QUICK AND DIRTY: THE RACIST NEW MISREADING OF THE VOTING RIGHTS ACT

Justin Levitt

Abstract

The role of race in the apportionment of political power is one of the thorniest problems at the heart of American democracy, and heading back to the Supreme Court. The Court has agreed to hear a case from Alabama involving the Voting Rights Act and the appropriate use of race in redistricting. But the litigation posture of the case has hidden the fact that Alabama is part of a disturbing pattern. States like Alabama have been applying not the Voting Rights Act, but a hamhanded cartoon of the Voting Rights Act — substituting blunt numerical demographic targets for the searching examination of local political conditions that the statute actually demands.

This short and timely Essay is the first to survey the ways in which multiple states in this redistricting cycle have substituted a rough sketch of the Voting Rights Act for the real thing. It argues that while the actual statute is tailored and nuanced, appropriately calibrated for a millennial approach to race relations, the demographic shorthand has at its heart a profound and pernicious racial essentialism. Replacing the real statute with the imagined one has a detrimental policy impact — but perhaps more sinister, it also creates unnecessary constitutional danger for the Voting Rights Act as a whole. Opponents of the Act may have finally found (or unwittingly stumbled upon) a successful strategy for hastening its demise: simply pretend that the statute does something else. Courts must see the cartoon for what it is.
The Voting Rights Act is often hailed as the most successful civil rights statute in American history. It helped provide meaningful access to the ballot for tens of millions of minority citizens who had previously been entirely shut out of the process. Through its application to redistricting, it then helped translate those ballots into meaningful allocations of political power. This year, 50-year retrospectives are in full bloom. And the fire hoses and church bombings of 1960s Birmingham are inevitably juxtaposed with the successful passage of the Voting Rights Act. It is no fluke that the movie *Selma*, a celebratory paean to the transformative power of the Act as both tool and symbol, was nominated for an Academy Award and captured the nation’s attention. With respect to race relations in the United States, these are evocative referents for some of our collective worst and some of our collective best.

At the same time, the sepia images of film and print and collective memory do a serious disservice to the statute. Yes, the Voting Rights Act was designed to be a powerful tool to combat the most hamhanded Bull Connor racism. But it was also designed to be, and has become, so much more than that.

In reality, the Voting Rights Act is profoundly millennial in its sophisticated approach to race relations, with rich layers of multifaceted and anti-essentialist nuance. Decades of Congressional and judicial tinkering have refined the law, particularly as applied to the drawing of

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electoral districts and the resulting apportionment of political power. And now, when properly applied, the statute threads a very narrow needle: it demands race-conscious remedies for race-based harm, but refuses to indulge racial presumptions along the way. That is, the statute recognizes the reality that people of similar racial or ethnic background sometimes have common political interests and that they sometimes face common political threats, but steadfastly refuses to assume that they do.

Liability under the Voting Rights Act is rigorously responsive to pragmatic local context, political culture, and electoral cleavages among both minority and majority populations; the presence or absence of vote dilution is relentlessly subject to proof or refutation with real data. Any remedies that the Act may require are similarly grounded in the facts on the ground. Under some local conditions, the Voting Rights Act has a profound impact on electoral decisions; under others, it demands only a little; under still others, it demands nothing at all. And the obligations imposed by the Voting Rights Act may be substantively different from town to town in central Texas, south Texas, and west Texas — or in Florida or Arizona or North Carolina or Wisconsin — because the statutory scheme understands that minority citizens are different, and inhabit different political environments, from town to town. The Voting Rights Act acknowledges attention to race and at the same time defiantly fights racial essentialism. This is the very model of a statutory scheme built for a 21st-century conception of race, ethnicity, and political voice.

And yet, there has emerged a troublesome tendency to understand the Voting Rights Act through the lens of a revisionist retrograde stereotype, treating the Act as if it demanded “safe” “black districts” and “Latino

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3 Sometimes, voting patterns are vigorously polarized by race in areas with troubling signs of past or present discrimination, and the Act asks that districts be drawn to preserve or establish real political opportunity for minority communities. Sometimes, patterns of polarization break down, and minority citizens do not have common objectives — or have common objectives but find success achieving those objectives in the regular tussle of politics, without specifically designed districts — and the Act allows those politics to flourish as is.

districts” wherever there are substantial minority populations. This approach, particularly notable in the redistricting of this decennial cycle, is as blunt and blunderbuss as the real statute is subtle and tailored. It inheres in the perception that the Act is a blunt mandate to tally and bundle minority voters into districts pegged at talismanic target percentages. That is, it treats the Act as a demographic imperative, deaf to local political conditions. It turns the Act from a refined and sophisticated piece of federal legislation into a cartoon.

In several states this cycle, entities drawing the lines — often but not always state legislators, and often but not always in regions with the most troublesome history of race relations — have substituted this shorthand version of the Voting Rights Act for the real thing. In some circumstances, the jurisdictions’ reliance on crude demographic targets overconcentrates real minority political power; in other circumstances, it underconcentrates real minority political power. In still other circumstances, the real political effects are unclear, because the lure of the demographic assumption means that nobody has bothered to examine the real political effects. But in every circumstance, the notion that it is possible to rely on a few census statistics to guarantee compliance with the obligations of the Voting Rights Act betrays the central statutory insight. By assuming that functional political cleavages can be measured purely by percentage of citizen voting-age population, the troublesome approach imposes racial stereotypes on a statute designed to combat them.

The misreading demonstrates a quality of law generally: at heart, law is a system of social ordering, and it therefore it is what societies decide that it is. Despite the Voting Rights Act’s constitutional grounding, statutory text, and legislative history aiming toward nuance, and the relative consistency of administrative and judicial interpretation reaffirming that nuance, state legislators in the states with the most troubling racial histories seem to either believe in a cartoon version of the Act or wish to will such a version into existence. And in informal communication networks, these legislators

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5 Sometimes these effects appear intentional, and sometimes they represent collateral damage.
likely propagate the misunderstanding to others. For substantial portions of
the regulated community, the statute has become nothing more than the
shorthand.

The misreading also has severe constitutional overtones. Though many
of the current Justices have serious misgivings about government attention
to race, the Court has also reluctantly acknowledged that we are not yet
“post-racial,” and that holistic and nuanced consideration of race may still
be an appropriate means to confront real racial injustice. In stark contrast
to that vision, the simplistic demographic cartoon of the Voting Rights Act
represents a conception of race consciousness that has repeatedly earned
the Court’s most emphatic ire.

Now, several cases are placing the new misreading of the Voting Rights
Act squarely before the Supreme Court. Several states purportedly sought
to comply with the Act when they redrew legislative district lines in 2011.
Yet their version of compliance appears premised purely on demographic
percentages — and thus, on demographic stereotype. In several of these
states, the legislative action was challenged in litigation. Redistricting cases
like these are often procedural oddities: when brought in federal court, they
are normally heard by a specially designated trial panel — and if appealed,

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discrimination and racially polarized voting are not ancient history. Much remains to be
done to ensure that citizens of all races have equal opportunity to share and participate in
our democratic processes and traditions; and § 2 must be interpreted to ensure that
continued progress.”); cf. Parents Involved in Community Schools v. Seattle School Dist.
No. 1, 551 U.S. 701, 787-89 (2007) (Kennedy, J., concurring in part and concurring in the
judgment) (recognizing a role for appropriately nuanced race-conscious decisionmaking in
the educational context); Marcia Coyle, Justice Ginsburg Laments “Real Racial Problem” in U.S.,
Nat’l L.J., Aug. 22, 2014,
http://www.nationallawjournal.com/id=1202667692557/Justice-Ginsburg-Laments-Real-
Racial-Problem-in-US (recognizing persistence of racial discrimination and government
power to take appropriate countermeasures).

7 See Parents Involved, 551 U.S. at 726-28 (plurality opinion) (harshly critiquing a school
district’s attempt to mirror its district’s demographic composition, purely for
critiquing a city’s attempt to grant contracts to minority-owned businesses based on blunt
numerical targets stemming from demographic assumptions).
they proceed directly to the Supreme Court. Moreover, in contrast to the Court’s discretion to hear or (far more frequently) reject petitions for writs of certiorari, the Supreme Court has an obligation to rule on each of these direct appeals. One is now before the Court. Others are coming.

The cases’ presence at the Court is both a threat and an opportunity. When the Court last confronted reality and cartoon with respect to the Voting Rights Act … it chose cartoon. In 2013, in *Shelby County v. Holder*, the Court purported to address a portion of the Act placing particular jurisdictions under a special preclearance regime requiring federal review of electoral changes. Ostensibly, the Court reviewed Congress’s judgment about which jurisdictions should be subject to the special preclearance procedure, and which should not. But in reality, the Court ruled on the validity of a simulacrum of the statutory provision, a popular image of the law rather than the actual law on the books. The new cases involve more of the substantive content of the Act, and a blunt approach to compliance with more pervasive consequences. If the Court again buys the hamhanded stereotype, the Act as a whole may be in jeopardy.

On the other hand, the pending cases also offer opportunity. If the Court focuses on the actual legislation at hand, it should be able to distinguish the real statute’s approach from that of its fictionalized retrograde cousin. Proper focus on local nuance and meaningful political power — as precedent demands — can restore the Voting Rights Act to a vehicle for fighting both racial discrimination and racial essentialism.

This short Essay proceeds in three sections. Part I explains the Voting Rights Act and its constitutional context: the way that the real statute is

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8 The procedure calls for a three-judge trial court, composed of two federal trial judges and one federal appellate judge; decisions are then appealed directly to the Supreme Court, without an intermediate appeal or a petition for certiorari. 28 U.S.C. § 1253, §2284.


11 133 S. Ct. 2612 (2013).

12 See infra text accompanying notes 20-25.

designed to function. Part II then investigates the strange prominence in recent redistricting of a cartoon version of the Act that ignores the tailored nuance built into the statute. Part III explains why the simulacrum is not merely wrong, but also dangerous: it may yield guidance for decisionmakers that is more administrable, but it does so only at the cost of constitutionally impermissible essentialist assumptions. These shortcuts are both unlawful and unnecessary.

I. THE CONSTITUTION AND THE VOTING RIGHTS ACT

The Supreme Court has interpreted the Constitution’s Fourteenth Amendment to prevent government from treating people differently primarily based on their race, without an especially good reason. In 1993, the Court made clear that this approach applied to certain forms of redistricting as well. More specifically, when race is the predominant and overriding reason for drawing either a plan as a whole or a particular district within that plan, that use of race must be narrowly tailored to a compelling government interest. The final caveat is important, but too often forgotten: a predominant focus on race in the drawing of districts is constitutionally suspect, not constitutionally invalid. The difference between the two depends on a state’s good reason and nuanced execution: on ensuring that, as with other suspect classifications, a state is proceeding based on real need and not overbroad generalization or stereotype.

In that precise space sits the Voting Rights Act. The Voting Rights Act of 1965, long lauded as perhaps the most successful example of

14 Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411, 2419 (2013).
18 For a longer explanation of the Voting Rights Act’s substantive provisions and its interaction with the constitution, see Justin Levitt, Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act, 46 U.C. DAVIS L. REV. 1041, 1047-69 (2013); Levitt, Section 5 as Simulacrum, supra note 13, at 170-73.
American civil rights legislation, is the signature product of Congress’s enumerated power to enforce the Fourteenth and Fifteenth Amendments. Though the court has never directly held that compliance with the VRA is a sufficient reason for a state to take direct action on the basis of race, a parade of Justices have opined or presumed that it suffices.

The privileged position of the Voting Rights Act is sensible. In two different provisions with substantial impact on redistricting, the VRA seeks to remedy past intentional discrimination and prevent present subordination where the risks of new or continued intentional discrimination are greatest.

Section 5

The higher-profile provision is based on section 5 of the Act. It established a regime of preclearance, under which jurisdictions of particular concern may not enforce any election-related change unless permitted to do so either by a federal court or by the U.S. Department of Justice. In the 2011 cycle of redistricting, this regime primarily applied to those jurisdictions where racial discrimination caused radically low democratic participation in the 1960s and 70s, and which had failed in the intervening years to demonstrate a record of minority engagement sufficiently improved to “bail out” of coverage. Preclearance also governed

19 U.S. CONST. amend. XIV, § 5; id. amend. XV, § 2.


21 Technically, a jurisdiction subject to a preclearance requirement may seek a declaratory judgment from the federal court or may seek administrative preclearance from the Department of Justice. For jurisdictions choosing the administrative path, a decision is considered to be precleared if the Department of Justice fails to object within 60 days from the date of a complete submission. 42 U.S.C. §1973c(a). Any jurisdiction may seek a judicial declaratory judgment, whether the Department of Justice has objected or not. Id.

22 42 U.S.C. § 1973b. This coverage determination was passed (and repeatedly renewed) with a sunset provision; Congress renewed coverage most recently in 2006, under the same terms. Fannie Lou Hamer, Rosa Parks, Coretta Scott King, César E. Chávez, Barbara C. Jordan, William C. Velásquez, and Dr. Hector P. Garcia Voting Rights Act

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jurisdictions that had been “bailed in” to coverage by a federal court, after a specific finding of intentional discrimination. That is, the hallmark of the preclearance regime in the last redistricting round is that it applied only to jurisdictions with an insufficiently attenuated connection to intentional discrimination.

Preclearance itself in the last redistricting round rested on two substantive standards. First, jurisdictions had to prove that an electoral change was not motivated by the intent to discriminate. Second, jurisdictions had to prove that an electoral change would not have the effect of denying or abridging the right to vote on account of race or language minority status. This latter effects-based standard has been interpreted by the Supreme Court to mean that a proposed election-related change may not be precleared if it leaves a community of minority voters worse off with respect to their “effective exercise of the electoral


After Shelby County, and until new legislation establishes a new primary coverage formula, the only jurisdictions required to preclear election-related changes are those that have been “bailed in.” See infra text accompanying note 23.

23 42 U.S.C. § 1973a(c). Relatively few jurisdictions had ever been “bailed in” under this provision, in part because of the comparatively expansive primary coverage of the preclearance regime. During the last redistricting cycle, only Buffalo County, SD, Charles Mix County, SD, and the Village of Port Chester, NY, were subject to preclearance requirements through bail-in. See Consent Decree, Kirkie v. Buffalo County, Case No. 03-cv-03011 (D.S.D. Feb. 12, 2004); Consent Decree, Blackmoon v. Charles Mix County, Case No. 05-cv-04017 (D.S.D. Dec. 4, 2007); Consent Decree, United States v. Village of Port Chester, Case No. 06-cv-15173 (S.D.N.Y. Dec. 21, 2009). Since then, courts have been asked to issue bail-in orders against several other jurisdictions, including Louisiana, North Carolina, and Texas; all such cases are still pending. See Hall v. Louisiana, No. 3:12-cv-00657 (M.D. La.) (Louisiana); N.C. State Conference of the NAACP v. McGrory, No. 1:13-cv-00658 (M.D.N.C.) (North Carolina); Perez v. Perry, No. 5:11-cv-00360 (W.D. Tex.) (Texas); Petteway v. Galveston County, TX, No. 3:13-cv-00308 (S.D. Tex.) (Galveston County); Terrebonne Parish Branch NAACP v. Jindal, No. 3:14-cv-00069 (M.D. La.) (Terrebonne Parish).

24 42 U.S.C. § 1973c(a), (c).

25 Id. § 1973c(a).
franchise” than they had been under the prior policy; the standard is known as “retrogression.”

There are several ambiguities in the retrogression standard, particularly as applied to redistricting; the ambiguities persist in part because redistricting is generally decennial, judicial preclearance is a rarity, and the combination gives courts few opportunities to construe the governing statute. 

For purposes of this Essay, two ambiguities are most significant. Both relate to a statutory “ clarification” made by Congress in 2006. Three years earlier, the Supreme Court had construed section 5 in a way permitting covered jurisdictions to trade minority voters’ control of a few districts for minority influence over, but not control of, a larger area. Congress responded, amending the statute to specify that any change diminishing the ability on account of race or language minority status of a community to elect their preferred candidates of choice would amount to an unlawful abridgement. The amendment made it clear that a covered jurisdiction could not reconfigure a district in which a minority community had the demonstrated ability to elect their preferred candidates of choice in such a way as to remove that ability.

That clarity left (at least) two ambiguities. First, the statute is written in one direction: it specifies, in direct response to the Supreme Court, that diminishing a minority community’s ability to elect candidates of choice in a covered jurisdiction is to be considered unlawful retrogression. The statute does not state, however, that this is the only conduct that may constitute retrogression. It may well be that a diminution in the effective exercise of the franchise even without an impairment of a pre-existing ability to elect is also retrogressive.

27 See Levitt, supra note 18, at 1063. Indeed, 38 years after the enactment of a provision prohibiting diminishment of the effective exercise of the electoral franchise, the Court explained that “we have never determined the meaning of ‘effective exercise of the electoral franchise.’” Georgia v. Ashcroft, 539 U.S. 461, 479 (2003).
28 See id., 539 U.S. at 481-84.
30 Id.
31 See Levitt, supra note 18, at 1062.
Second, the statute did not specify whether a diminution in the ability to elect was to be measured within a particular district, as well as in the total number of districts yielding reliable minority electoral power. That is, it seems straightforward to conclude that if a minority community had the reliable ability to elect candidates of choice in three districts, redrawing the lines such that the community could reliably elect candidates of choice in only two districts would diminish the community’s ability to elect candidates of choice. But it is less clear whether the statute also protected a particular level of reliable victory within a district: if a minority community had the reliable ability to elect candidates of choice by overwhelming margins within a given district, did the statute bar any plan that reduced the likely margin of victory in that district, even if it left the minority community still reliably in control of the election outcome?  

32 Such an interpretation could lead, perversely, to reduced minority electoral power, as overpacked “safe” districts leach minority voters from surrounding areas.  

The more likely interpretation of the 2006 Amendment to the Voting Rights Act, understood as a reaction to Georgia v. Ashcroft, seems to allow jurisdictions to draw districts that reduce minority power within a district as long as they maintain the minority community’s ability to elect candidates of choice within that district. In Georgia v. Ashcroft, the Court discussed two different ways of preserving a minority community’s ability to elect candidates of choice: one involving a “certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice,” and one involving “a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.” Georgia, 539 U.S. at 480 (2003). And the Court made clear that “[s]ection 5 does not dictate that a State must pick one of these methods of redistricting over another.” Id.  

The Court then distinguished both of those options from two other indicia of electoral success: drawing influence districts, “where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process,” id. at 482, and maintaining the leadership positions within the legislature for representatives of districts with large minority communities, id. at 483-84. It characterized these influence districts and positions of legislative leadership as alternative means of assessing electoral power, factors “in addition to the comparative ability of a minority group to elect a candidate of its choice.” Id. at 482 (emphasis added). By focusing on the ability to elect, Congress manifested its intent to preclude these third and fourth options from supplanting the first two: drawing influence districts or maintaining leadership positions for particular representatives as a substitute for districts in which the minority community could elect candidates of choice. But because either of the Court’s first two options preserve the community’s ability to elect candidates of choice, it appears that
Even with unresolved issues like those above, what was not ambiguous is the relentlessly pragmatic approach of a proper retrogression inquiry. The 2006 Amendments to the Voting Rights Act did not overturn the Supreme Court’s understanding that assessing the effective exercise of the electoral franchise — and those policies that could diminish it — is an exercise focused on real political power and not merely math, and therefore highly dependent on local circumstances and context, including comparative levels of voter registration, turnout, and polarization. “No single statistic provides courts with a shortcut to determine whether a voting change retrogresses from the benchmark.” The tally of voting-age citizens within a district by race or language minority status does not alone reveal whether the community has suffered a meaningful diminution in the effective exercise of the franchise.

The courts’ focus on the pragmatic impact of a change on the ground in assessing retrogression is entirely consistent with the approach of the Department of Justice. DOJ Guidance on retrogression in the redistricting context had consistently emphasized the nuanced, contextual assessment of changes to the functional exercise of the franchise:

either would satisfy the retrogression inquiry Congress established. The only court to have considered the matter thus far in the redistricting context seems to have agreed with this reading of the Act. Texas v. United States, 887 F. Supp. 2d 133, 145-46 (D.D.C. 2012) (three-judge court), vacated on other grounds by 133 S. Ct. 2885 (2013). The Department of Justice has adopted a similar stance. See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Dep’t of Justice Feb. 9, 2011) (“In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.”).


34 Cf. In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 626-27 (Fla. 2012)(construing the Florida state constitution’s retrogression provision, and concluding that “[b]ecause a minority group’s ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number under Florida’s minority protection provision. . . . To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment.”).

35 The vast majority of changes in covered jurisdictions were reviewed by the DOJ and not the courts, and so for the life of the Voting Rights Act, the DOJ had been primarily responsible for evaluating retrogression.
In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department’s view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact . . . the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.36

A federal court noted that this guidance, promulgated in 2011, is in this respect “consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades.”37

This is all in keeping with the preclearance regime’s careful avoidance of racial essentialism and stereotype. In establishing the jurisdictions to be covered by the preclearance requirement, the statute provided a mechanism for bailout, so that jurisdictions that no longer warranted especially close review could be dropped from the regime.38 And in establishing the conditions for retrogression — the conditions warranting a substantive objection — the statute demands review of whether and how minority communities actually effectuate electoral power, locality by locality. Relying on census data to determine retrogression would require assumptions about the voting patterns of racial or ethnic groups based on nothing other than their race or ethnicity. The courts and administrative agency tasked with preventing retrogression make no such assumptions.

36 Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Dep’t of Justice Feb. 9, 2011); see also id. at 7471-72 (reviewing additional factors).


Section 2

The other provision of the Voting Rights Act with primary impact on redistricting is commonly known as “section 2,” and it shares the same nuanced, functional approach and aversion to essentialism. Section 2 applies nationwide, preventing the inequitable dilution of minority communities’ voting power where alternative districts might otherwise allow minorities to maintain an effective opportunity to elect candidates of choice.39

Section 2 establishes a threshold to test where district lines might be responsible for depriving a minority community of the equal opportunity for electoral success: to invoke the statute, minority communities must be sufficiently large and sufficiently cohesive to provide a meaningful opportunity to elect candidates, and the remainder of the surrounding electorate must be sufficiently polarized to consistently defeat minority voters in the area.40 The first component tests whether minorities would have meaningful opportunity if the lines were appropriately drawn; the second tests whether minorities would be deprived of that opportunity if the lines were drawn without solicitude.

Still, not every lost opportunity amounts to a violation of section 2: the statute further instructs that dilution is to be tested “in the totality of circumstances.”41 Courts have consistently analyzed this totality through the lens of the “Senate factors”: factors listed in the Senate Judiciary report accompanying the amendment of the Voting Rights Act in 1982.42 These Senate factors include elements like a history of official discrimination in voting or in other areas that affect the voting process, or troublesome signs of current discriminatory attitudes.43 In general, they amount to “danger

39 Id. § 1973.
40 Collectively, these threshold elements are known as “Gingles conditions,” after the case establishing them. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).
43 Id. In addition to the Senate factors, courts will also consider in the totality of circumstances the degree to which minority communities have achieved rough proportionality of control jurisdiction-wide. Gingles, 478 U.S. at 77 (opinion of Brennan,
signs” of enhanced risk that either intentional discrimination on the basis of race or language minority status, or the legacy of such discrimination, is interacting with the placement of districts to fuel the deprivation of minority opportunity.\textsuperscript{44}

\textsuperscript{44} Section 2, as we know it, is also the product of a disagreement between Congress and the Supreme Court. In 1980, the Court construed then-existing text of section 2 to precisely mirror constitutional prohibitions on racial discrimination, preventing the drawing of district lines only upon sufficient proof of discriminatory intent. Mobile v. Bolden, 446 U.S. 55, 60-61 (1980) (plurality opinion). This set a rather high evidentiary bar, and when Congress amended the Voting Rights Act in 1982, it clearly intended to afford relief from dilutive practices without requiring plaintiffs to offer the same degree of proof present in a constitutional claim of discriminatory intent. See Voting Rights Act Amendments of 1982, § 3, Pub. L. No. 97-205, 96 Stat. 131 (1982) (changing “No [procedure] shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color” to “No [procedure] shall be imposed or applied by any State or political subdivision \textit{in a manner which results in a denial or abridgment} of the right of any citizen of the United States to vote on account of race or color,” and defining the violation in terms of the totality of circumstances) (emphasis added); see also S. Rep. No. 97-417, at 27 (1982), \textit{reprinted in} 1982 U.S.C.C.A.N. 177, 205 (“The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of [sic] practice in order to establish a violation.”).

As a consequence, section 2 as amended has often been referred to as an “effects test” or a “results test.” This shorthand is an unfortunate misnomer, see United States v. Blaine County, Montana, 363 F.3d 897, 909 (9th Cir. 2004), because it may imply that section 2 prohibits practices with merely a disparate impact on minority voters. Section 2 has not been construed in such a manner. See Smith v. Salt River Project Agricultural Improvement and Power Dist., 109 F.3d 586, 595 (9th Cir. 1997). Instead, and based largely on the demand for an examination of the totality of the circumstances, courts have generally insisted on some sort of tie to intentional discrimination, past or present, or the enhanced risk of such discrimination. See Christopher S. Elmendorf & Douglas M. Spencer, \textit{After Shelby County: Getting Section 2 of the VRA to Do the Work of Section 5}, at text accompanying notes 108-113 (forthcoming 2015), \url{http://ssrn.com/abstract=2414652} (reviewing courts’ varying interpretations of the totality of circumstances, and concluding
This test for liability is designed to render equitable opportunity for minority communities without indulging in essentialism. A racial or ethnic minority’s electoral (and geographic or socio-cultural)\(^45\) cohesion must be proven, not assumed.\(^46\) A racial or ethnic majority’s cohesion must be proven, not assumed. The consistent tendency of the majority to defeat candidates preferred by the minority in the absence of appropriate race-conscious relief must be proven, not assumed. The presence of enhanced risk that intentional discrimination has played a role in rendering opportunity unequal must be proven, not assumed. All of these factors must be proven in the context of local politics, without importing assumptions from national trends.\(^47\) Demographics alone — numerical tallies of voting-age citizens of a particular race or ethnicity — are insufficient to establish any one of these elements, much less the conditions for overall liability. As with section 5, section 2 resists back-of-the-envelope demographic simplification.\(^48\) The establishment of a

\(^{45}\) See League of United Latin American Citizens v. Perry, 548 U.S. 399, 433-34 (2006) (“We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes. The mathematical possibility of a racial bloc does not make a district compact.”).

\(^{46}\) See, e.g., Miller v. Johnson, 515 U.S. 900, 920 (1995) (“A State may not ‘assum[e] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”) (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).


\(^{48}\) The final clause of section 2 — which I call the “proportionality proviso” — represents yet another way in which the statute stands against racial essentialism. The final sentence states that in establishing vote dilution based on the totality of the circumstances, “[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” 42 U.S.C. § 1973(b).

This clause is apparently much misunderstood. Some Justices have apparently understood it to mean that section 2 of the Voting Rights Act does not establish a right of minority citizens to proportional representation of their interests. See, e.g., Holder v. Hall,
violation “depends upon a searching practical evaluation of the past and present reality,” connected to “an intensely local appraisal of the design and impact of the contested electoral mechanisms.”49 “No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.”50

Indeed, demographic shortcuts are authorized in only one aspect of section 2: the requirement, as a condition of proving dilution under an unfavorable districting scheme, that plaintiffs show that cohesive minorities form a sufficiently large portion of a district-sized population to exercise control if the lines were favorably drawn.51 For years, groups of minority citizens had argued that they had functional political control of a district-sized population even without comprising at least 50% of that population, and the Court had repeatedly assumed without deciding that such control might suffice in meeting the threshold condition.52 In 2009, the Court confronted the issue directly, and a plurality determined in Bartlett v.

512 U.S. 874, 927 (Thomas, J., concurring in the judgment); id. at 956 (Ginsburg, J., dissenting); Thornburg v. Gingles, 478 U.S. 30, 84 (O’Connor, J., concurring in the judgment). But “[b]y its terms, this language addresses the number of minorities elected to office, not the number of districts in which minorities constitute a voting majority. These two things are not synonymous, and it would be an affront to our constitutional traditions to treat them as such. The assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter.” De Grandy, 512 U.S. at 1027 (Kennedy, J., concurring in part and concurring in the judgment).

That is, the actual text of the proportionality proviso is less a strike against proportionality than a strike against essentialism. Congress did not wish to indulge the unwarranted assumption that an equal opportunity for cohesive groups of minority citizens would yield a proportional number of minority legislators, or that the lack of the former could be proven by the lack of the latter, when minority voters might well prefer candidates of different races.


50 De Grandy, 512 U.S. at 1020-21.

51 This is generally known as a piece of the first “Gingles condition.” See supra note 40.

Strickland that section 2 is unavailable to a minority community comprising less than 50% of a district-sized electorate.\(^{53}\)

The decision was premised in part on a theoretical approach to dilution: the plurality reasoned that dilution of a minority community’s opportunity to elect candidates on account of race or language minority status had to be assessed based on the potential power of the minority community alone.\(^{54}\) It was premised in part on a desire to improve the judicial administration of cases.\(^{55}\) And it was premised in part on a perceived need to limit the circumstances in which jurisdictions devoted primary attention to considerations of race.\(^{56}\)

It is crucial to recognize, however, that Bartlett’s 50.1% threshold affects only the predicate conditions for section 2 liability. The Court did not determine that the same demographic shorthand was appropriate for constructing a remedy once vote dilution is established.

A remedial rule pegging districts drawn to satisfy section 2 at a 50.1% minority electorate may seem a mirror image of Bartlett — but it is actually not an equivalent. That is because the strict demographic threshold in Bartlett adopts a preference for administrability, but only when doing so entails no essentialism. Put differently, a rule requiring 50.1% for liability purposes does not depend on assuming that minority or majority community members all have the same political interests. From the government jurisdiction’s perspective, the 50.1% threshold alerts decisionmakers that they should inquire further into the need to consider race: it signals a potential issue. And from the perspective of minority communities, the 50.1% threshold cuts off some otherwise valid claims that minority communities have been deprived of control. But after Bartlett, liability under the Voting Rights Act still depends on the local electoral nuances of minority engagement, just as it did before.\(^{57}\) There remains no tolerance for essentialist assumptions in establishing a valid claim.

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\(^{53}\) 556 U.S. 1, 18 (2009) (plurality opinion).

\(^{54}\) Id. at 15.

\(^{55}\) Id. at 18.

\(^{56}\) Id. at 21-22 (noting that a contrary interpretation “would result in a substantial increase in the number of mandatory districts drawn with race as the predominant factor motivating the legislature’s decision.”) (internal quotation marks and citation omitted).

\(^{57}\) Id. at 39-40 (Souter, J., dissenting).
The same cannot be said for a presumptive 50.1% majority-minority remedy (or worse, drawing districts at 50.1% without any attention to whether liability is plausible). Section 2 liability depends on evidence that a minority community has been inequitably deprived of an effective opportunity to elect candidates of choice; a remedy must, in consequence, ensure that the electoral laws give that minority community a meaningfully effective opportunity to elect its preferred representatives. This normally involves state action based primarily on race, which demands contextualized nuance and precision. The Court has recognized this need, acknowledging that “it may be possible for a citizen voting-age majority to lack real electoral opportunity.”\footnote{League of United Latin American Citizens v. Perry, 548 U.S. 399, 428 (2006).} Assuming that a 50% minority district does the job entails just the opposite: engaging essentialist assumptions about how minority and majority electors will vote based on race or language minority status alone.\footnote{Indeed, a district pegged at 50% based on demographics alone assumes either that the minority and majority electorates are perfectly cohesive — that, for example, black or Latino citizens universally vote for one type of candidate, whites for another — or that they are not cohesive to exactly the same degree. Real analysis of electoral patterns may confirm or refute these suppositions: the point is only that the suppositions cannot stand on their own.} The Voting Rights Act is designed to avoid, not impose, such shorthand.

II. DEMOGRAPHIC DETERMINISM AND RACIAL ESSENTIALISM IN THIS REDISTRICTING CYCLE

In this redistricting cycle, several jurisdictions seem to have cast aside the Voting Rights Act’s careful tailoring to local political conditions and aversion to racial essentialism. Instead, they seem to have relied on hamhanded demographic targets — a belief, real or professed, that the Voting Rights Act simply requires hitting a predetermined percentage of minorities in a predetermined number of districts. These jurisdictions deliberately sought to maintain supermajority quotas of minority voting-age or citizen voting-age population ostensibly to avoid retrogression, or to peg districts at a 50% minority-voter threshold ostensibly to satisfy section 2, without the searching local electoral analysis required to determine if those
targets were statutorily necessary or sufficient. According to this cartoon version of compliance, all a redistricting entity needed to know was that District A had to be 72% black in 2011 because it was 72% black in 2010 or 2001 … or that District B needed to be 50% Latino because a lot of Latinos lived in the area.\(^{60}\) That may represent a shorthand gloss on the Voting Rights Act’s obligations that is pervasive in the social circles of legislators and their consultants, but it does not do justice to the design of the statute on the books.

**Alabama**

In Alabama, the State’s mechanical reliance on demographics when purportedly attempting to satisfy its obligations under the Voting Rights Act were most visible in the context of preclearance and section 5. As the federal court that reviewed the redistricting noted, those drawing the lines did so with the design to ensure, as a preclearance strategy, that “the new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census.”\(^{61}\) Simple percentages — which the dissent characterized as a “district-specific racial quota”\(^{62}\) — were repeatedly equated with the population’s ability to elect.\(^{63}\)

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\(^{60}\) See, e.g., Holder v. Hall, 512 U.S. 874, 903-06 (1994) (Thomas, J., concurring in the judgment) (articulating the approach of the simulacrum).

\(^{61}\) Ala. Legis. Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1247 (M.D. Ala. 2013); see also id. at 1276 (“[T]he Committee tried to match the percentages of the total black population in majority-black districts to the percentages in the 2001 districts based on the 2010 Census numbers.”); id. at 1297 (“To avoid a potential violation of section 5 of the Voting Rights Act, [the map-drawing consultant] also added enough contiguous black populations to maintain the same relative percentages of black populations in the majority-black districts.”); id. at 1310 (“The Legislature preserved, where feasible, the existing majority-black districts and maintained the relative percentages of black voters in those majority-black districts. . . . Using the 2010 Census data, the percentages of the black voting-age populations in the majority-black districts under the Acts remain relatively constant when compared to the 2001 plans.”).

\(^{62}\) Id. at 1314 (Thompson, J., dissenting).

\(^{63}\) The dissent quotes the deposition of one of the co-chairs of the Redistricting Committee, focusing rigidly on total population as the (sole) measure of retrogression within a district:
It is therefore no surprise that lines were moved (and precincts split) accordingly, to capture minority voters that could meet the targets. There is no mention of any investigation of cohesion or political efficacy to conclude that the percentages targeted were in fact necessary to abide by Voting Rights Act requirements. There is no attempt, that is, to discern whether maintaining demographic consistency was necessary to maintain political efficacy.\textsuperscript{64}

This appears to be consistent with past practice, if not legal obligation: the federal court reviewing Alabama’s 2012 redistricting noted that “[i]n 2001, the Democrat-controlled Legislature repopulated the majority-black districts by shifting thousands of black people into those districts to

Q. So you did not want the total population of African–Americans to drop in [SD 23]?
A. That’s correct.

Q. Okay. And if that population dropped a percentage, in your opinion that would have been retrogression?
A. Yes, sir.

Q. So if — And I’m not saying these are the numbers, but I’m just saying if Senator Sanders’ district had been 65 percent African–American, if it dropped to 62 percent African–American in total population, then that would have been retrogression to you?
A. In my opinion, yes.

Q. And so that’s what you were trying to prevent?
A. Yes.

\textit{Id.} at 1324 (Thompson, J., dissenting).

The court majority, it appears, made the same mistake. \textit{See id.} at 1310 (“[T]he Alabama Legislature correctly concluded . . . that it could not significantly reduce the percentages of black voters in the majority-black districts because to do so would be to diminish black voters’ ability to elect their preferred candidates.”).

\textsuperscript{64} There was some evidence that two African-American incumbents requested, during the redistricting process, that their districts be drawn with at least 62\% African-American population. \textit{Id.} at 1246. But there is little indication that the requests were made because a 62\% African-American population threshold is necessary in those areas, in light of local mobilization and political cleavages, to afford an equal ability for the minority community to elect candidates of choice — rather than because a 62\% African-American population would amount to comfortable political safety for the incumbents.
maintain the same relative percentages of the black population in those districts.”

Indeed, the court’s frequent and prominent citation of allegedly similar behavior welcomed by the litigation plaintiffs ten years earlier, in a different partisan direction, implies that turnabout is fair play. In truth, the presence of unjustified dependence on demographics in an earlier cycle does not provide legal safe harbor for unjustified dependence on demographics now.

California

In some states, those drawing the lines relied exclusively on demographics to assess Voting Rights Act compliance, despite contrary warnings of counsel. In California, however, where a new independent citizens’ commission was tasked with drawing congressional and state legislative lines, counsel seems to have provoked the exclusive emphasis on demographics. This position of legal advisor was so important that initiative proponents embedded in the governing statute a requirement that at least one counsel to the commission be chosen based on “demonstrated extensive experience and expertise in implementation and enforcement of the federal Voting Rights Act of 1965.” And yet, at least in meetings open to the public, the counsel selected consistently assessed minority populations’ electoral opportunities in purely demographic terms, against the prevailing interpretation of the Department of Justice.

65 Id., 989 F. Supp. 2d at 1242 (emphasis added).
66 See, e.g., id., 989 F. Supp. 2d at 1301-02; id. at 1302 (“We refuse to apply a double standard that requires the Legislature to follow one set of rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it.”).
67 See, e.g., infra text accompanying notes 90-98 (Texas).
68 Some Commissioners apparently sought to consider more pragmatic indicators of minority communities’ voting power, but it is unclear whether those Commissioners ever received the data necessary to make relevant informed decisions. Levitt, supra note 18, at 1091.
69 Cal. Gov’t Code § 8253(a)(5).
70 See, e.g., CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF SACRAMENTO BUSINESS MEETING VOL. 1, at 21 (June 1, 2011) (“If I understand the question correctly, it is -- better to restate it, it would be is there a percentage population that is lower than what is needed to have an ability to elect, so that effectively you don’t need to
Florida

Florida’s state constitution contains provisions, newly enacted in 2010, that mirror the substantive protections of the Voting Rights Act: “[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.”71 The Florida Supreme Court has construed these provisions to provide the same functional protections for electoral power — dependent not merely on demographics, but on real political circumstances on the ground — as their federal counterparts.72

In practice, part of Florida’s process appeared to live up to this standard, and part did not. The Florida Supreme Court praised the state House for its attention to factors beyond demographics alone in designing districts to preserve minority political opportunities.73 The Senate did not fare as well. The Court specifically noted that the Senate appeared to rely

worry about a reduction in that percentage in a new district? So, first, I want to clarify that the term “ability to elect” is a term of art in Voting Rights Act cases, and it really references a 50 percent plus majority.”); id. at 26 (“So, the easy choice is always maintain the percentages of the benchmark district because then, essentially, your job has been done.”); CAL. CITIZENS REDISTRICTING COMM’N, TRANSCRIPT OF NORTH RIDGE BUSINESS MEETING 12-14 (May 27, 2011) (“Now, you need to know that the phrase “ability to elect” is a term of art. And it essentially refers to the condition where you have a majority, so 50 plus percent that can elect. Because if you do, then at least theoretically you can elect candidates of your choice. . . . And then in particular, if there’s a situation where the C.V.A.P., the citizen voting age population, exceeds 50 percent or might exceed 50 percent, then I think we need to take extra care to make sure that whatever the new district is meets that same level, the – of the ability to elect.”).

71 Fla. Const. art. III, §§ 20(a), 21(a).

72 See In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 625-26 (Fla. 2012).

73 Id. at 645. At least, the Florida Supreme Court offered its praise in the context of the limited record before it; the court’s review was limited to a 30-day period. Id. at 598. In particular, the court placed more emphasis on the sufficiency of the record to evaluate claims of retrogression — and of the state House’s attention to factors beyond demographics alone in the context of retrogression — than in the context of the state’s provision mirroring section 2 of the federal Voting Rights Act. See id. at 645.
on demographics and disclaimed any interest in further information, despite DOJ guidance to the contrary; it approached the drawing of state Senate districts ostensibly to ensure that new districts did not diminish the ability of minorities to elect representatives of their choice, “without reference to election results or voter-registration and political party data.”74 That is, the state Senate ostensibly drew districts to preserve minority political power with information about headcount, but without information about the real components of minority political power.

**North Carolina**75

North Carolina is certainly no stranger to undue racial stereotyping in the redistricting context: it gave rise to the *Shaw v. Reno*76 line of cases establishing the constitutional cause of action for the unjustified predominant use of race in drawing district lines, and a decade of litigation that followed.77 The Supreme Court firmly instructed the legislators of North Carolina — and legislators elsewhere around the country — that the Equal Protection Clause did not permit districts built predominantly in order to achieve racial targets, if such districts were not actually necessary to achieve a sufficiently compelling state interest.78

This cycle’s redistricting seems to indicate that North Carolina needs a reminder. Despite the *Shaw* Court’s emphatic statement that the conditions for section 2 liability “never can be assumed,”79 the 2011 North Carolina legislature seems to have built majority-minority districts once again on demographics. Per a state court reviewing the legislature’s plan: “the General Assembly acknowledges that it intended to create as many VRA

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74 Id. at 656.

75 Full disclosure: I have joined an amicus brief of election law professors to the North Carolina Supreme Court, which is currently reviewing a lower court’s evaluation of the state’s latest redistricting map. *See* Brief of Amici Curiae Election Law Professors Guy-Uriel Charles et al., Dickson v. Rucho, Case No. 201PA12-2 (N.C. Oct. 11, 2013), http://redistricting.lls.edu/files/NC%20dickson%2020131011%20amici%20election.pdf.


77 Id. at 642.

78 Id. at 653-57.

79 Id. at 653.
districts [sic] as needed to achieve a ‘roughly proportionate’ number of Senate, House, and Congressional districts as compared to the Black population in North Carolina,” and that “it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population.” That is, the legislature set a target number of districts based on the state’s proportion of African-American population, and determined that it would pack each of those target districts at least half-full of African-American adults, without ever determining for each district if local electoral patterns created the statutory responsibility to hit a predetermined 50% racial target.  

South Carolina

The evidence of pervasive demographic determinism is less clear in South Carolina than in some of the other states evaluated here, but there are nevertheless disturbing indications of an overly blunt approach to the Voting Rights Act. Before redistricting, African-American Representative Mia McLeod represented a district in which about 35% of the electorate was African American. In the course of the redistricting process, and without any pertinent request from her (or, presumably, from constituents of whom she was aware), she was apparently told that the chairman of the relevant legislative subcommittee was “working to get your BVAP (black


81 It does appear that the legislature had before it ample evidence of polarized voting through the relevant areas of North Carolina, and it certainly had ample evidence of a general history of racial discrimination (and a continuing legacy of that discrimination). Id. app. A *80. What it lacked, though, is any evidence that existing district structures were failing to allow minority voters an equal opportunity to elect candidates of choice, and that it was necessary to move minority voters into districts to meet a 50% voting-age African-American population threshold in order to remedy the ostensible dilution.

82 Representative McLeod was then known by her married name, Mia Butler Garrick. See Richland Lawmaker Not Afraid to Stir the Pot, THE STATE, Dec. 16, 2012.

83 Affidavit of the Honorable Mia Butler Garrick ¶ 2, Backus v. South Carolina, Case No. 3:11-cv-03120 (D.S.C. Feb. 22, 2012) (Doc. 147). I am not aware of a specific finding presented in the case that Rep. McLeod either has been or has not been the candidate of choice of her African-American electorate.
voting age population) up in your District, but we’ve got to tweak it some
more to get it just right.” She was apparently later told that “the lawyers”
were advising legislators that increasing the BVAP of the district was
required. The district was eventually drawn with a 52% African-American
voting age population, without any political or electoral analysis indicating
that minority candidates of choice would regularly be defeated in a district
that was less packed.

This lawyers’ advice was clarified in South Carolina’s legal filings,
responding to an assertion of impermissible racial gerrymandering. The
Speaker of the South Carolina House of Representatives claimed that it was
“legally necessary for the General Assembly to create majority-minority
districts” in areas “when the Gingles conditions were present” — that
“anything less” than a “numerical majority of the protected racial group”
“will not satisfy the mandate of Gingles.” And the lawyers apparently
believed that these conditions involved “whether a minority group can
form a majority in a single-member district; whether the minority group is
politically cohesive; and whether there is racial bloc voting.” That is,
wherever there are large pockets of African-American voters, if there is any
degree of racial polarization, the state sought to pack voters into districts
that were at least 50% minority — without any attention to whether the
candidates of choice of the minority community already had an equal
opportunity to win elections. That is, demographic thresholds prevailed
without any analysis of the political conditions indicating either dilution or
its absence.

84 Id. ¶ 8.
85 Id. ¶ 9.
86 Id. ¶ 10. Additional testimony claimed that the legislative committee refused to draw any
district that had a black voting-age population reduced from its benchmark, no matter
whether the functional ability to elect remained constant. See Rep. Bakari Sellers Trial
Transcript at 26, 29-32, Motion for Relief from a Judgment and Order exh. B, Backus v.
South Carolina, Case No. 3:11-cv-03120 (D.S.C. Aug. 29, 2013) (Doc. 223).
87 Post-Trial Memorandum of Defendant Robert W. Harrell, Jr. at 4, Backus v. South
88 Id. at 7.
89 Id. at 9.
Texas

Texas drew districts in 2011 that are still the subject of litigation three years later, despite an intervening 2012 plan governing elections going forward. The 2011 plan presents a vivid example of demographic determinism. Despite contrary legal advice that map drawers had received from nonpartisan staff, the architects of the Texas plan apparently considered their legal responsibilities complete, for purposes of preclearance under the Voting Rights Act, if they merely maintained “demographic numbers of protected districts at their benchmark levels.”

In late 2011, Texas went to court seeking an order of preclearance, contending that its district plans were neither retrogressive nor constructed with discriminatory intent. And the State maintained the demographically deterministic position in litigation. Given a benchmark plan with a certain number of “districts in which Blacks make up forty percent of the voting-age population” or a certain number of districts in which “Hispanics make up fifty percent of the citizen voting-age population,” Texas claimed that a new plan maintaining the same number of districts with the same demographic criteria would necessarily be nonretrogressive, without any

90. See Perez v. Texas, Case No. 5:11-cv-00360 (W.D. Tex.).

91. Whether the 2011 plan was predicated upon discriminatory intent, in violation of the Fourteenth Amendment, remains relevant for a determination whether Texas may be “bailed in” by a federal court to a renewed preclearance requirement under the Voting Rights Act. 42 U.S.C. § 1973a(c); see also Order, Perez v. Texas, No. 11-CA-360 (W.D. Tex. Sept. 6, 2013) (three-judge court) (explaining the relevance of evidence with respect to the intent behind maps passed in 2011, for claims pending after new maps had been put in place).


93. See Texas, 887 F. Supp. 2d at 203-04, 232. It appears that the Texas map drawers considered as “demographic factors” not merely race and ethnicity, citizenship, and age, but also registration status. Id. (noting the consideration of the proportion of registered voters with Hispanic surnames). The drawers did not apparently consider other political history — including turnout, levels of cohesion and polarization, the size of districts and access to funds, or other factors — to be relevant to any responsibilities under the Voting Rights Act.
need to know more about the affected population. That is, Texas claimed that the only necessary measurement of an effect on minority voters’ ability to elect candidates of choice is a basic headcount.

While Texas’s legal claim was that the Voting Rights Act requires only cursory maintenance of a demographic plateau, the actions of those in charge of the redistricting effort show that they were amply aware that factors other than demographics are integral to a minority community’s “ability . . . to elect their preferred candidates of choice.” The three-judge district court adjudicating the State’s preclearance submission found that

[i]t]he mapdrawers consciously replaced many of the district’s active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of CD 23’s Anglo citizens. In other words, they sought to reduce Hispanic voters’ ability to elect without making it look like anything in CD 23 had changed. See, e.g., Defs.’ Ex. 304 (email from Eric Opiela, counsel to Texas House Speaker Joe Straus, to mapdrawer Gerardo Interiano in November 2010 urging Interiano to find a metric to “help pull the district’s Total Hispanic Pop[ulation] and Hispanic CVAPs up to majority status, but leave the Spanish Surname [Registered Voter] and [turnout numbers] the lowest,” which would be “especially valuable in shoring up [CD 23 incumbent] Canseco,” [who was not the preferred candidate of the Hispanic voters in the area] . . . . We also received an abundance of evidence that Texas, in fact, followed this course by using various techniques to maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness. . . . Texas’s protestations that the district has remained functionally identical are weakened first by the mapdrawers’ admissions that they tried to reduce the effectiveness of the

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Hispanic vote and then, more powerfully, by evidence that they did.\textsuperscript{96}

The court rejected the Texas methodology, starkly critiquing the reliance on demographic data alone.\textsuperscript{97} Indeed, the court emphasized that “[s]everal districts in the proposed plans show that population statistics alone rarely gauge the strength of minority voting power with accuracy. For example, . . . Congressional District 23 and House District 117 were selectively drawn to include areas with high minority populations but low voter turnout, while excluding high minority, high turnout areas. Such districts might pass a retrogression analysis under Texas's population demographics test . . . , even though they were engineered to decrease minority voting power.”\textsuperscript{98}

\textbf{Virginia}

As in South Carolina, the evidence of demographic determinism in the redistricting process is less robust than in some of the other states mentioned — but there are still a few indications of reasons for concern.

\textsuperscript{96} Texas, 887 F. Supp. 2d at 155.

This tactic recalls one of the most notorious maps of the 1981 redistricting cycle: the Georgia plan that mildly increased the African-American voting-age population of Georgia’s lone majority-minority congressional district, while ensuring that the district retained a substantial Anglo majority of registered voters so that it would be unlikely to perform as a meaningful opportunity district for the African-American electorate. Busbee v. Smith, 549 F.Supp. 495, 498-99 (D.D.C. 1982). The purported architect of the plan, the chair of Georgia’s House redistricting committee, explained his decisions in part by proclaiming, “I don't want to draw nigger districts.” \textit{Id. at} 501.

\textsuperscript{97} Texas, 831 F.Supp.2d at 260 (“We find that a simple voting-age population analysis cannot accurately measure minorities’ ability to elect and, therefore, that Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans.”); \textit{id. at} 262 (“[P]opulation demographics alone will not fully reveal whether minority citizens' ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished under a proposed plan within the meaning of Section 5.”).

\textsuperscript{98} Texas, 887 F. Supp. 2d at 140 n.5.
Virginia seems to have adopted the same approach to preclearance seen above: the state apparently viewed as definitional retrogression any decrease in the percentage of minority voters within a district that had, as a benchmark, the ability to elect candidates of choice — whether electoral realities on the ground actually contributed to a diminished ability to elect or not. Virginia designated the Third Congressional district as a district in which minorities had the ability to elect candidates of choice. And in legal filings defending District 3 against a claim of racial gerrymandering, the state claimed that it had “more than a strong basis in evidence to conclude that Section 5 prohibited any reduction in District 3’s BVAP, which could diminish minority voters’ ability to elect their candidates of choice by making a safe black district less safe.”

Indeed, it appears that the legislature acted on this belief: the author of the plan allegedly stated that he drew the challenged Third District by looking “at the census data as to the current percentage of voting age African American population in [CD 3] and what that percentage would be in the proposed lines to ensure that the new lines that were drawn for [CD 3] . . . would not have less percentage of voting age African American population under the proposed lines . . . that exist under the current lines under the current Congressional District.”


Although it is clear that section 5 precluded the replacement of a district in which the minority community was able to elect candidates of choice with a district in which the community did not have such an ability, there is an open question about whether section 5 actually precluded making a “safe” black district “less safe,” while still retaining a meaningful ability to elect candidates of choice. See supra text accompanying note 32 and note 32.

It is true that a reduction in the proportion of African-American voters within a district could diminish the community’s ability to elect a candidate of choice — but that depends entirely on a functional assessment of local political engagement. Because the General Assembly never conducted such an analysis, it merely equated demographics with destiny. A federal court reviewing the General Assembly’s work recognized the error, critiquing the “legislature’s use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns.” Unsupported assumptions about a racial community’s political allegiance or efficacy do not meet constitutional muster.

The examples above do not purport to comprise a complete list of those states engaging in an unduly blunderbuss approach to Voting Rights Act compliance. Absent litigation over the issue, it is difficult to assess a state’s performance, simply because legislatures’ true considerations in drawing redistricting maps are often less than transparent.

But by the same token, the list above is also relatively confined. Many states with specific responsibilities under the Voting Rights Act are undoubtedly doing the hard work necessary under the correct approach, and some courts are admirably correcting the states that get it wrong.


103 For example, although there was some dispute over the accuracy of the political efficacy analysis in Louisiana, it at least appears that the legislature considered minority electoral power beyond mere demographics. That is, the legislature appears to have considered whether majority-minority districts actually offer an effective ability to elect candidates of choice. See, e.g., Statement of Anticipated Minority Impact at 3-4, 9-19, Louisiana Pre-clearance Submission for H.B. 1, att. 6, ftp://legisftp.legis.state.la.us/06%20Statement%20of%20Minority%20Impact/Minority%20Impact.pdf.

It is important to emphasize that just as considering the wrong factors does not itself guarantee failure to abide by the substantive requirements of the Voting Rights Act, see infra text accompanying note 105, considering the right factors (but in the wrong way) does not guarantee success.

104 See, e.g., In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 656 (Fla. 2012); Texas v. United States, 887 F. Supp. 2d 133, 203-04, 232 (D.D.C. 2012)
The unjustifiably blunt approach to compliance with the Voting Rights Act is by no means universal. But the examples above show that it is sufficiently prevalent to be worrisome.

One final caveat with respect to the states above is worth mentioning. The claim that the states above incorrectly went about the process of complying with the Voting Rights Act is not itself an assessment that they did not actually comply. It is entirely possible for a jurisdiction to get the


In two other states, courts seem to bear the primary blame for demographic shortcuts of a different, albeit related, nature. In Arkansas, the politician commission charged with drawing state legislative lines seemed to acknowledge — at least in a legal defense of the lines that it had already drawn — that local political realities and not merely demographics would be important in fulfilling its obligations under section 2 of the Voting Rights Act. See, e.g., Governor Beebe, Attorney General Dustin McDaniel, and the Arkansas Board of Apportionment’s Trial Brief 35-48, Jeffers v. Beebe, Case No. 2:12-cv-00016 (E.D. Ark. May 2, 2012) (Doc. No. 75). The court reviewing that commission’s plan, however, focused on demographics, finding that any district drawn with a majority of minority voting-age citizens necessarily complied with a section 2 obligation. Jeffers v. Beebe, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012). That is, under the court’s logic, in areas with section 2 obligations, a jurisdiction need only draw a district with a minority citizen voting-age population of 50.1% or more to immunize itself from challenge. Presumably, the court’s fixation on demographics alone would refuse to find section 2 liability even for a majority-minority district intentionally drawn in light of local political realities to prevent the minority community from achieving an equal opportunity to elect candidates of choice, and actually having that effect (as in the allegations in Texas, see supra text accompanying notes 95-98).

In New Mexico, after the governor vetoed a legislative redistricting plan, the courts were tasked with drawing district lines. With elections impending, proceedings were “extremely expedited,” particularly after the trial court’s initial lines were appealed, and returned on remand. Maestas v. Hall, 274 P.3d 66, 70 (N.M. 2012). One issue on appeal concerned a Hispanic population in the eastern portion of the state; the New Mexico Supreme Court considered presumptive proof of dilution established, and directed the trial court to determine, on remand, “whether the relevant population is an effective Hispanic citizen voting-age population.” Id. at 74. However, on remand, the trial court “interpret[ed] the remand from the Supreme Court to require that District 63 remain as close as possible to its present configuration and that, at a minimum, the percentage of the Hispanic voting age population not be decreased.” Decision on Remand 16, Egolf v. Duran, Case No. D-101-cv-2011-02942 (N.M. 1st Judicial Dist. Ct., County of Santa Fe Feb. 27, 2012). Only a focus on demographics alone would cause the court to equate the two distinct standards.
analysis wrong but the answer — at least the statutory answer — right. A state may have misgauged the appropriate way to comply with section 5 and yet still drawn lines that happened to avoid retrogression; a state may have incorrectly attempted to comply with section 2 and yet still drawn lines that provide an equal opportunity for minority voters to elect candidates of choice. Those questions are entirely different from the main argument of this Essay, which is that the improper use blunt demographics alone — whether it happens to yields a result that complies with the statutory responsibility or not — involves a misunderstanding of the Voting Rights Act with decidedly serious constitutional implications.

III. RATIONALES AND CONSEQUENCES

There are several potential explanations for the apparent prevalence of demographic determinism in the states above. The first is simple mistake: a real misunderstanding about what the Voting Rights Act requires. The cartoon version of the Act, demanding nothing more than matching raw demographic percentages to a readily available target, is relatively easy to grasp, and relatively easy (if incorrect) for counsel or fellow legislators to communicate. Its requirements may simply have made the rounds within formal or informal networks in digest form, as any law is inevitably distilled to a rough approximation by those who are not subject-matter experts.

105 For example, the Department of Justice precleared every statewide plan submitted through the administrative preclearance mechanism in this redistricting cycle. See U.S. Dep’t of Justice, Status of Statewide Redistricting Plans, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last visited Aug. 8, 2014). The mere fact that the DOJ granted preclearance, however, does not itself indicate that the states’ approach to complying with section 5 was correct — only that the result happened to hit the mark.

106 This is explanation, not excuse. It is reasonable to expect the public to have an overly broad, overly blunt understanding of regulation. But it is also reasonable to expect the directly regulated community to be a bit more steeped in the nuances of actual regulatory requirements. That latter expectation seems even more reasonable when the directly regulated community is, as with the Voting Rights Act, largely a community of legislators themselves professionally tasked with ostensibly understanding and issuing complex regulation. And it is even more reasonable still to expect legislators with profound expertise in elections and profound self-interest in the election process to pay more attention to the nuances of a statute that concerns electoral structures.
And conceiving of voters as fungible tokens without the likelihood of political variation within a racial or ethnic group may be a comparatively natural mode of analysis for officials used to thinking about race or ethnicity in essentialist ways.

The second explanation is administrability. Building districts upon raw demographic percentages is not only easy to grasp, but comparatively easy to administer. Map drawers who understand the nuanced electoral assessment required by the Voting Rights Act may nevertheless be tempted to apply the demographic shortcut based on limited time, budget, or attention — or some combination of the three. Even when these pressures do not amount to lawful justification to substitute a shorthand for a statute, the pressures are nevertheless both real and powerful. Similarly, because cases alleging the unconstitutional use of race are difficult to prove and difficult to win, line drawers may think that they are generating less litigation risk by overcorrecting, using race in an unjustifiably coarse manner to create at least the facial impression that there is no substantial Voting Rights Act liability. In reality, reliance on a target percentage alone remains unlawful, but perhaps line-drawers believe that the hamhanded approach can more easily be defended in court.

A third potential explanation is pretext for partisan political gain. Incumbents may seek to further personal or partisan political objectives by hiding behind the public cover of the cartoon of the Voting Rights Act: claiming, in essence, that “we built these districts in this way not because we want to, but because we have to.” In some cases, an unnecessary raw demographic target may serve as the excuse to overpack a district with cohesive minority voters, well beyond the level needed to actually comply with the Act’s mandates; such a district may contribute to the “safety” of the existing representative while bleaching the perceived threat of minority voting power in neighboring areas. This was, for example, one of the

107 See Easley v. Cromartie, 532 U.S. 234, 241-42 (2001) (firmly re-emphasizing that the burden of proof on the plaintiffs in such cases is “a demanding one.”).

108 Cf. Johnson v. De Grandy, 512 U.S. 997, 1019-20 (1994) (“Finally, we reject the safe harbor rule [necessarily insulating states with rough proportional control from liability under section 2 of the Voting Rights Act] because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity.”).
concerns expressed by a state judge evaluating Florida’s most recent redistricting.\textsuperscript{109} In other cases, an unnecessary raw demographic target may serve as the excuse to draw a district that appears to be under a minority community’s control, but is actually designed to perform for an opponent. A federal court believed this sort of strategy to be the impetus for at least some districts in the 2011 Texas map — including, notably, the same district 23 struck down by the Supreme Court in 2006 for the very same reason.\textsuperscript{110}

A final potential explanation also involves pretext for partisan political gain, but of a different and darker nature. In South Carolina, a state representative related the following anecdote in a sworn affidavit submitted in federal court:

As the conversation turned to redistricting, Rep. Viers told me that race was a very important part of the Republican redistricting strategy. Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. He said the long-term goal was a future where a voter who sees a ‘D’ by a candidate’s name knows that the candidate is an African-American candidate. . . . Then he

\begin{itemize}
  \item \textsuperscript{109} In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So.3d 597, 693 (Fla. 2012) (Perry, J., concurring) (“It concerns me that under the guise of minority protection, there is—at the very least—an appearance that the redistricting process sought to silence the very representatives of the people the Legislature indicates it is trying to protect. For example, during floor debate one such representative, Senator Arthenia Joyner, rose in opposition to the redistricting plan, stating: “I believe that [the reapportionment plan] was prepared in violation of Florida’s Redistricting standards. Specifically I believe the Legislature is poised to use the pretext of minority protection to advance an agenda that seeks to preserve incumbency and pack minority seats in order to benefit a particular party.”).
  
  \item \textsuperscript{110} Compare Texas, 887 F. Supp. 2d at 155, with League of United Latin American Citizens v. Perry, 548 U.S. 399, 424-25 (2006); see also League of United Latin American Citizens, 548 U.S. at 440-41 (noting the “use of race to create the facade of a Latino district” that was actually designed “to protect [incumbent] Congressman Bonilla from a constituency that was increasingly voting against him.”).
\end{itemize}
chuckled and said, ‘Well now, South Carolina will soon be black and white. Isn’t that brilliant?’

It is not necessary to subscribe to this latter view of the rationale for drawing districts based on demographics alone in order to find the practice disturbing. All of the explanations above fail to justify a practice that is intentionally discriminatory if pretextual, and unduly dependent on essentialist assumptions if not. As most courts have thus far recognized, the Voting Rights Act does not require, and the Constitution does not permit, shortcuts based solely on blunt minority population targets. Congress has demanded, and is constitutionally entitled to demand, more.

Indeed, by failing to account for real local electoral behaviors, the legislators operating on demographic assumptions are subscribing to a retrograde conception of race relations that undermines a good deal of what the Voting Rights Act was designed to accomplish. It betrays the very heart of the Act, which acknowledges that race and ethnicity are complex and nuanced concepts without fixed political consequences. Those drawing district lines based on demographic targets alone are conforming only to a dangerously essentialist cartoon. Courts should not hesitate to remind them that they should be paying more attention to the actual statute on the books.