

A recent decision by the U. S. District Court for the Eastern District of Michigan provides a brief but accurate textbook example of the importance of establishing the "irreducible constitutional minimum of standing" for purposes of asserting constitutional claims in vote dilution litigation.[145] In *Anthony v. Michigan*,[146] individual registered voters and several minority organizations challenged the merger of the Recorder's Court for the City of Detroit with the Wayne County Circuit Court.[147] The controversy related to a statute enacted by the Michigan legislature abolishing the Recorder's Court, and making the judges of that court Wayne County Circuit Court judges.[148] The plaintiffs in *Anthony* claimed that the merger violated their Fourteenth and Fifteenth Amendment

140. *Id.*

141. *Id.*

142. *Id.* at 854–55 (applying *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1212-13 (S.D. Tex. 1997), *aff'd*, 165 F.3d 368 (5th Cir. 1999)).

143. *See id.* at 855.

144. *See id.* at 855-56.

145. *Anthony v. Michigan*, 35 F. Supp. 2d 989, 1002-03 (E.D. Mich. 1999).

146. 35 F. Supp. 2d at 989.

147. *See Anthony*, 35 F. Supp. 2d at 991.

148. *See id.*

rights because it was motivated by a racially discriminatory purpose, and that the merger also violated section 2 of the Voting Rights Act because the white majority in Wayne County was guilty of racial bloc voting that defeated the preferred candidates of black voters in the Wayne County Circuit Court elections.[149] The court granted the State's motion for summary judgment, holding that with respect to the constitutional claims, the plaintiffs did not have standing as to voters residing in the City of Detroit, because they had failed to establish that they suffered an injury in fact as a result of the merger of these two courts.[150] The district court, citing *Lujan v. Defenders of Wildlife*,[151] addressed the standing issue by holding that the individual plaintiffs failed to satisfy *Lujan*'s three elements for standing.[152] The district court held that it was an indispensable part of the organizational plaintiffs' case to, at a minimum, make out a question of material fact as to each of the elements for organizational standing; first, that the members of the organization would "otherwise have standing to sue in their own right"; second, that the interests that the organization seeks to protect are "germane" to the purpose of that organization; and third, that "neither the claim asserted nor the relief requested require[d] the participation of individual members in [this] lawsuit."[153] The district court found that the plaintiffs' generalized complaint was insufficient to establish a question of fact with regard to standing, reasoning that

> Plaintiffs do not articulate how they are *particularly* harmed as a result of the merger, and the record is devoid of evidence of a concrete and particularized injury to either the individual or organizational plaintiffs. Though plaintiffs are or have members that are registered voters residing in the City of Detroit, plaintiffs proffer no evidence that any of them ran unsuccessfully for the Wayne County Circuit Court in any past election, plan to run for the Wayne County Circuit Court in any future election,

149. *See id.*

150. *See id.* at 1003.

151. 504 U.S. 555, 560-61 (1992); *Anthony*, 35 F. Supp. 2d at 1002 (holding that neither the individual plaintiff nor the organizational plaintiffs, including the NAACP, the National Bar Association, the National Conference of Black Lawyers, and the Legal Aid Defender Association, had standing to assert and bring these constitutional claims).

152. *Anthony*, 35 F. Supp. 2d at 1002 (including the requirement that the plaintiffs must have suffered an injury in fact, that there be a "causal connection between the injury and the conduct complained of," and that "it must be 'likely,' as opposed to merely 'speculative,' that the injury [would be] 'redressed by a favorable decision'") (quoting *Lujan*, 504 U.S. at 560-61).

153. *Id.* at 1002-3 (citing Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 343 (1977)).

> have a criminal jury trial pending in Wayne County Circuit Court, or even that they have supported an unsuccessful candidate for the Wayne County Circuit Court in the past. Further, neither the individual nor the organizational plaintiffs seem to be the object of the government action.[154]

The essence of the plaintiff's claim, unsupported by evidence, was that the legislation merging these two courts was "an attempt to keep black judges off the bench" and to "dilute" the presence of black jurors in criminal cases that would have otherwise been tried in the Recorder's Court, and that the "impetus" for abolishing the Recorder's Court and merging it with the Wayne County Circuit Court "is to insure that African American judges, such as Dalton Robertson, are not allowed to make determinations in relation to crimes allegedly committed by African-Americans against white suburbanites within the City of Detroit."[155]

The district court properly concluded that the plaintiffs' claimed injuries were conjectural rather than concrete and particularized, and that they had failed to establish that either they or members in their organization had a "sufficient personal stake in the outcome of the Wayne County Circuit Court races to have standing."[156] The court dismissed the constitutional claims for lack of standing, stating that "[p]laintiffs' argument for standing is essentially that the merger is unfair because it was motivated by a racial animus in the majority of the Michigan legislators who voted in favor of Public Act 374 of 1996, and presumably the governor who signed it."[157]

V. JUDICIAL REDISTRICTING

In *Mallory v. Ohio*,[158] the Sixth Circuit affirmed the lower court's rejection of a section 2 challenge to Ohio's at-large electoral system for judges in eight of its largest counties. Commending the district court for a "carefully written, solidly reasoned, and extremely comprehensive opinion," the Sixth Circuit addressed the *Gingles* preconditions in the context of a challenge to a judicial redistricting plan.[159]

With respect to geographical compactness, the plaintiff class failed to prove that a majority-minority district with a rational shape could be drawn in fourteen of the eighteen challenged judicial districts, although

154. *Id.* at 1003 (citing *Lujan*, 504 U.S. at 562).
155. *Id.*
156. *Id.*
157. *Id.*
158. 173 F.3d 377 (6th Cir. 1999).
159. *Id.* at 380 (citing Mallory v. Ohio, 38 F. Supp. 2d 525 (S.D. Ohio 1997)).

the class satisfied the geographic compactness requirement as to the remaining four districts.[160] The plaintiff class took issue with the finding in the fourteen other judicial districts. The Sixth Circuit noted, however, that the only evidence submitted by the plaintiffs to demonstrate compactness was a set of maps purportedly showing the concentration of black populations within each of the largest counties in the state, and these maps neither demonstrated the number of whites within the relevant areas nor signified the relevant census tracks, information usually needed to draw an electoral district.[161] In the face of the plaintiffs' "bare conclusion" that the district court erred, the Sixth Circuit upheld the district court's determination that the plaintiff class failed to meet its burden of demonstrating that geographically compact, single-member districts could be traced in which blacks would constitute a majority in these fourteen other districts.[162]

The next *Gingles* precondition is minority political cohesion; that is, that "the minority group must be able to show that it is politically cohesive."[163] In the instant case, the plaintiff class could only point to conclusory trial testimony by its witnesses that "blacks tend to vote for blacks and whites tend to vote for whites," unsupported by any statistical evidence, any statistical examination of racial bloc voting, or any analysis of all of the challenged districts.[164] On the other hand, Ohio's witness, Harvard Professor Gary King, one of the world's foremost authorities on statistical analysis of racial bloc voting, noted that there was an absence of legally significant racially polarized voting in any of the districts in question and that the evidence did not show a consensus "candidate of choice" among blacks in the challenged districts. Moreover, "the degree of racial bloc voting varied widely from election to election, and that candidates supported by African-Americans were routinely supported by significant numbers of Caucasian voters."[165] Professor King also pointed to many elections won by black candidates through considerable support, sometimes even by a majority, of white voters.[166] The Sixth Circuit affirmed the district court's acceptance of the state's version of facts based upon Professor King's "valid, comprehensive scientific study," as opposed to the plaintiffs' proffered "unscientific report on a single judicial

160. *See Mallory*, 173 F.3d at 382.
161. *See id.* at 382-83.
162. *See id.* at 383.
163. Thornburg v. Gingles, 478 U.S. 30, 51 (1986).
164. *See Mallory*, 173 F.3d at 383.
165. *Id.*
166. *See id.*

district and the subjective experience of several voters."[167]

With regard to the third *Gingles* precondition of racial bloc voting, the Sixth Circuit noted that the plaintiff class presented no evidence other than unsubstantiated testimony of various black voters. On the other hand, the state's expert, Professor King, did not find any evidence of "legally significant racially polarized bloc voting."[168] The Sixth Circuit upheld the district court's finding that the plaintiff class did not bear its burden of proving white racial bloc voting.[169]

The Sixth Circuit then turned to a number of conclusory arguments that, charitably described, were "only tangentially related to the *Gingles* preconditions."[170] First, the plaintiff class argued that the state's electoral system created a "chilling effect," discouraging blacks from running for judicial office.[171] The district court rejected this reasoning because

> candidates who do not run cannot be elected [; therefore,] it is impossible to statistically measure this so-called chilling effect. Although conceding that this statement is technically accurate, the class labels it "cynical," and accuses the district court of a "lack of understanding of the continuing impact of racially discriminatory practices" that, when "coupled with patterns of consistent racial bloc voting," deters "African-Americans from fully participating in the judicial electoral process."[172]

Noting that the plaintiff class failed to provide any legal support for the chilling effect argument and cited no authority that a section 2 claim could be established without statistical evidence of racial bloc voting, the Sixth Circuit rejected as meritless the plaintiff's class claims that the district court erred in disregarding elections in which blacks did not participate.[173] Moreover, the Sixth Circuit refused to follow the approach used by the Eleventh Circuit and the Fifth Circuit that district courts are required to consider the possibility that "African-Americans do not run because they cannot win," noting that even if the Sixth Circuit adopted such a theory, "it would only apply in a case where there was evidence that African-Americans could not win. Here, the evidence shows exactly the opposite."[174]

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167. *Id.* at 384.
168. *Id.* at 383.
169. *See id.* at 384.
170. *Id.*
171. *See id.*
172. *Id.*
173. *See id.* at 384-85.
174. *Id.* at 385.

VI. PROOF OF CAUSATION OF RACIALLY DIVERGENT VOTING

The Fifth Circuit addressed the problem of the entanglement of race and politics, in the context of determining whether section 2 plaintiffs have established legally significant white racial bloc voting and sufficient probative evidence of racially polarized voting to establish a section 2 vote dilution claim in *League of United Latin American Citizens v. Clements*.[175] Writing for the majority, Judge Patrick Higginbotham said that in establishing racial bloc voting and racial polarization, a section 2 plaintiff must show, at a minimum, that racially divergent voting was not primarily caused by or the result of partisan politics:

> On appeal, defendants contend that the district court erred in refusing to consider the nonracial causes of voting preferences they offered at trial. Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, defendants argue, plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail. When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the contested counties, defendants conclude, the district court's judgment must be reversed.
>
> We agree. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters "on account of race or color." Without an inquiry into the circumstances underlying unfavorable election returns, courts lack the tools to discern results that are in any sense "discriminatory," and any distinction between deprivation and mere losses at the polls becomes untenable. In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat.[176]

The Fifth Circuit also addressed the concern that it was erecting some type of new requirement for section 2 plaintiffs to prove minority electoral failure resulting from racial motivation:

> We need not hold that plaintiffs must supply conclusive proof

175. 999 F.2d 831 (5th Cir. 1993) (en banc).

176. *Id.* at 850.

that a minority group's failure to elect representatives of its choice is caused by racial animus in the white electorate in order to decide that the district court's judgment must be reversed. It is true that such a requirement could be inferred from the text of § 2 . . . the caselaw Congress intended to codify in amending the provision, . . . the Senate Report, . . . the testimony of prominent supporters of the Act, . . . and the controlling opinions of the Supreme Court . . . . There is also a powerful argument supporting a rule that plaintiffs, to establish legally significant racial bloc voting, must prove that their failure to elect representatives of their choice cannot be characterized as a "mere euphemism for political defeat at the polls," . . . or the "result" of "partisan politics . . . ."

Describing plaintiffs' burden in terms of negating "partisan politics" rather than affirmatively proving "racial animus" would not be simply a matter of nomenclature . . . . [T]here are many other possible non-racial causes of voter behavior beyond partisan affiliation. A rule conditioning relief under § 2 upon proof of the existence of racial animus in the electorate would require plaintiffs to establish the absence of not only partisan voting, but also all other potentially innocent explanations for white voters' rejection of minority-preferred candidates. Factors that might legitimately lead white voters to withhold support from particular minority candidates include, for example, limited campaign funds, inexperience, or a reputation besmirched by scandal. Because these additional factors map only imperfectly into partisan affiliation, detailed multivariate analysis might then be the evidence of choice. The argument would then be that without this additional inquiry, courts that confine their scrutiny to partisan voting might well find racial bloc voting in circumstances where the losses of minority-preferred candidates were actually attributable to causes other than race. This result, it is urged, might unfairly tip the scales in favor of liability.

This argument possesses considerable force. Certainly, the allocation of proof in § 2 cases must reflect the central purpose of the Voting Rights Act and its intended liberality as well as the practical difficulties of proof in the real world of trial. In countless areas of the law weighty legal conclusions frequently rest on methodologies that would make scientists blush . . . . Requiring plaintiffs affirmatively to establish that white voters' rejection of minority-preferred candidates was motivated by racial animus would make racial bloc voting both difficult and, considering the additional analysis that would be needed, ex-

> pensive to establish . . . . Moreover, it would facilitate the use of thinly-veiled proxies by permitting, for example, evidence that a minority candidate was regarded as "unqualified" or "corrupt" to defeat a claim that white voters' refusal to support him was based on race or ethnicity. The argument continues that an inquiry into causation beyond partisan affiliation seems inconsistent with the fundamental division between "partisan politics" and "racial vote dilution" . . . . Having said this, we need not resolve the debate today. Whether or not the burden of the plaintiffs to prove bloc voting includes the burden to explain partisan influence, the result is the same. This is so even if the partisan voting is viewed as a defensive parry.
>
> Finally, we recognize that even partisan affiliation may serve as a proxy for illegitimate racial considerations. Minority voters, at least those residing in the contested counties in this case, have tended uniformly to support the Democratic Party. At the same time, a majority of white voters in most counties have consistently voted for district court candidates fielded by the Republican Party. Noting this persistent, albeit imperfect correlation between party and race, plaintiffs assert that a determination that partisan affiliation best explains voting patterns should not foreclose § 2 liability in this case because the Republican and Democratic Parties are proxies for racial and ethnic groups in Texas. *Whitcomb's* distinction between "racial vote dilution" and "political defeat at the polls" should not control, they contend, for "partisan politics" *is* "racial politics."[177]

One of the most recent cases addressing this causation issue comes from the Second Circuit, *Goosby v. Town Board.*[178] The Second Circuit upheld the district court's ruling that found that Town of Hempstead's at-large voting method for election of Town Board members violated section 2 of the Voting Rights Act and that a proposed remedial plan consisting of one single-member district and one multi-member district violated the Equal Protection Clause of the Fourteenth Amendment.[179]

It helps to put this case in perspective. The Town of Hempstead had a population of over 725,000, awarding it the most populous town in the United States,[180] a traditional Republican stronghold consisting of twenty-two villages and thirty-four unincorporated areas in the western-

177. *Id.* at 859-60.
178. 180 F.3d 476 (2d Cir. 1999).
179. *See id.* at 497-98.
180. *See id.* at 483.

most part of Nassau County, Long Island.[181] Hempstead was predominantly white, with a black population of 3.4 percent in 1960, growing to 5.8 percent in 1970, 9.3 percent in 1980, and 12.1 percent in 1990; the black population was concentrated in one area of the town.[182]

The Town Board presented a regression analysis to study the relationship between partisanship and race, showing that candidates received similar levels of support from the voters without regard to race.[183] When Curtis Fisher, the only black person ever to sit on the Town Board, ran for office, "the level of support he received from white voters was similar to that received by white Republican candidates for Town Board."[184] This supported the Town's conclusion ultimately that "though there was a pattern of racially polarized voting in the Town, there was a stronger pattern of voting along partisan lines."[185] The plaintiffs' expert testified that there was white bloc voting in the town and found that black-preferred candidates would have been more successful if they ran in a majority black district as opposed to at-large.[186] The plaintiffs' expert also used "ecological correlation and regression analysis" as well as "extreme case analysis" to support the conclusion that voting was split along racial lines in each of the Town Board elections.[187] Another expert for the plaintiff presented electoral data from elections between 1983 and 1993 revealing that "the white Republican majority consistently defeats the Democratic candidates, who are supported by the black minority."[188] Given this conflict in the expert testimony, the Second Circuit noted "both sides agree that there is polarized voting but dispute its cause."[189]

The primary issue on appeal was whether the third *Gingles* precondition of white racial bloc voting had been satisfied; that is, whether "the white majority [of the Town of Hempstead] vote[d] sufficiently as a bloc usually to defeat the preferred candidate of the minority."[190] The district court found racially polarized voting from the following fact that black voters favored a black democratic candidate running for Town Board, the black Democrat received over fifty percent of the black vote in every election except one, there was at least one minority-preferred candidate

181. *See id.* at 483-84.
182. *See id.* at 484.
183. *See id.* at 490.
184. *Id.*
185. *Id.*
186. *See id.* at 489.
187. *See id.*
188. *Id.*
189. *Id.*
190. *Id.* at 492.

in every Town Board election, and every minority-preferred candidate for the Town Board lost to the majority-preferred candidate because white voters voted for candidates not supported by black voters.[191]

The core of the Town's argument on appeal was that political partisanship caused white bloc voting in Town elections.[192] The Town argued that white bloc voting patterns could not be "legally significant under the third *Gingles* precondition" because the divergent voting patterns were attributable to partisan affiliation, not race.[193] The Town argued that the majority of white voters in the Town of Hempstead had voted Republican "since time immemorial."[194]

The Second Circuit held that causation was "irrelevant in the inquiry into the three *Gingles* preconditions," although it was "relevant in the totality of circumstances inquiry."[195] Relying upon Judge Cabranes' opinion in *NAACP v. City of Niagara Falls*,[196] the Second Circuit adopted the trial court's approach in light of the political partisanship argument under the "totality of circumstances" analysis, rather than part of the third *Gingles* precondition of white racial bloc voting, and determined that there was legally sufficient bloc voting to defeat the town's minority-preferred candidates.[197]

The Town persisted in its argument on appeal, arguing that "blacks have lost as Democrats, not as 'blacks.'"[198] The Second Circuit addressed the Town's "principal and pervasive argument" that "political partisanship, rather than race, account[ed] for the defeat of black candidates."[199] The court also addressed the Town's argument that the plaintiffs had never tried to prove that the inability of African Americans to elect Democrats was a function of their race, and thus "'the plaintiffs' claim of racial vote dilution was a mere euphemism for defeat at the polls and was legally insufficient.'"[200] Rejecting this contention, the Second Circuit stated:

> The foregoing represents a fundamental misunderstanding of

191. *See* Goosby v. Town Bd., 956 F. Supp. 326, 351 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999).

192. *See Goosby*, 180 F.3d at 492.

193. *Id.* at 493.

194. *Id.*

195. *Id.* at 493 (quoting Lewis v. Alamance County, 99 F.3d 600, 616 n.12 (4th Cir. 1996)).

196. 65 F.3d 1002 (2nd Cir. 1995).

197. *See Goosby*, 180 F.3d at 493 (citing *City of Niagra Falls*, 65 F.3d at 1019).

198. *Goosby*, 180 F.3d at 495.

199. *Id.*

200. *Id.*

> what the plaintiff class alleged and proved to the satisfaction of the district court. The claim was that the at-large system of voting made it impossible for blacks to elect their *preferred candidates*. The Town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer. But they are not able to elect preferred candidates under the Republican Party regime that rules in the Town. Moreover, blacks should not be constrained to vote for Republicans who are not their preferred candidates.[201]

The Second Circuit distinguished *League of United Legal American Citizens v. Clements (LULAC)* as being in sharp contrast to the factual situation in *Goosby*, where "[w]ithout access to the Republic slating process, blacks [in the Town of Hempstead] simply are unable to have any preferred candidate elected to the Town Board, given the historical success of the Republican Party in all Town Board elections."[202] The Second Circuit differentiated the case from *LULAC*, because white voters, Democrat and Republican, supported minority candidates who were elected by their parties at levels that were equal to or greater than those of white candidates. It was proper to conclude in *LULAC* that the divergent voting patterns among white and black voters were "best explained by partisan affiliation."[203] In *Goosby*, the district court reasoned that:

> In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic subdistricts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogeneous population consisting of many different communities and voices, I conclude that black citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics.[204]

The district court was affirmed on appeal and in the remedy phase, the Second Circuit agreed that, under *Bush v. Vera*, the Town's favored plan was "so unusual and bizarre that it clearly cannot fulfill the 'narrowly

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201. *Id.*

202. *Id.* at 496.

203. League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 861 (5th Cir. 1993).

204. Goosby v. Town Bd., 956 F. Supp. 326, 355 (E.D.N.Y. 1997).

tailored' requirement."[205] According to the district court, the segregation resulting from the Town's two-district plan was "almost total," with ninety-seven percent of the black voters of the Town being placed in District One, with an overall black population greater than fifty-eight percent, as contrasted to District Two, which contained the rest of the Town, which was less than three percent black.[206] The district court had "found that the sole motivating factor for this two-district political division was race," and the proposed plan violated the Fourteenth Amendment.[207]

Although the two-district plan was rejected by the district court on the basis that race was the sole factor motivating it, the district court found that "race played a role, but was not the predominant factor, in the six-district plan."[208] That plan accorded with traditional districting principles, and race consciousness was a subordinate factor in it.[209] The Second Circuit upheld the district court in ordering the six-district plan as a remedy, holding that

> even if the six district plan required strict scrutiny, it is in any event narrowly tailored to the goal of remedying the vote dilution found here. It includes six reasonably compact districts that are normal in shape and approximately equal in size of population. It respects local community boundaries, and racial considerations were addressed only insofar as necessary to remedy the violation. We think that the six-district plan is an entirely appropriate remedy under the circumstances.[210]

The Second Circuit's decision accords with the Supreme Court's recent decisions with respect to race-conscious remedial measures. In non-voting rights cases, the Supreme Court has suggested that any race-conscious remedial measure is subject to strict scrutiny under the Equal Protection Clause.[211] This is true regardless of which race is burdened or benefited by the racial classification at issue.[212] Under strict scrutiny, a

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205. *Goosby*, 180 F.3d at 498 (citing Bush v. Vera, 517 U.S. 952, 962 (1996)). The town's favored plan was a two-district plan containing one single-member district "encompassing one-sixth of the Town's population and a majority of the Town's black population, and a second five-member district for the other five-sixths of the population." *Id.*

206. *See id.*

207. *Id.*

208. *Id.*

209. *See id.*

210. *Id.* *See generally* Benjamin E. Griffith, *Implementing the Race-Predominant Standard for State and Local Government Redistricting Plans*, 27 STETSON L. REV. 835 (1998).

211. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

212. *See id.* at 221-22 (citing City of Richmond v. J. A. Croson Co., 488 U.S. 469, 494 (1989)).

racial classification is required to be justified by a compelling governmental interest and narrowly tailored to further that interest.[213] To assess whether a remedy has been narrowly tailored, four factors must be considered and assessed:

> The necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; the relationship of the numerical goals to the relevant market; and the impact of the relief on the rights of third parties.[214]

When a remedial measure is challenged as not being narrowly tailored, the party defending the remedial measure carries the burden of proving that the remedial measure is constitutional.[215] A race-conscious remedy is required to be narrowly tailored to eliminate the effects of past discrimination as well as bar similar discrimination in the future and must be framed so as to address the exact effects and harms of the discrimination at issue.[216] Finally, a race-conscious remedy should be the remedy of last resort, and "will not be deemed to be narrowly tailored until less sweeping alternatives—particularly race-neutral [or less restrictive remedies]—have been considered and tried."[217]

It is for the above reasons that a number of circuits, most notably the Eleventh, launch into vote dilution inquiries with regard to remedy and liability as inseparable issues, and it is for this reason that section 2 defendants often level the bulk of their firepower at a clear demonstration of the absence of a feasible, constitutional remedy.[218]

VII. CONCLUSION

In this first Election Law Symposium sponsored by the *Catholic University Law Review*, a few closing remarks are in order. First, America has long been considered a melting pot, and one that has not boiled over, thanks to the rule of law. The contrast with the gruesome ethnic cleans-

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213. *See Goosby*, 180 F.3d at 498 (citing Bush v. Vera, 517 U.S. 952, 962 (1996)).

214. United States v. Paradise, 480 U.S. 149, 171 (1987).

215. *See* Aiken v. City of Memphis, 37 F.3d 1155, 1162 (6th Cir. 1994).

216. *See Adarand*, 515 U.S. at 227-28.

217. Williams v. Babbitt, 115 F.3d 657, 666 (9th Cir. 1997); *see also Adarand*, 515 U.S. at 237. *See generally* Burton v. City of Belle Glade, 178 F.3d 1175, 1199 (11th Cir. 1999) (holding that unless a plaintiff demonstrates the existence of a proper remedy, and proves the viability of an alternate election scheme that would provide better access to the political process, then the "challenged voting practice is not responsible for the claimed injury"); Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994) (en banc) ("A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system.").

218. *See* Growe v. Emison, 507 U.S. 25, 40 (1993).

ing that has taken place in Bosnia and most recently in Kosovo is a stark one. We are a people from diverse ethnic, racial, and religious backgrounds who have long experienced the social, political, and religious freedoms that are unique to our relatively young Nation. Many have thrived upon those freedoms, but some have not. Second, the key to removing barriers to equal electoral opportunity is and has always been access and participation, aided by vigorous enforcement of the Voting Rights Act of 1965. Many of those barriers are now relegated to history. Third, we are witnessing a mid-course correction as we approach the new millennium. It is not a rollback of civil rights earned in the 1960s and refined in the ensuing two decades, but it is a steady and principled move toward the center. Indeed, it is a move away from self-defeating entitlement theory that confuses guaranteed results and "safe" electoral districts with equal opportunity. It is a visionary move toward the political reality of one nation, indivisible.