Fair Redistricting in Virginia

Understanding and advocating for racially fair election plans in Virginia's cities, counties, and towns

American Civil Liberties Union of Virginia

Virginia State Conference NAACP

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INTRODUCTION

Although redistricting is often thought of as something best left to the politicians and the experts, nothing could be further from the truth. Every voter has a vital stake in redistricting because it determines the composition of districts that elect public officials at every level of government.

This document examines local redistricting in Virginia from the viewpoint of racial fairness. You will find inside a brief history of redistricting in Virginia over the last twenty years and tips on how you can have an impact on redistricting today. If you have been involved in redistricting before, you might want to pay close attention to the changes in the law that have taken place since the early 1990s, when Virginia's local governments last went through this process.

One warning in advance: the law in the voting area is always evolving, and sometimes rather complex questions arise. The first part of this document presents a general overview of the redistricting process in Virginia, but it is by no means intended to offer definitive answers. The question and answer primer on the Voting Rights Act that follows delves deeper into redistricting law. But it also may not answer all the questions you have. The last section, which is a list of contacts, is the place to go when your needs move beyond the text of this document.

Thomas Jefferson said that for democracy to work, we must have a well-informed citizenry. Nowhere is this more apparent than with redistricting. Interested citizens can have a positive impact on redistricting just by letting government officials know they are being watched. But citizens who are informed and organized can profoundly affect the outcome of redistricting in their locality. This little booklet will not make you a voting rights expert overnight, but being familiar with it could dramatically increase your effectiveness as an advocate for racially fair redistricting.

II. RACE AND REDISTRICTING IN THE EIGHTIES AND NINETIES IN VIRGINIA

The Eighties: The Law Leaps Forward

Passed by Congress in 1965, the Voting Rights Act prohibited racially discriminatory election practices and quickly became an effective tool for advancing minority voting rights. But it was not until the 1980s that several dramatic developments gave the law the power it needed to have a widespread impact on the drawing of election district boundaries.

In 1982, Congress amended the Voting Rights Act to make litigation easier by requiring that challengers to discriminatory election plans prove only that the plan had a discriminatory effect on minority voters. Previously, plaintiffs in these lawsuits had the much greater burden of proving that the plan was both intentionally designed to prevent minorities from holding elected office and that it had a discriminatory impact.

Later, in 1986, the Supreme Court ruled in *Thornburg v. Gingles* that the Voting Rights Act could be used to compel state and local governments to draw single-member election districts in which minority voters had a fair opportunity to elect the candidate of their choice. Three conditions had to be present to justify the creation of the district. First, it had to be possible to draw a compact and contiguous election district in which a majority of the people are minorities. Second, minorities in the district must have demonstrated that they were politically cohesive. Third, it had to be shown that white voters in the area tended to vote as a bloc to defeat the minority's preferred candidates.

As a result of these developments, more than 20 successful legal challenges were brought or threatened in Virginia under the Voting Rights Act. Most of the cities, counties and towns that were targets of these cases either conducted at-large elections in which white voters completely controlled the

election process or were divided into districts designed to insure the election of white candidates over minority candidates.

In case after case, federal court judges in Virginia ordered these localities to redesign their election plans. The remedy, typically, was to create one or more voting districts in the political jurisdiction in which minority voters would have an equal opportunity to elect the candidate of their choice.

By the late 1980s, places such as Mecklenburg, Pittsylvania, Hopewell, South Hill, Lancaster, Covington, and King & Queen, to name only a few, had created their first ever majority-minority election districts and elected African-American candidates to represent those districts.

The Early Nineties: More Dramatic Results

In 1991, when local government officials began the required post-census redistricting process, they were very aware of the successful lawsuits from the 1980s. They were also aware that new majority-minority districts could be drawn in many places where they still did not exist. For this reason--and with prodding from citizens and advocacy groups--local officials began to comply with the Voting Rights Act by voluntarily drawing election districts in which minorities comprised a majority of the voters.

By the time the early 1990s' redistricting process was completed, minorities were poised to be elected to public office in unprecedented numbers. In 1983, according to the Joint Center for Political and Economic Studies in Washington, D.C., there were about 80 African-Americans elected to city councils, boards of supervisors, and other local governing bodies in Virginia. By 1993, there were about 125, an increase of nearly 70%. While population shifts could account for some of these elections, the vast majority came about as a result of lawsuits and racially fair redistricting.

(Note: By 1998, there were nearly 300 African-American elected officials at the local level. This increase, while important, was largely due to the fact that the universe of elected offices nearly doubled when Virginia's localities were finally allowed to elect school board members.)

The Mid-Nineties: Resetting the Voting Rights Clock

Unfortunately, the U.S. Supreme Court had a few surprises in store in for voting rights advocates during the mid-1990s. In several high impact cases, the nation's highest court placed new restraints on the Voting Rights Act, turning it into something less that what advocates and the lower courts supposed it to be.

Over the years, gerrymandering for political gain has caused many election districts to be stretched or hammered into unusual shapes. The Supreme Court found no problem with that tradition, but in 1993 -- in *Shaw v. Reno* -- it ruled that a bizarre shaped election district, when drawn for the purpose of creating a racially fair election plan, violated the Constitution.

Later, in *Miller v. Johnson*, the Supreme Court ruled that unless the government could show a compelling reason, it was unconstitutional for race to be the dominant factor in determining the shape of any election district, no matter how pretty or ugly it was.

In the early 1990s, the Voting Rights Act was generally interpreted to mean that wherever the three *Gingles* factors were present majority-minority districts had to be drawn. *Shaw* and *Miller* did not supercede *Gingles*, but they did cast a shadow over it, making the 2001 redistricting rules more complex and less clear than the 1991 rules.

III. CREATING AND PROTECTING FAIR DISTRICTS IN 2001

Creating New Majority-Minority Voting Districts

It is not true, as some say, that race can no longer be considered when drawing election boundaries. It is just that race cannot be such a dominant factor that it subjugates traditional factors such as compactness of shape, communities of interest, or the protection of incumbents.

As Justice O'Connor put it, in order to find that a majority-minority district was unconstitutional, the challenger to such a plan would have to show that the designers "relied on race in substantial disregard of customary and traditional redistricting practices."

In the end, there are very few election districts-- majority-minority or not--that are ever drawn without taking all these other factors into consideration to some extent. But because it can be controversial, the racial factor may tend to dominate media coverage or the public hearings on redistricting, even when, in truth, it is no more important than other factors.

This time around, it is important to make certain that the public record of the redistricting process shows that these other factors were taken into consideration when drawing election boundaries. Whether it appears in the minutes of meetings or in written comments submitted to the official redistricting group, all the factors that determine the outcome of the election district boundaries should be recorded.

Protecting Previous Gains by Minority Voters

Virginia is one of the states covered by Section 5 of the Voting Rights Act. This means that every new redistricting plan will be submitted to the U.S. Department of Justice for its approval--or "preclearance" as they call it--before the plan can take effect. The Justice Department will determine if the new plan is "retrogressive," that is, whether or not it makes minority voters worse off than they were under the old plan.

If the redistricting proposal for your locality reduces the number of majority-minority districts or reduces the proportion of minority voters in an existing district, it may be retrogressive.

When a proposed plan appears retrogressive, community groups should point this out to the official redistricting group and warn them that the plan needs to be changed. If the plan is adopted anyway, the Justice Department should be contacted immediately. (See page 7 for address and phone number and page 18 for additional details on the process.)

IV. THE LOCAL REDISTRICTING PROCESS

A main goal of redistricting after each census is to make certain that every citizen's vote carries the same weight. This concept of "one person, one vote" means that election districts within a jurisdiction should all contain, within reason, the same number of people. The census data reveals where the population shifts have occurred, thus enabling local governments to redraw election boundaries to insure compliance with the one-person, one vote requirement.

In jurisdictions that have a substantial number of minority voters, the Voting Rights Act also requires that the plans be drawn so as not to discriminate on the basis of race. Individuals and groups who wish to have an impact on the redistricting process need to know what they can expect under the law and how they can effectively advocate for those results.

If you believe that a majority-minority district can be drawn that meets the three *Gingle*s criteria--that is, the district is geographically compact, minorities in it are politically cohesive, and whites there tend to vote as a bloc to defeat candidates preferred by minority voters--you should ask the redistricting group to do it. If you have drawn such a district yourself, you should present it to the commission, even if it is just a rough draft.

If your concern is primarily to protect the status quo of minority voters, then you should familiarize yourself with the current election plan and be prepared to comment on any actions that appear to diminish the impact of the minority community on the political process. A legitimate standard to seek is the adoption of a plan that has the "least change" from the existing plan.

Below are a few things to remember as you engage in the redistricting process:

- **Finding Out Who, When and Where**

Redrawing election boundaries is ultimately the responsibility of the local governing body, but the process may occur largely through an appointed commission and its technical advisors. The first thing you need to do is to find out who is doing what, where and when. This should require nothing more than a phone call to city hall.

While there will be public hearings on the redistricting process at which individuals may comment, much of the work on redistricting plans will be done in other venues. Under the Virginia Freedom of Information Act, you have a right to access the information that those groups are reviewing, and you have a right to attend their meetings. In most places, you will discover that this information will be freely shared by government officials, but when it is not, you should know your rights.

- **Being Organized, Informed, and Present**

Having a say in the redistricting process is best accomplished by individuals speaking on behalf of community groups. Better, still, are individuals who represent a coalition of groups that has formed to urge the passing of fair redistricting plans. And while one or two individuals typically address the redistricting commission or local governing body, it is equally important that large numbers of citizens be present at these hearings. Nothing influences public officials more than a room crowded with people who are there for a particular purpose.

You should make certain that you know as much about the proposed election plans as possible and that you have a clear idea of what it is you want in a plan. When possible, this means having a set of alternative plans that you can present to the redistricting group. This is not as hard as it sounds. Although not required to help you create your own plans, nothing prevents your local governing body from giving you access to the personnel or equipment needed to draw election districts. If you need help drawing plans from an outside source, there are a number of places that can offer that service. (See the list of organizations beginning on page 20.)

- **Engaging the local media**

Make sure that local television, radio and newspapers are aware of the redistricting process and especially of your interest in a fair election plan. Although not always true, generally the more light spread on the subject of redistricting, the better.

- **Acting multiracially, when practical**

The 2000 census data shows that African-Americans, while still the dominant minority in Virginia, have been joined by a dramatic growth in the Hispanic and Asian-American populations.

Minority groups in the same communities who have common goals should consider working together to advocate for fair plans. As the state becomes more diverse, the ability of minorities to join forces politically becomes an increasingly important factor in the redistricting process.

- **Documenting the process**

Although your local government's redistricting committee will be required to document the process, it will be telling the redistricting story from its own perspective. Your documentation could be critically important if the plan you desire is not adopted, and you decide to take your comments to the U.S. Department of Justice.

Remember, because of the new rules for redistricting, you should be sure to document all the factors that helped determine the boundary lines of the plan you prefer. While race is obviously a relevant factor, the factors listed below should be clearly involved in the drawing of the plan, and they should be documented.

Shape

Districts should look somewhat regular and not be distorted into terribly odd shapes to make them racially fair. There is no exact legal language used to define a plan that passes the shape test, but the word that is often used to describe such a plan is "compact." It is important to remember, though, that shape is relative. An oddly shaped city or county is likely to produce oddly shaped voting districts that are perfectly acceptable.

Contiguity

Each district must be in a single piece. The test of contiguity is whether or not you can actually drive or walk to every part of a district without going through another district. In Virginia, as in most states, a district split by water is still considered to be contiguous.

Communities of interest

Any factors showing that a district was drawn to include segments of the population who share common goals and lifestyles should be documented.

Protection of incumbents

The redistricting process is often perceived as a way for one group to diminish the power of another group by putting two or more incumbents in a district, or drawing an incumbent out of district in which he or she has popular support. This may be true, but customarily redistricting is supposed to allow voters an opportunity to continue to elect someone to office if he or she has represented them well. Lines drawn to keep two or more incumbents from being lumped in the same district are considered a plus when judging the fairness of plans.

V. WHEN THE LOCAL PROCESS IS COMPLETED

Contacting the Justice Department

Every voting change, whether it is the location of a polling place or the redrawing of an election plan, must be submitted to the U.S. Department of Justice for preclearance.

The Justice Department will check the new plan to make sure that it is not retrogressive. In jurisdictions where minority voters made significant advances during the 1991 redistricting process, this

is a powerful tool that will prevent reversals of the gains made at that time. Whether or not this is the case, if you are dissatisfied with the local redistricting process or the final result, you should contact the U.S. Department of Justice for comment.

The Justice Department will be judging the plan by a number of factors to determine if retrogression has occurred. By anticipating the criteria the Justice Department will use to determine retrogression, your comments will have greater impact and be more helpful to the preclearance reviewers. Here are the three main questions for which the Justice Department will be seeking answers:

1. Does the new plan reduce the percentage of minority voters in any particular district?

2. Did it pack more minority voters than necessary in a particular district, thereby reducing minority voting strength elsewhere?

3. Did it split the minority community up by putting minority voters in several different districts?

The Justice Department will also look at the voting history in the jurisdiction--which may include past election results and voter registration and voter turnout patterns--and any other factor that may affect equal participation in the political process by minority voters.

If the Department of Justice refuses to preclear the plan, as someone who has commented on it, you will be told why. You will then have an opportunity to participate in the redistricting process again when your local governing body is required to make changes to comply with the Justice Department's demands.

If you are satisfied with the local plan that has been submitted to the Department of Justice, you should also submit comments. Endorsement of a plan by minority groups is also an important factor in preclearance.

The Justice Department has sixty days to act on the plan, but if elections are imminent, the jurisdiction submitting the plan may request that the timetable be shortened. Whether or not this is the case in your locality, it is wise to file your comments as soon as possible after the plan has been submitted.

Included in this document, beginning on page 17, are excerpts from a recent Department of Justice document explaining how it will determine if a plan is retrogressive.

If you have questions about the preclearance process, you may call the Department of Justice at 1-800-253-3931, extension 3. Comments to the Department can be called in to the same number or addressed in writing to:

Joseph D. Rich, Acting Chief
Voting Rights Division
U.S. States Department of Justice
Washington, D.C. 20530

Litigation

If all else fails, a lawsuit under Section 2 of the Voting Rights Act may be possible. Although there were many successful lawsuits in Virginia in the past, the U.S. Supreme Courts rulings in the mid-nineties have made such cases more difficult. If you are interested in a lawsuit, first read the relevant sections of *The Basics of Redistricting Law: Questions and Answers*, which follows directly, then contact a lawyer or one of the appropriate organizations listed as a contact. You may also contact the Department of Justice, which has the authority to file Section 2 lawsuits, although such cases are rare.

VI. THE BASICS OF REDISTRICTING LAW: QUESTIONS AND ANSWERS [1]

Redistricting Defined

Q: What is redistricting?

Redistricting refers to the process of redrawing the lines of districts from which public officials are elected.[2] Redistricting typically takes place after each census and affects all jurisdictions that use districts, whether for members of congress, state legislatures, county commissions, city councils, school boards, etc.

One Person, One Vote

Q: Why bother to redraw district lines?

The U.S. Constitution and the federal courts require it. It's also the fair and equitable thing to do. Historically many states did not redistrict to reflect shifts and growth in their populations. In a series of cases in the 1960s, one of which coined the phrase "one person, one vote," the Supreme Court held that single member voting districts within jurisdiction must have the same size population.

Q: As far as state and local offices are concerned, how does one person, one vote work?

Ideal district size is determined by dividing the total population by the number of seats involved. Some deviation from this ideal is allowed but not much.[3]

Q: How often must a state or local government redistrict?

As a matter of federal law, redistricting is required only once a decade.

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[1] Excerpts from *Everything You Always Wanted to Know About Redistricting But Were Afraid to Ask*, published by the American Civil Liberties Union, Southern Regional Office, 2001.

[2] *Johnson v. Miller,* 929 F.Supp. 1529, 1534 n.12 (S.D.Ga. 1996).

[3] Plans with a total population deviation (the sum of the largest plus and minus deviations) under 10% are regarded as complying with one person, one vote (*White v. Regester*, 412 U.S. 755, 764 (1973); *Brown v. Thomson*, 462 U.S. at 842-43). Plans with deviations between 10% and 16.4% are acceptable *only* if they can be justified "based on legitimate considerations incident to the effectuation of a rational state policy." (*Mahan v. Howell*, 410 U.S. 315, 325 (1973). Plans with deviations greater that 16.4% are regarded as unconstitutional and are probably never justifiable (Connor v. Finch, 413 U.S. 407, 420 (1977). But see *Brown v. Thomson*, and *Gorin v. Karpan*, 775 F.Supp. 1430 (D.Wyo. 1991).A state can justify a deviation greater than 10% based on a rational state policy, such as drawing districts that are compact and contiguous (all parts connected and touching), keeping political subdivisions intact, protecting incumbents, preserving the core of existing districts, and complying with the Voting Rights Act. Given the ease with which districts of equal population can be drawn using modern redistricting technology, and the fact that a plan with an excessive deviation is an invitation to a lawsuit, a jurisdiction has every incentive to draw a plan with a deviation of less than 10%.

Minority Vote Dilution

Q: What is minority vote dilution?

Vote dilution, as opposed to vote denial, refers to the use of redistricting plans and other voting practices that minimize or cancel out the voting strength of racial and other minorities. In the words of the Supreme Court, the essence of a vote dilution claim "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[4]

Q: What are some of the techniques used in redistricting plans to dilute minority voting strength?

Three techniques frequently used to dilute minority voting strength are "cracking," "stacking," and "packing." "Cracking" refers to fragmenting concentrations of minority population and dispersing them among other districts to ensure that all districts are majority white. "Stacking" refers to combining concentrations of minority population with greater concentrations of white population, again to ensure that districts are majority white. "Packing" refers to concentrating as many minorities as possible in as few districts as possible to minimize the number of majority-minority districts.

Q: Is vote dilution prohibited by the Constitution?

Yes. A voting plan that dilutes minority voting strength is unconstitutional if it was conceived or operated as a *purposeful* device to further racial discrimination.[5] Race need not be the sole or main purpose, but only a motivating factor in the decision making process.[6]

Q: Does the Voting Rights Act prohibit vote dilution in redistricting?

Yes. Two provisions of the Voting Rights Act, Section 2[7] and Section 5,[8] prohibit the use of voting practices or procedures, including redistricting plans, that dilute minority voting strength.

Q: Who is protected by the Voting Rights Act?

When it was first enacted, the Voting Rights Act targeted southern states, including Virginia, which had systematically discriminated against African-Americans in voting and prohibited discrimination based on "race or color."[9] In 1975 Congress extended protection of the act to language minorities, defined as American Indians, Asian-Americans, Alaskan Natives, and persons of Spanish Heritage.[10]

Section 2 of the Voting Rights Act

Q: What does Section 2 provide?

Section 2 provides that a voting practice is unlawful if it "results" in discrimination, i.e., if, based on the totality of circumstances, it provides minorities with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[11] Although

[4]*Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

[5]Rogers v. Lodge, 458 U.S. 613 (1982).

[6]Hunter v. Underwood, 471 U.S. 222 (1985).

[7]42 U.S.C. § 1973.

[8]42 U.S.C. § 1973c.

[9]42 U.S.C. § 1973.

[10]42 U.S.C. § 1973aa-1a(e).

[11]42 U.S.C. § 1973(b).

Section 2 does not require minorities to prove racial purpose, practices which were enacted or are being maintained for the purpose of discriminating on the basis of race would also be unlawful under the statute.

Q: How do you prove a violation of the results standard of Section 2?

The most important case interpreting Section 2 is *Thornburg v. Gingles*[12], in which the Supreme Court invalidated multi-member legislative districts in a redistricting plan adopted by North Carolina after the 1980 census. The Court identified three factors, known as the "*Gingles* factors," that are of primary importance in determining a violation of the statute: (1) whether "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) whether "the minority group . . . is politically cohesive," i.e., tends to vote as a bloc; and (3) whether "the majority votes sufficiently as a bloc to enable it - in the absence of special circumstances . . . usually to defeat the minority's preferred candidate."[13]

Q: How compact must a district be to satisfy Section 2 and the first Gingles factor?

The Supreme Court has said that a district need not be the winner "in endless 'beauty contests'" to meet the compactness standard of Section 2.[14] Instead, a district complies with Section 2 if it "is reasonably compact and regular, taking into account traditional redistricting principles such as maintaining communities of interest and traditional boundaries."[15]

There are various social science measures of compactness, but most courts have applied an intuitive, "eyeball" test, that is, if a district looks reasonably compact and is similar in shape to other districts drawn by the jurisdiction it is deemed compact within the meaning of Section 2 and the first *Gingles* factor.[16] Some courts have placed more emphasis on how a district would function in the political process, rather than on how it looks. The functional approach takes into account such things as transportation networks, media markets, the existence of recognized neighborhoods, etc., to determine whether it is possible to organize politically and campaign effectively in the district.[17]

Q: What is the make up of a majority-minority district?

Most courts have held that a majority means that the minority is 50% plus 1 of the voting age population (VAP) in a district on the theory that only those of voting age have the potential to elect candidates of their choice.[18]

Q: How does a court determine whether a minority is politically cohesive under the second Gingles factor?

In *Gingles* the court held that political cohesion can be shown by evidence "that a significant number of minority group members usually vote for the same candidates."[19] The Court also said that

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[12]478 U.S. 30 (1986).

[13]*Thornburg v. Gingles*, 478 U.S. at 50-1.

[14]*Bush v. Vera*, 517 U.S. 952, 977 (1996); See also *Clark v. Calhoun County*, Miss., 21 F.3d 92, 95 (5th Cir. 1994) (*Gingles* "does not require some aesthetic ideal of compactness").

[15]*Bush v. Vera*, 517 U.S. at 977.

[16]See, e.g., *Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995); *Cuthair v. Montezuma-Cortez, Colorado School Dist.*, 7 F.Supp. 1152, 1167 (D.Col. 1998).

[17]See, e.g., *Clark v. Calhoun County*, 21 F.3d at 95; *Sanchez v. State of Colorado*, 97 F.3d 1303, 1312 (10th Cir. 1996).

[18]See, e.g., *McNeil v. Springfield Park District*, 851 F.2d 937 (7th Cir. 1988); Magnolia Bar Ass'n, Inc. v. Lee, 994 F.2d 1143, 1150 (5th Cir. 1993).

[19]*Thornburg v. Gingles*, 478 U.S. at 56.

racial bloc voting and political cohesion could be established "where there is 'a consistent relationship between [the] race of the voter and the way in which the voter votes.'"[20] Most courts have applied a common sense rule that if a majority of minority voters vote for the same candidates a majority of the time the minority is politically cohesive.

Q: How pervasive must white bloc voting be to satisfy the third Gingles factor?

The third *Gingles* factor is satisfied if the majority votes sufficiently as a bloc to enable it "usually" to defeat the minority's preferred candidate.[21] The fact that some minority candidates may have been elected does not foreclose a Section 2 claim. Instead, in the words of the Supreme Court, where a challenged scheme "generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters."[22]

Q: Can two minority groups, such as African-Americans and Hispanics, ever be combined to form a majority-minority district for purposes of Section 2?

The Supreme Court hasn't resolved this issue,[23] but most courts have held that different minority groups can be combined provided they satisfy the *Gingles* factors.[24]

Q: Since we have a secret ballot, how is it possible to show racial bloc voting?

In *Gingles* the Court approved two widely used methods of proving racial bloc voting, extreme case (or homogeneous precinct) analysis, and ecological regression analysis.[25] Homogeneous precinct analysis looks at precincts predominantly (90% or more) of one race. If, for example, a black candidate gets most of the votes in the predominantly black precincts but few votes in the predominantly white precincts, the voting in those precincts is necessarily along racial lines. Ecological regression analysis, which is generally performed by experts in the field, looks at all the precincts to determine if there is a correlation between the racial makeup of the precincts and how votes are cast. It generates estimates of the percentages of members of each race who voted for minority candidates.

Q: Is it necessary to prove that voters are voting because of race?

No. The Supreme Court has held that "the reasons black and white voters vote differently have no relevance to the central inquiry of Section 2."[26]

Q: Which elections are the most important in proving racial bloc voting and in determining whether it is legally significant?

Every election in which a voter votes, e.g., a presidential preference primary, a statewide contest, a local school board election, tells us something about voter behavior and is therefore theoretically relevant in a vote dilution challenge. However, elections for the particular office at issue and those which

[20] Id. at 53 n.21.

[21] 478 U.S. at 51, 56.

[22] Id. at 76.

[23] *Growe v. Emison*, 507 U.S. 25, 41 (1993).

[24] See *Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

[25] Id. at 52-3.

[26] Id. at 63.

give the voters a racial choice are generally considered the most important in determining a Section 2 violation.[27]

Section 5 of the Voting Rights Act

Q: How does Section 5 work? Is Virginia covered by it?

Section 5 requires certain "covered" states to get federal approval, or preclearance, of their new voting laws or practices before they can be implemented.[28] All of Virginia is covered by Section 5.

Q: What voting changes are covered by Section 5?

The courts have interpreted Section 5 broadly to cover practices that alter the election laws of a covered jurisdiction in even a minor way.[29] Covered changes have run the gamut from redistricting plans,[30] to annexations,[31] to setting the date for a special election,[32] to moving a polling place.[33]

Q: Is Section 5 permanent?

No. Unlike Section 2, Section 5 was originally enacted as a temporary, five-year measure.[34] Section 5 was extended and expanded in 1970, 1975, and 1982,[35] and is currently scheduled to expire in 2007.[36]

Q: Does that mean minorities will lose the right to vote in 2007?

Absolutely not. Despite rumors to the contrary, even if Section 5 is not extended, the remaining provisions of the Voting Rights Act will remain in force and continue to safeguard the right to vote.

Q: How is preclearance obtained?

Preclearance can only be granted by the Federal Court in the District of Columbia in a lawsuit, or by the U.S. Attorney General in an administrative submission. Local federal courts have the power, and duty, to stop the use of unprecleared voting practices, but they have no jurisdiction to determine whether a change should be approved.[37] That decision is reserved exclusively for the District of Columbia court or

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[27] *Clark v. Calhoun County*, 21 F.3d at 97 ("elections involving the particular office at issue will be more relevant than elections involving other offices"); *RWTAAAC v. Sundquist*, 29 F.Supp.2d 448, 457 (W.D.Tenn. 1998) ("[b]ecause of the prevalence of endogenous [legislative] data, the court does not find the exogenous [county] elections to be particularly useful or necessary").

[28] 42 U.S.C. § 1973c. The determination of Section 5 coverage is made by the Attorney General and the Director of the Census. 42 U.S.C. § 1973b(b).

[29] *Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969).

[30] *Beer v. United States*, 425 U.S. 130 (1976).

[31] *City of Richmond v. United States*, 422 U.S. 358 (1975).

[32] *Henderson v. Harris*, 804 F.Supp. 288 (M.D.Ala. 1992).

[33] *Perkins v. Matthews*, 400 U.S. 379, 387-90 (1971).

[34] S.Rep. No. 295, 94th Cong., 2d Sess. 12 (1975).

[35] 28 C.F.R. § 51 Appendix.

[36] 42 U.S.C. § 1973b(a). Jurisdictions can escape or "bail out" from Section 5 coverage prior to its expiration, but the standards for doing so are stringent and few jurisdictions have bothered to try.

[37] *Allen v. State Board of Elections*, 393 U.S. at 555-56 n.19.

the U.S. Attorney General. Section 5 also places the burden of proof on the jurisdiction to show that a proposed voting change does not have a discriminatory purpose or effect.[38]

Q: What if a jurisdiction refuses to submit a voting change for preclearance?

Citizens have the right to bring suit in local federal court to block the use of unprecleared voting practices.[39]

Q: What standard do the District of Columbia Court and the U.S. Attorney General use in determining whether a proposed change has a discriminatory effect?

The Supreme Court has construed the discriminatory effect standard of Section 5 narrowly to mean retrogression.[40] That is, only those voting changes that make minorities worse off than they were under the preexisting practice or system (known as the "benchmark" for determining retrogression)[41] are objectionable under the effect standard.

Q: How do you determine whether a proposed change has a discriminatory purpose under Section 5?

As with the effect standard, the Supreme Court has construed the purpose standard of Section 5 narrowly to mean a purpose to retrogress. Thus, a voting change enacted with the express purpose of abridging minority voting strength would be objectionable only if the jurisdiction intended to make minorities worse off than they were before.[42]

Q: Can minorities participate in the Section 5 preclearance process?

Yes. The U.S. Attorney General's regulations allow, and encourage, minorities to participate in the preclearance process and submit information concerning the possible discriminatory purpose or effect of voting changes. In practice, the U.S. Attorney General is heavily dependent on information received from citizens in the communities effected by proposed voting changes in administering the statute.

Q: What is the procedure for making a Section 5 comment?

Section 5 comment letters can be phoned in or mailed to the Department of Justice, Washington, D.C. See page 24 for address and phone number. To learn more about the Section 5 process, you can log on the voting section's website at www.usdoj.gov/crt/voting.

Q: If a voting change has been precleared under Section 5 can it still be challenged under Section 2?

Yes. Even if a redistricting plan has been precleared under Section 5, it can still be challenged under Section 2 by a lawsuit in the local federal district court.[43]

The Shaw/Miller Cases

Q: What did the Supreme Court hold in Shaw v. Reno?

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[38] *McCain v. Lybrand*, 465 U.S. 236 (1984). A voting change has a discriminatory effect under Section 5 if it leads to a "retrogression" in minority voting rights, i.e., makes them worse off. Beer v. United States, 425 U.S. at 141.

[39] 42 U.S.C. §§ 1973j(d) and (f).

[40] *Beer v. United States*, 425 U.S. at 141.

[41] *Holder v. Hall*, 512 U.S. 874, 883-84 (1994) (the baseline for comparison in determining retrogression "is the existing status").

[42] *Reno v. Bossier Parish School Bd.*, 120 S.Ct. 866, 871 (2000).

[43] *Thornburg v. Gingles*; Major v. Treen.

In *Shaw v. Reno*,[44] decided in 1993, the Court ruled in favor of white voters who alleged that North Carolina's two majority black congressional districts were so bizarre in shape that they could only be understood as an attempt to segregate voters on the basis of race.

Q: Has the Court limited Shaw type claims to districts that were bizarrely shaped?

No. In *Miller v. Johnson*,[45] the Court held that Georgia's majority black Eleventh Congressional District was unconstitutional, not because of its shape, but because race was the "predominant" factor in drawing district lines, and the state "subordinated" its traditional redistricting principles to race without having a compelling reason for doing so.

Q: Did the Court in the Shaw and Miller cases establish special rules for white voters allowing them to challenge majority-minority districts?

Yes. First, the *Shaw/Miller* cases allow white voters to challenge majority-minority districts based solely on their shape. Second, in voting cases brought by blacks the Court has required the plaintiffs to prove that a challenged practice was adopted or was being maintained with a discriminatory purpose. [46] In the *Shaw/Miller* cases, the plaintiffs did not even claim, that the state's redistricting plans were enacted for the purpose of discriminating against white voters.[47] Third, in cases brought by blacks the Court had held that the plaintiffs had to show a personal, concrete injury.[48] In the *Shaw/Miller* cases, however, the Court dispensed with any requirement that the plaintiffs allege or prove that the challenged plans had diluted their voting strength or injured them in any way.[49]

Q: Is it still permissible to draw majority-minority districts?

Yes. The Court has invalidated majority black and Hispanic districts in some states,[50] but it has rejected challenges to such districts in others.[51] Governments are not only permitted to draw majority-minority districts, but may be required to do so to comply with the Voting Rights Act.

According to the Court, a legislature "will . . . almost always be aware of racial demographics," but it may not allow race to predominate in the redistricting process.[52] A state "is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interest."[53] A state may therefore "create a majority-minority district without awaiting judicial findings" if it has a strong basis in evidence for avoiding a Voting Rights Act violation.[54]

Q: Do majority-minority districts segregate voters?

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[44]509 U.S. 630 (1993).

[45]515 U.S. 900, 919-20 (1995).

[46]*Mobile v. Bolden*, 446 U.S. 55 (1980).

[47]*Shaw v. Reno*, 509 U.S. at 641-42.

[48]*Allen v. Wright*, 468 U.S. 737, 754, 756 (1984).

[49]*Shaw v. Reno*, 509 U.S. at 641.

[50]I.e., Districts 2 and 11 in Georgia (*Miller v. Johnson*, *Abrams v. Johnson)*, District 12 in North Carolina (*Shaw v. Hunt*, 517 U.S. 899 (1996)), and Districts 18, 29, and 30 in Texas (*Bush v. Vera*, 517 U.S. 952 (1996)).

[51]I.e., in California (*DeWitt v. Wilson*, 515 U.S. 1170 (1995), affirming, 856 F.Supp. 1409 (E.D.Cal. 1994)), and in Illinois *(King v. Illinois Board of Election*, 118 S.Ct. 877 (1998), affirming, 979 F.Supp. 582, 619 (N.D.Ill. 1996)). In *Lawyer v. Department of Justice*, 521 U.S. 567 (1997), the Court rejected a *Shaw* challenge to a majority black and Hispanic state legislative district in Florida.

[52]*Miller v. Johnson*, 515 U.S. at 916.

[53]Id. at 920.

[54]Id. at 994.

No. The majority-minority districts in the South created after the 1990 census, far from being segregated, were the most racially integrated districts in the country. They contained an average of 45% of non-black voters. No one familiar with Jim Crow could ever confuse the highly integrated redistricting plans of the 1990s with racial segregation under which blacks were not allowed to vote or run for office. Moreover, the notion that majority black districts are "segregated," and that the only integrated districts are those in which whites are the majority, is itself a racist concept. A constitutional doctrine that can tolerate only what is majority white in redistricting is surely a perversion of the equal protection standard of the Fourteenth Amendment.

Q: Do majority-minority districts stigmatize or harm voters?

No. There is no empirical evidence that majority-minority districts have stigmatized voters or caused them harm. The witnesses in the Georgia case testified at trial that the challenged plan had not increased racial tension, caused segregation, imposed a racial stigma, deprived anyone of representation,or guaranteed blacks congressional seats. The district court concluded that "the 1992 congressional redistricting plans had no adverse consequences for . . . white voters."[55] None of the plaintiffs in the *Shaw* type cases argued that they were directly harmed by the challenged plans. Their claimed injury was entirely theoretical and abstract.

Q: Do majority-minority districts increase racial tension?

There is no evidence that they do. The evidence tends to show, if anything, that the creation of highly integrated majority-minority districts has helped reduce white fears of minority office holding, and as a result may have had a dampening effect on racial bloc voting.

Q: Have majority-minority districts increased political opportunities for minorities?

Yes. In 1964 there were only about 300 black elected officials nationwide. By 1998 the number had grown to more than 8,858.[56] This increase is the direct result of the increase in majority-minority districts since under Voting Rights Act.[57]

Q: Are majority-minority districts still needed?

Yes. Prior to the 1996 elections, the only black candidate in this century to win a seat in Congress from a majority white district in the deep South states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas was Andrew Young. The number of blacks elected to state legislatures increased after the 1990 redistricting, but the increase was the result of the increase in the number of majority black districts.[58]

Given the persistent patterns of racial bloc voting over time in the South, the destruction of majority-minority districts, whether at the congressional or state and local levels, would inevitably lead to a decline in the number of minority office holders. It is premature to claim that the electorate is suddenly

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[55] *Johnson v. Miller*, 864 F.Supp. 1354, 1370 (S.D.Ga. 1994).

[56] Joint Center for Political and Economic Studies, Number of Black Elected Officials in the United States, by State and Office, January 1998.

[57] See Lisa Handley & Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations," in Quiet Revolution in the South 335 (Chandler Davidson & Bernard Grofman, eds. 1994) ("the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts").

[58] David Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts and the Evolving Party System in the South 46 (Joint Center for Political and Economic Studies, 1995).

color-blind or that majority-minority districts are no longer necessary to counter the effects of racial bloc voting.

Q: Is there any way to avoid a Shaw/Miller challenge?

Probably not. There will always be voters who are disgruntled over being put in a majority-minority district and who will be willing to go to court to challenge the plan. But there are things a legislative body can do to defeat a *Shaw/Miller* challenge if one is brought. They include: drawing districts that are reasonably compact; observing traditional redistricting principles; and establishing a record showing that the minority community has common interests, needs, and concerns.

A jurisdiction can also draw majority-minority districts if it has a reasonable basis in evidence for avoiding a Section 2 violation. That evidence would consist of the factors identified in *Gingles* and the legislative history of Section 2: geographic compactness; political cohesion; legally significant white bloc voting; a history of discrimination; the use of devices that enhance the opportunity for discrimination, such as majority vote requirements or anti-single shot provisions; whether the minority bears the effects of discrimination in such areas as education, employment and health, which hinders its ability to participate effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; and the extent to which minorities have been elected to public office in the jurisdiction.

A jurisdiction should make it clear, moreover, that it considered these factors at the time it adopted its redistricting plan. After-the-fact attempts to establish a basis in evidence for complying with Section 2 might be dismissed as being unrelated to the decision making process.

Q: Are minorities better off influencing the election of white candidates, rather than minority candidates whom they might prefer?

When it amended Section 2 of the Voting Rights Act in 1982, Congress provided that the right protected by the statute was the equal right of minorities "to elect" candidates of their choice.[59] As Congress recognized, a system in which the majority can freely elect candidates of its choice but in which blacks and other minorities can only influence the outcome of elections is not a true democracy.

Q: Did the creation of majority-minority districts have unintended political consequences by causing the Democratic party to lose control of Congress in 1994?

No. Most social science studies place the actual cost to Democrats of creating majority-minority districts at about a dozen seats in the house.[60] Given the fact that Democrats lost a total of 54 house seats in 1994 and that 24 were in states where there are no majority-minority districts, the party's loss of control of the house cannot be laid at the doorstep of majority-minority congressional districts. Democrats lost control of the U.S. Senate after the 1994 election, but since senators are elected statewide congressional redistricting could not have been the cause of the loss.

Q: Shouldn't redistricting be color blind?

In an ideal world where people didn't vote on the basis of race, perhaps. In the real world, states and local governments may and should consider race in redistricting for a variety of reasons--to overcome the affects of prior and continuing discrimination, to comply with the Fourteenth Amendment and the Voting Rights Act, or simply to recognize communities that have a particular racial or ethnic makeup to account for their common, shared interests. The Supreme Court has acknowledged that legislators are

[59]42 U.S.C. § 1973.

[60]Bernard Grofman & Lisa Handley, "1990s Issues in Voting Rights," 65 Miss. L. J. 205, 264 (1995).

always aware of racial information and the relationship between race and voting behavior.[61] It is far more honest to discuss and consider race openly than to pretend it is not a factor in reapportionment decision making.

Partisan Gerrymandering

Q: Can the party in control enact a plan to limit the political opportunities of another party?

In theory no. The Supreme Court held for the first time in 1986 that a plan which discriminated against a political party could be challenged under the Fourteenth Amendment.[62] Although the Court rejected the plaintiffs' claim, it indicated that a violation could be established by proof of intentional discrimination, an actual discriminatory effect, and that the system would "consistently degrade" the group's influence on the political process as a whole.[63]

Q: Have the courts invalidated many redistricting plans on the basis that they were partisan gerrymanders?

No. As a practical matter the standard of proof announced by the Court has proved to be almost impossible to meet. Only one reported case has invalidated an election plan on the basis that it was a partisan gerrymander, a plan involving judicial elections in North Carolina.[64] Moreover, in one of the *Shaw* type cases from Texas, the Court expressly held that "political gerrymandering" was not subject to constitutional scrutiny.[65]

VII. UNDERSTANDING RETROGRESSION*

Following release of the 2000 Census data, the Department of Justice expects to receive several thousand submissions of redistricting plans pursuant to the preclearance provisions in Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The Civil Rights Division has received numerous requests for guidance concerning the procedures and standards that will be applied during review of these redistricting plans. Many requests relate to the role of the 2000 Census data in the Section 5 review process and to the Supreme Court's decisions in *Shaw v. Reno*, 509 U.S. 630 (1993), and later related cases.

The ``Procedures for the Administration of Section 5 of the Voting Rights Act," 28 CFR Part 51, provide detailed information about the Section 5 review process. Copies of these Procedures are available upon request and through the Voting Section Web Site (http://www.usdoj.gov/crt/voting). This document is meant to provide additional guidance with regard to current issues of interest. Citations to judicial decisions are provided to assist the reader but are not intended to be comprehensive.

The Scope of Section 5

The Supreme Court has held that under Section 5, a covered jurisdiction has the burden of establishing that a proposed redistricting plan does not have the purpose or effect of worsening the position of minority voters when compared to that jurisdiction's ``benchmark" plan. *Reno v. Bossier Parish School*

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[61] *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 176 n.4 (1977) ("[i]t would be naive to suppose that racial considerations do not enter into apportionment decisions").

[62] *Davis v. Bandemer*, 478 U.S. 109 (1986).

[63] Id. at 132.

[64] *Republican Party of North Carolina v. Hunt*, 841 F.Supp. 722 (E.D.N.C. 1994).

[65] *Bush v. Vera*, 517 U.S. at 964.

Board, 120 S. Ct. 866, 871-72 (2000). If the jurisdiction fails to show the absence of such purpose or effect, then Section 5 preclearance will be denied by the Department of

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**Excerpts from "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, " Department of Justice, Office of the Assistant Attorney General, Civil Rights Division; Federal Register:*
1/ 18/01, Volume 66, Number 12,Notices,Page 5411-5414

Justice or the District Court for the District of Columbia.

The decision in the *Bossier Parish School Board* case addressed the scope of Section 5 review. Redistricting plans that are not retrogressive in purpose or effect must be precleared, even if they violate other provisions of the Voting Rights Act or the Constitution. The Department of Justice may not deny Section 5 preclearance on the grounds that a redistricting plan violates the one-person one-vote principle, on the grounds that it violates *Shaw v. Reno*, or on the grounds that it violates Section 2 of the Voting Rights Act. Therefore, jurisdictions should not regard Section 5 preclearance of a redistricting plan as preventing subsequent legal challenges to that plan by the Department of Justice. In addition, private plaintiffs may initiate litigation, claiming either constitutional or statutory violations.

Benchmark Plans

The last legally enforceable redistricting plan in force for a Section 5 covered jurisdiction is the ``benchmark'' against which a new plan is compared. See 28 CFR 51.54(b)(1). Generally, the most recent plan to have received Section 5 preclearance (or have been drawn by a federal court) is the last legally enforceable redistricting plan for Section 5 purposes. When a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a federal court has drawn a new plan and ordered it into effect, that plan replaces the last legally enforceable plan as the Section 5 benchmark. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981); *Texas v. United States*, 785 F. Supp. 201 (D.D.C. 1992); *Mississippi v. Smith*, 541 F. Supp. 1329, 1333 (D.D.C. 1982), 461 U.S. 912 (1983).

In *Abrams v. Johnson*, 521 U.S. 74 (1997), the Supreme Court held that a redistricting plan found to be unconstitutional under the principles of *Shaw v. Reno* and its progeny could not serve as the Section 5 benchmark. Therefore, a redistricting plan drawn to replace a plan found by a federal court to violate *Shaw v. Reno* will be compared with the last legally enforceable plan predating the unconstitutional plan. Absent such a finding of unconstitutionality under *Shaw* by a federal court, the last legally enforceable plan will serve as the benchmark for Section 5 review. Therefore, a jurisdiction is not required to address the constitutionality of its benchmark plan when submitting a redistricting plan and the question of whether the benchmark plan is constitutional will not be considered during the Department's Section 5 review.

Comparison of Plans

When the Department of Justice receives a Section 5 redistricting submission, several basic steps are taken to ensure a complete review. After the ``benchmark'' districting plan is identified, the staff inputs the boundaries of the benchmark and proposed plans into the Civil Rights Division's geographic information system. Then, using the most recent decennial census data, population data are calculated for each of the districts in the benchmark and proposed plans.

Division staff then analyzes the proposed plan to determine whether it will reduce minority voting strength when compared to the benchmark plan, considering all of the relevant, available information. Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any retrogression analysis, our review and analysis will be greatly facilitated by inclusion of additional demographic and election data in the submission. See 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior. Within

a particular jurisdiction there may be large differences between the rates of turnout among minority populations in different areas. Thus, a redistricting plan may result in a significant, objectionable reduction of effective minority voting strength if it changes district boundaries to substitute poorly-participating minority populations (for example, migrant worker housing or institutional populations) for active minority voters, even though the minority percentages for the benchmark and proposed plans are similar when measured by Census population data. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other information are important to assessing the effect of a redistricting plan. This information is used to compare minority voting strength in the benchmark plan with minority voting strength in the proposed plan.

The Section 5 Procedures identify a number of factors that are considered in deciding whether or not a redistricting plan has a retrogressive purpose or effect. These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are over concentrated in one or more districts; whether available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered; whether the proposed 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, whether the plan is inconsistent with the jurisdiction's stated redistricting standards. See 28 CFR 51.59; see also 28 CFR 51.56-51.58.

A proposed plan is retrogressive under the Section 5 ``effect'' prong if its net effect would be to reduce minority voters'' ``effective exercise of the electoral franchise'' when compared to the benchmark plan. See *Beer v. United States*, 425 U.S. 130, 141 (1976). The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarized voting is an important factor considered by the Department of Justice in assessing minority voting strength. A proposed redistricting plan ordinarily will occasion an objection by the Department of Justice if the plan reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.

Alternatives to Retrogressive Plans

If a retrogressive redistricting plan is submitted, the jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot be drawn. In analyzing this issue, the Department takes into account constitutional principles as discussed below, the residential segregation and distribution of the minority population within the jurisdiction, demographic changes since the previous redistricting, the geography of the jurisdiction, the jurisdiction's past redistricting practices, political boundaries such as cities and counties, and state redistricting requirements.

In considering whether less-retrogressive alternative plans are available, the Department looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction's redistricting principles. If it is determined that a reasonable alternative plan exists that is non-retrogressive or less retrogressive than the submitted plan, the Department will interpose an objection. Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person one-vote principle. See 52 FR 488 (Jan. 6, 1987). Similarly, preventing retrogression under Section 5 does not require jurisdictions to violate *Shaw v. Reno* and related cases.

The one-person one-vote issue arises most commonly where substantial demographic changes have occurred in some, but not all, parts of a jurisdiction. Generally, a plan for congressional redistricting

that would require a greater overall population deviation than the submitted plan is not considered a reasonable alternative by the Department. For state legislative and local redistricting, a plan that would require overall population deviations greater than 10 percent is not considered a reasonable alternative.

In assessing whether a less retrogressive alternative plan can be drawn, the compactness of a jurisdiction's minority population will be a factor in the Department's analysis. This analysis will include a review of the submitting jurisdiction's historical redistricting practices and district configurations to determine whether the alternative plan would (a) abandon those practices and (b) require highly unusual features to link together widely separated minority concentrations.

At the same time, compliance with Section 5 of the Voting Rights Act may require the jurisdiction to depart from strict adherence to certain of its redistricting criteria. For example, criteria which require the jurisdiction to make the least change to existing district boundaries, follow county, city, or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries may need to give way to some degree to avoid retrogression. In evaluating alternative plans, the Department of Justice relies upon plans that make the least departure from a jurisdiction's stated redistricting criteria needed to prevent retrogression.

Prohibited Purpose

In those instances in which a plan is found to have a retrogressive effect, as well as in those cases in which a proposed plan is alleged to have a retrogressive effect but a functional analysis does not yield clear conclusions about the plan's effect, the Department of Justice will closely examine the process by which the plan was adopted to ascertain whether the plan was intended to reduce minority voting strength. This examination may include consideration of whether there is a purpose to retrogress in the future even though there is no retrogression at the time of the submission. If the jurisdiction has not provided sufficient evidence to demonstrate that the plan was not intended to reduce minority voting strength, either now or in the future, the proposed redistricting plan is subject to a Section 5 objection.

VIII. WHO TO CONTACT FOR HELP

Virginia Organizations

American Civil Liberties Union of Virginia
Six North Sixth St., Suite 400
Richmond, Virginia 23219
Tel: (804) 644-8080
acluva@aol.com

Virginia State Conference, NAACP
1214 W. Graham Road
Richmond, Virginia
Tel: (804) 321-5678
statenaacp@aol.com

National Organizations

ACLU Southern Regional Office
2725 Harris Tower, 233 Peachtree Street, NE
Atlanta, GA 30303
Tel: (404)523-2721

Technical Assistance, litigation

Southern Regional Counsel
133 Carnegie Way, NW, Suite 900
Atlanta, GA 30303
Tel: (404)522-8791
Technical Redistricting Services

NAACP
4805 Mount Hope Drive
Baltimore, MD 21215
Tel: (410) 486-9180
Information, legal counsel

Southern Poverty Law Center
P.O. Box 548
Montgomery, AL 36104
Tel: (334)264-0286
Information, litigation

NAACP Legal Defense & Educational Fund
99 Hudson Street, Suite 1600
New York, New York
Tel: (800)221-7822
Technical Assistance, Litigation

Lawyers Committee for Civil Rights Under Law
1401 New York Avenue, NW, Suite 400
Washington, D.C. 20005
Tel: (202)662-8600
Litigation