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REDISTRICTING: DETERMINING THE JUDICIALLY ACCEPTABLE USE OF RACE IN THE REDISTRICTING PROCESS

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To what extent can line drawers, legislators, and grassroots organizers, consider race in the redistricting process? This paper will analyze the permissible use of race in the redistricting process. In doing so, it will discuss recent Supreme Court cases and the necessity to comply with federal law, specifically the Voting Rights Act. Statewide redistricting in California will be presented as an example.

INTRODUCTION

After each decennial Census, jurisdictions that use districts for elections must redistrict—redraw their districting plans to accommodate demographic changes and equalize district populations. The 2010 Census showed that the nation's population increased almost ten percent in the last decade.¹ California continues to reign as the most populous state, while Wyoming has the fewest residents. During the last decade, Texas gained the highest number of residents, with an increase of over four million residents, and Nevada

experienced the largest proportional increase of its population at nearly thirty-five percent.

These numbers are important for several reasons. The Census count informs the distribution of funding for transportation, utilities, education, health services and many other important expenses vital to life in this country. In addition, the Census determines the apportionment or distribution of United States House of Representative seats and plays a significant role in redistricting them, as well as state and local governing bodies.

This critical process of redistricting is fraught with political and legal landmines. In the early 1960's, the United States Supreme Court established the "one person, one vote" rule as a basic redistricting principle. To rectify decades of neglect that led in some cases to grossly malapportioned districts, the Supreme Court required legislative and congressional districts to have equal populations, i.e.,

1. According to the 2010 Census figures, the United States population increased approximately 9.7 percent to 308,745,538 residents. Census.gov

2. See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

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that all districts for the same office contain the same or similar number of people.² While Congressional districts must contain as equal a population as practicable, the level of equality for state and local district populations may vary more, in some cases up to 10%, depending on state and local requirements.³

Along with equalizing population, redistricting has become an important opportunity to ensure that the electoral process does not discriminate against voters of color by limiting their ability to elect candidates of choice. The Voting Rights Act has been interpreted to apply to how districts are drawn, meaning redistricting officials must consider the impact on racial and protected language minority groups. On the other hand, a line of Fourteenth Amendment cases principally in the 1990s, suggests that consideration of race in redistricting has some limitations. Moreover, the reauthorization of the VRA in 2006, as well as VRA cases in the 2000s, raise questions about the current state of the consideration of race in redistricting. This paper will address these issues and discuss how redistricting officials can comply with VRA requirements to provide electoral opportunities for all racial groups without running foul of Constitutional requirements. Statewide redistricting in California will be presented as an example.

Race and Redistricting: The Voting Rights Act (VRA)

The Voting Rights Act prohibits discrimination on the basis of race or certain protected language minority statuses (Asian, Native American, Alaskan Native, or Spanish heritage). In redistricting, the VRA prohibits plans that have a discriminatory purpose—are adopted with an intent to discriminate—or discriminatory result—provide protected voters with less opportunity to elect a candidate of choice than other voters. In practice, it prohibits districting plans that “crack” or divide minority populations in such a way that they cannot constitute a majority in a district, as well as plans that “pack” or over concentrate minority voters into fewer districts than they might constitute.

The VRA has been heralded as one of the most effective pieces of legislation in this country’s history and has vastly improved voting rights for voters of color. The VRA contains two primary enforcement provisions involved in redistricting: Section 2, which prohibits discrimination in voting based on race, color or language minority status, and Section 5, which requires certain jurisdictions to obtain “preclearance” or permission from the federal government prior to using any new voting practice or procedure. Both Sections 2 and 5 are important in the pursuit of equal electoral opportunity. The Supreme Court has found that legislators may consider race when drawing districts in order to comply with Sections 2 and 5 of the VRA.

A. Section 2 and the Redistricting Process

Section 2 prohibits racial or language minority discrimination in any voting standard, practice or procedure, including redistricting plans. It is a permanent provision of the VRA and applies nationwide to all jurisdictions that conduct elections. In 1982, in response a Supreme Court case interpreting Section 2 to prohibit only intentional

3. See *White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973).

4. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

discrimination,⁴ Congress amended Section 2 to establish firmly that the VRA prohibits not only intentional discrimination, but also voting practices that have a discriminatory effect on protected groups. Section 2 prohibits voting laws or practices that deny minority voters an equal opportunity “to participate in the political process and to elect representatives of their choice.”⁵

Section 2 allows voters to challenge racially discriminatory districting practices that dilute their ability to participate equally in the electoral process. In a 1986 opinion, the Supreme Court established the framework for vote dilution claims.⁶ As a threshold matter, voters must satisfy a three part inquiry, often referred to as the “*Gingles* preconditions”: geographic compactness, political cohesion, and legally significant white bloc voting.⁷ If plaintiffs satisfy these preconditions, courts must consider the totality of the circumstances to determine, considering both past and contemporary examples of discrimination, whether the political process is equally open to minority voters.

As we will see, states must have a compelling reason to draw a district using race as a primary factor. The Supreme Court has found adherence to the VRA to be a compelling reason.⁸ Accordingly, when redistricting, jurisdictions may consider race in order to avoid diluting voting strength in violation of Section 2. This means maintaining, or where necessary, creating majority-minority districts that meet the *Gingles* criteria, i.e., geographic compactness, political cohesiveness and white bloc voting.

While Section 2 can require the creation of majority-minority districts, the Supreme Court

The VRA prohibits voting practices with discriminatory purpose or effect, including redistricting plans that dilute minority voting strength.

recently found that it does not require abandoning other redistricting principles in order to create less than majority-minority districts (called crossover districts) where minority voters are less than 50% of the population but can elect candidates of their choice with some “cross over” voting from whites.⁹ Because the district at issue was less than 50% African American voting age population, the Court found that it did not meet the first *Gingles* precondition, which requires that the minority group be geographically compact enough to constitute a majority within the district. As such, the Court rejected the state’s argument that its potential Section 2 liability required it to circumvent a state redistricting criterion not to cross county borders.

Although the Court found that Section 2 did not require crossover districts or any other form of less than majority districts, the Court specifically noted that it did not prevent states from drawing such districts if they wished. In fact, the Court looked favorably on such crossover districts where voters of different races vote together, stating that “[t]he option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more.”¹⁰

5. 42 U.S.C. § 1973(b) (2006).

6. *Thornburg v. Gingles*, 478 U.S. 30, 46-51 (1986).

7. The *Gingles* preconditions are as follows: “First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed ... —usually to defeat the minority’s preferred candidate.” *Id.* at 50-51.

8. See *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 475 (2006) (Stevens, J., concurring in part and dissenting in part); *Bush v. Vera*, 517 U.S. 952, 994 (1996)

9. *Bartlett v. Strickland*, 129 S. Ct 1231 (2009).

10. *Id.* at 1248.

In order to avoid VRA liability, line drawing jurisdictions must ensure that the districts they draw do not dilute voting strength and are not adopted for a discriminatory purpose.

Accordingly, states are free to pursue crossover districts when they are able to do so while complying with other redistricting criteria and without making race the predominant consideration.

That said, Section 2 prohibits the drawing of crossover or influence districts in lieu of majority-minority districts where they are possible. In 2006, the Supreme Court found that a plan to “unpack” a majority Latino Congressional district violated Section 2.¹¹ Texas had shaved down the Latino population in the district to protect the incumbent, who was Latino but not Latino voters’ candidate of choice. Further, it held that the creation of a majority-minority district in another part of the state did not address the Section 2 violation involving the dismantling of the Latino district at issue.

B. Section 5 and the Redistricting Process

Section 5 of the VRA requires certain “covered jurisdictions,” primarily deep South states as well as parts of other states, such as North Carolina and California, to submit all voting changes to either the Attorney General or the District Court of the District of Columbia for permission (preclearance) to implement the change prior to implementation. If a jurisdiction decides to submit the change to the Attorney General, he has sixty days to review

the change. If the Attorney General takes no action within the sixty-day period, the change is deemed precleared. Further, if the Attorney General takes an action, his preclearance or objection is not subject to judicial review.

Recently, the Department of Justice issued guidance in which it addressed changes to the law and the impact of the 2006 reauthorization on the redistricting process. In its guidance, the DOJ states:

...there are two necessary components to the analysis of whether a proposed redistricting plan meets the Section 5 standard. The first is a determination that the jurisdiction has met its burden of establishing that the plan was adopted free of any discriminatory purpose. The second is a determination that the jurisdiction has met its burden of establishing that the proposed plan will not have a retrogressive effect.

In determining whether a plan is retrogressive, the Attorney General will consider the new plan against the benchmark plan, which is the last legally enforceable redistricting plan. The Attorney General conducts a thorough analysis of the benchmark and submitted plans to determine, *inter alia*, whether the new plan places minority voters in a worse position than they were in the benchmark plan, or whether “the circumstances surrounding the submitting authority’s adoption of a submitted voting change, such as a redistricting plan, [indicates] ... direct or circumstantial evidence ... of any discriminatory purpose of denying or abridging the right to vote on account of race or color or membership in a language minority group.”¹²

In 2003 the Supreme Court allowed the unpacking of majority-minority districts in Georgia, in part because the shaving down of majority-minority districts increased what are called “influence districts.”¹³

11. See *LULAC v. Perry*, 548 U.S. 399 (2006).

12. DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7,471 (Feb. 9, 2011) [hereinafter DOJ Guidance].

13. *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

However, in the 2006 reauthorization of the VRA, Congress passed a legislative fix to this opinion, sometimes called the “Ashcroft fix,” to make clear that Section 5 review should focus on districts where minority voters have the “opportunity to elect” candidates of their choice. As such, the Ashcroft fix places an additional bar on Section 5 states that currently have majority-minority districts prohibiting cracking such districts to create influence districts.

The submitting jurisdiction bears the burden of demonstrating the absence of a discriminatory purpose or retrogressive effect that denies the right to vote based on race, color or language minority status. For example, if a submitted plan contains fewer majority-minority districts than the benchmark plan, the jurisdiction must demonstrate the absence of a discriminatory purpose and that the decrease was caused by demographic changes. To the extent that alternative plans containing more minority opportunity districts were submitted to the jurisdiction, the Attorney General can consider those plans as circumstantial evidence of discriminatory purpose. Note, however, that the Attorney General has indicated that the fact that a jurisdiction does not maximize the number of minority districts alone “does not mandate that the Attorney General interpose an objection based on a failure to demonstrate the absence of a discriminatory purpose. Rather, the Attorney General will base the determination on a review of the plan in its entirety.”¹⁴ However, it is important to note that preclearance of a plan does not prove a lack of Section 2 violation or insulate a jurisdiction from another legal challenge to its plan.

Race and Redistricting: Constitutional Considerations

In the 1990s, the Supreme Court considered a string of cases dealing with Fourteenth Amendment Equal Protection challenges to majority-minority districts,

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often referred to as “*Shaw* and its progeny.” While much has been written regarding the impact of these cases on the redistricting process, it is important to note from the outset that these cases did not prohibit racial considerations in redistricting. Indeed, *Shaw* and its progeny recognize the use of race as a redistricting principle, but caution against allowing race to become the sole or predominate reason for drawing districts in non-remedial situations.

In *Shaw v. Reno*,¹⁵ the Supreme Court considered a challenge to North Carolina’s Congressional redistricting that charged that the “State had created an unconstitutional racial gerrymander” in violation of the Fourteenth Amendment.¹⁶ In particular, two districts were said to have been crafted “arbitrarily—without regard to considerations such as compactness, contiguousness, geographical boundaries, or political subdivisions, with the purpose to create congressional districts along racial lines and to assure the election of two black representatives to Congress.”¹⁷ The Court concluded that because the shape of the newly drawn districts was “so bizarre,” they were “unexplainable on grounds other than race” and therefore the Court would apply the most exacting standard of constitutional review—strict scrutiny.¹⁸ The shape of the districts caused the Court to question the constitutionality of the

14. DOJ Guidance, *supra* note 12.

15. 509 U.S. 630 (1993).

16. *Id.* at 636.

17. *Id.* at 637 (internal quotations omitted).

18. *Id.* at 644 (quoting *Arlington Heights v. Metro. Housing Auth.*, 429 U.S. 252, 266 (1977)).

Because California is extremely populous and diverse, the CRC must pay particular attention to how the location of lines affects racial and protected language minority groups.

constructed districts.

Although the State argued that it drew the districts to avoid a VRA Section 5 violation, the Court rejected that argument and found that the plan was not narrowly tailored. It admonished covered jurisdictions to only do what is “reasonably necessary” to avoid retrogression.¹⁹ Nevertheless, the Court recognized that race could serve as a redistricting consideration, but must be balanced with other traditional redistricting principles.²⁰

In subsequent cases, the Supreme Court reaffirmed that race may be a consideration in redistricting. For example, in *Lawyer v. Department of Justice*,²¹ the Court upheld Florida’s redistricting, rejecting a challenge that race predominated because the district at issue encompassed more than one county, crossed a body of water, was oddly shaped, and had a higher percentage of black voters than other counties. The Court found that none of these factors were “different from what Florida’s traditional districting principles

could be expected to produce” and that race did not predominate. Moreover, in *Easley v. Cromartie*,²² the Court explained that a redistricting plan would not be held unconstitutional because the redistricting is performed with consciousness of race or because a jurisdiction deliberately designed a majority-minority district.²³

Race and Redistricting:

In summary, the VRA prohibits voting practices with discriminatory purpose or effect, including redistricting plans that dilute minority voting strength. As such, in order to avoid VRA liability, line drawing jurisdictions must ensure that the districts they draw do not dilute voting strength and are not adopted for a discriminatory purpose. The Fourteenth Amendment to the Constitution not only prohibits redistricting plans adopted with a discriminatory purpose, but also sets some limits on the degree to which race can be considered when drawing lines. Although the Supreme Court has found that when race is the predominant consideration in redistricting, strict scrutiny will apply, it has also recognized that complying with the VRA is a compelling state interest that can justify the narrow consideration and use of race as a criterion.

Line drawers must keep both of these considerations in mind when deciding where to draw lines. That means maintaining majority-minority districts unless demographic shifts make maintenance impossible. It also means considering demographic changes in the new Census figures to determine whether additional majority-minority districts are necessary to avoid vote dilution. In addition, even

19. The Court acknowledged it never “held that race-conscious state decision-making is impermissible in *all* circumstances.” *Shaw*, 509 U.S. at 642. Consequently, merely because a jurisdiction’s plan is nonretrogressive does not give them “*carte blanche* to engage in racial gerrymandering in the name of nonretrogression.” *Id.* at 655.

20. 532 U.S. 234, 258 (2001).

21. 521 U.S. 567 (1997). After the 1990 Census, Florida adopted a redistricting plan, but the Attorney General would not preclear it on the ground that the plan “divided politically cohesive minority populations.” *Id.* at 570 (internal quotation omitted).

22. 532 U.S. 234 (2001).

23. See also *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O’Connor, J., concurring) (“[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected and that neglect is predominately due to the misuse of race does strict scrutiny apply.”) (emphasis omitted) (citations omitted); *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (holding that strict scrutiny of majority-minority districts is appropriate when “race was the predominant factor motivating” the jurisdiction’s redistricting decision).

where minority populations do not rise to majority of a district, line drawers should consider whether, as a matter of policy, they want to keep minority populations together in a district by drawing crossover or influence districts and still complying with other state redistricting principles. While these districts are not VRA required, they are permitted.

Case Study: California Statewide Redistricting

The redistricting criteria set forth in the California Constitution place compliance with the Voting Rights Act above nearly every other criterion the California Citizens Redistricting Commission (“CRC”) is to consider. The redistricting criteria are presented in rank order, meaning criteria at the top of the list supersede those lower on the list in the case of a conflict. Compliance with the VRA is second, after compliance with the US Constitution and equal population. For California statewide districts, equal population is specifically subject to the VRA, since the California Constitution states that such districts will have reasonably equal population except where necessary to comply with the Voting Rights Act. VRA cases have generally accepted a population deviation of up to 5% above or below the ideal population. Accordingly, compliance with the Voting Rights Act is a key criterion the Commission should take into account.

In taking the VRA into account, the CRC must not only consider the import of Section 2, but also Section 5 of the Act. Presently, four counties in California—Monterey, Merced, Kings and Yuba—are Section 5 covered jurisdictions. Accordingly, as discussed above, redistricting in those counties is analyzed to determine whether a discriminatory purpose or retrogressive effect exists. This means that once the CRC completes its redistricting process, it must submit the entire California redistricting plan to either the United States Attorney General or the United States District Court for the District of Columbia. An objection, however, may only be entered regarding a district

Consistent consideration of the state redistricting criteria will assist the Commission in drawing a plan that complies with the United States and California Constitutions as well as the VRA.

partially or completely in one of the covered counties.

Because California is extremely populous and diverse, the CRC must pay particular attention to how the location of lines affects racial and protected language minority groups. First, the CRC should avoid district lines that crack or divide concentrations of voters of color in a way that reduces their ability to elect a candidate of their choice. For example, if an Asian American community were large and compact enough to be a majority in an Assembly District, the CRC should avoid splitting it into two districts where it cannot be a majority. In addition, the CRC should avoid “packing” or over concentrating communities in too few districts. For example, if an African American community were large enough to comprise a majority in two districts, the CRC should avoid drawing it into one district where it constitutes nearly all of the population.

That said, the CRC should also comply with other criteria, in particular contiguity and compactness, to ensure that race did not play the sole or predominant factor in how lines were drawn. For example, the CRC should avoid drawing a majority Latino district that is not contiguous. Regarding compactness, the California criteria do not require that a district resemble a certain geographic shape, such as a circle. The criteria define compactness as “nearby areas of population [that] are not bypassed

24. California Constitution, Art 21, Sec. 2 (d)(5)

for more distant population.”²⁴ In some areas of the state, this may mean that in order to follow populations, a district may follow a river, highway or valley, leading to a shape that is not compact in a way that some traditional measures can appreciate. Majority-minority districts should be substantially the same as non-minority districts in terms of compactness. In addition, complying with other criteria to the extent possible, such as respecting the integrity of communities of interest, establishes that race was not the sole or predominant factor. Consistent consideration of the state redistricting criteria will assist the Commission in drawing a plan that complies with the United States and California Constitutions as well as the VRA.

CONCLUSION

The redistricting process involves the consideration of a number of criteria, including but not limited to, compactness, contiguity, communities of interest and race. These considerations are developed and given various priorities through legislative processes. The United States Constitution and federal statutes, however, establish the preeminence of constructing districts that comply with one person, one vote requirements and avoid racial discrimination. Consequently, the United States Supreme Court and state constitutions throughout the country consider compliance with the Voting Rights Act an acceptable and compelling redistricting principle. The Voting Rights Act was enacted to ensure that minorities could participate equally in the electoral process. Thus, the consideration of race to protect against and prevent discrimination in the redistricting process has been found consistent with Fourteenth and Fifteenth Amendment guarantees and should not be ignored during the 2011 redistricting process.

This brief was made possible by a grant from the James Irvine Foundation. The conclusions in this brief are those of the author.