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Racial Redistricting in a Post-Racial World

Gilda R. Daniels
University of Baltimore School of Law, gdaniels@ubalt.edu

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RACIAL REDISTRICTING IN A POST-RACIAL WORLD

Gilda R. Daniels*

ABSTRACT

The 2011 redistricting will provide some interesting challenges for minority voting rights. How can we preserve minority electoral opportunities and gains in the wake of Bartlett v. Strickland and Georgia v. Ashcroft? What is the impact on future voting rights litigation and are coalition district claims viable as an opportunity to continue the electoral gains made since the passage of the Voting Rights Act? Are majority-minority districts safe from legislative backsliding? The Supreme Court's construed admonitions against race-conscious redistricting in recent cases may become cautionary tales. This Article discusses the central role the Voting Rights Act should play in preserving minority electoral gains.

While most of us would prefer to live in a color-blind society, we live in a "second-best" world where color-conscious problems require color-conscious remedies.

—Bernard Grofman1

INTRODUCTION

As we approach the 2011 redistricting cycle, the ability to maintain minority electoral gains that have been made since the passage of the Voting Rights Act (VRA) takes center stage. Recent Supreme Court decisions in Bartlett v. Strickland2 and Northwest Austin Municipal Utility District No. One (NAMUDNO) v. Holder3 could serve as...

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* Assistant Professor of Law, University of Baltimore School of Law. I would like to thank the faculty at the University of Baltimore School of Law, the coordinators of the Third National People of Color Legal Scholarship Conference for selecting our panel, and my exceptional research assistant Anne Wilkinson.

1 BERNARD GROFMAN, RACE AND REDISTRICTING IN THE 1990s, at 78 (1998) (citation omitted).

2 129 S. Ct. 1231 (2009) (holding that the Voting Rights Act did not require states to draw crossover districts); see infra Part II.B.

3 129 S. Ct. 2504 (2009) (challenging the constitutionality of section 5 of the VRA).
cautionary tales for the upcoming 2011 redistricting cycle. Additionally, Congress’s legislative fix to Georgia v. Ashcroft in the 2006 VRA reauthorization and the current administration’s interpretation of how to apply the new redistricting standards under section 5 are crucial to the status of minority electoral rights. How legislatures and the federal government interpret their responsibilities under the VRA can determine the difference between preserving gains made since the passage of the Act and backsliding. These developments bring the strength and necessity of the VRA to center stage. As the actors gather to argue their positions and secure their constituencies, the parameters of the VRA can assist in maintaining adherence to constitutional and statutory principles enacted to protect minority voting rights and equal access to the democratic process.

Scholars have suggested, based on considerable minority electoral success, that the VRA, and particularly section 5 of the Act, has fulfilled its purpose and is no longer needed. Some commentators suggest, referencing President Obama’s election, that we have reached a place in our society where race has lessened in significance, declaring the

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7 42 U.S.C. § 1973c in pertinent part reads:

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term “purpose” in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

8 See Georgia v. Ashcroft, 539 U.S. 461, 477 (2003) ("[P]reclearance under § 5 affirms nothing but the absence of backsliding." (emphasis added)).

9 See, e.g., Abigail Themstrom, Focus on the Voting Rights Act: Section 5 of the Voting Rights Act: By Now, a Murky Mess, 5 GEO. J.L. & PUB. POL’Y 41, 41 (2007) (praising the VRA as it was enacted; however, noting that the Department of Justice and courts have “rewritten the statute” and that the Act’s “constitutional legitimacy has been seriously undermined," especially in the section 5 context).
country officially post-racial, where race bears little significance or consequence. In this self-proclaimed post-racial era, there are those who would argue for the elimination of the VRA and the elimination of racial considerations in the districting process.

While President Obama’s election was certainly historical, that event alone does not serve as an indication that we have reached the post-racial promised land. Moreover, the post-racial proclamation is perplexing. Should Hillary Clinton or Sarah Palin win election to America’s highest office, would we then declare that the country has reached a post-gender state where sex has less significance? Feminists and others around the world would certainly celebrate the accomplishment, but surely they would consider it for what it represents: progress. Consequently, President Barack Obama’s election serves as a mere symbol of America’s progression, but our country must make much more political and social advancement before we can truly become post-racial. Likewise, considerably more progress must be made in the electoral realm in state houses, governorships, and the United States Congress, particularly in the Senate, before we can declare a race-neutral state of affairs. When considering former and current gains, one must juxtapose the progress against the current climate of post-racialism, which suggests that enough progress has been made in the minority electoral arena.

For example, with the Supreme Court’s construed admonitions against race-conscious redistricting, and its endorsement of influence districts as a post-racial panacea, how can we preserve minority

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11 See, e.g., Clegg, supra note 4 (arguing that it makes sense to limit section 2). Clegg believes that both section 2 and section 5 have been so successful that it makes sense at this point “to scrap the law altogether and start anew,” basing this belief on concerns regarding federalism and federal overreaching. Id. at 50.


15 Currently, there are no African American United States Senators, one African American governor, and a small number of African Americans who were elected to statewide office in the 2010 midterm elections. See DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL & ECON. STUDIES, BLACKS AND THE 2010 MIDTERMS: A PRELIMINARY ANALYSIS 6-7 (2010), available at http://www.jointcenter.org/publications_recent_publications/political_participation/blacks_and_the_2010_midterms_a_preliminary_analysis.
electoral opportunities and gains in the wake of Bartlett v. Strickland?\(^{16}\)
What is the impact on future section 2 litigation, and are influence, crossover and coalition districts viable as opportunities to continue the electoral gains made since the passage of the VRA? With the 2011 redistricting cycle quickly approaching, how these questions are interpreted could mean the difference between maintaining minority electoral gains and returning to the barrier-laden election structures of the past.

This Article will propose approaches to redistricting that prevent jurisdictions from backsliding and ways to preserve minority gains without running afoul of constitutional considerations.\(^{17}\) This Article advocates that reliance on and enforcement of the VRA provide the best protection for the continued maintenance of minority electoral gains. Part I of this Article will discuss the importance of the VRA and how it remains a centerpiece in the quest for equal opportunity in the electoral process. Part II explores redistricting jurisprudence as it relates to the use of race. Part III analyzes the issue of post-racial redistricting and suggests approaches using recent cases, such as Bartlett, to secure and preserve gains that have been made since the VRA.

I. IMPORTANCE OF THE VOTING RIGHTS ACT

Prior to the passage of the VRA, minority voters could rely only upon the Fourteenth and Fifteenth Amendments to attempt to correct and restore their right to vote.\(^{18}\) The minority voters’ ability to elect representatives had historically been undermined through the use of the redistricting process to dilute votes from minority communities. Jurisdictions practiced “cracking,” where they would split large concentrations of minority voters into smaller powerless groups, and “packing,” where they would “pack” as many minority voters as possible into districts to limit the number of positions that minorities could control.\(^{19}\) For example, in Gomillion v. Lightfoot, the Alabama legislature changed the boundaries of predominately black Tuskegee, Alabama, “from a square to an uncouth twenty-eight-sided figure.”\(^{20}\)

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16 129 S. Ct. 1231 (2009).
17 This Article includes ideas that I will explore and expand in Proxy Politics: Exploring the Intersection of Race and Partisanship in Redistricting, forthcoming 2011.
18 See Grofman, supra note 1, at 3 (arguing that the Fourteenth and Fifteenth Amendments and previous Civil Rights Acts from 1957 and 1964 were not helpful in advancing electoral opportunities).
Petitioners argued that the legislature had done so in an effort to deny them the right to vote. The Court, after distinguishing this case from one involving a political question, agreed. The piecemeal ability to address these kinds of shenanigans involving the drawing of election districts, voter registration, and voter intimidation, and Attorney General Katzenbach's cries for help, led Congress to pass the VRA.

The VRA has been heralded as one of the most effective pieces of legislation in this country's history. The Act was intended to demolish barriers to voter participation and created an environment in which minority citizens envisioned an equal opportunity to participate in the electoral process. The VRA contains two primary enforcement provisions: Section 2 prohibits discrimination in voting based on race,

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21 The Court addressed the State's argument that the drawing of the district lines was a political question that was left to the legislature to answer. The Court found this case distinguishable, holding:

The decisive facts in this case, which at this stage must be taken as proved, are wholly different from the considerations found controlling in Colegrove. That case involved a complaint of discriminatory apportionment of congressional districts. The appellants in Colegrove complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.

Id. at 346.

22 In an effort to advocate for the passage of the 1965 Voting Rights Act, Attorney General Katzenbach asked Congress and President Lyndon B. Johnson to pass legislation that would give the Department of Justice more authority to combat racial discrimination involved in the voting process and voter intimidation of black voters. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Court noted:

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. The Civil Rights Act of 1960 permitted the joinder of States as defendants, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections. Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination.

Id. at 313.


24 See Beer v. United States, 425 U.S. 130, 140 (1976) (stating that the purpose of the passage of the VRA was "to rid the country of racial discrimination in voting" (citing Katzenbach, 383 U.S. at 335)).


(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b) of this section.
color or language minority status; and section 5\textsuperscript{26} requires specified jurisdictions to submit all of their voting administration changes to the Attorney General or United States District Court for the District of Columbia prior to implementation.

The VRA addressed systemic discrimination regarding the unwillingness of Southern whites in particular to register African American voters and electoral schemes such as at-large methods of electing governing bodies. In both instances, the VRA provided a means, such as federal registrars and observers, to address voter registration issues, while sections 2 and 5 addressed discriminatory electoral schemes.\textsuperscript{27} Both are important in the pursuit of equal electoral opportunity. On the issue of redistricting, both play an important role.

A. Section 2 and Redistricting

Congress included a nationwide prohibition against discrimination in enacting section 2 of the Act.\textsuperscript{28} This provision imposes a prohibition against racial discrimination in any voting standard, practice or procedure, including redistricting plans. Under section 2, "[p]laintiffs must demonstrate that . . . the devices result in unequal access to the electoral process."\textsuperscript{29} This section of the VRA allows for both vote

\textsuperscript{26} 42 U.S.C. § 1973c.

\textsuperscript{27} See, e.g., Nw. Austin Mun. Util. Dist. No. One (NAMUDNO) v. Holder, 129 S. Ct. 2504 (2009) (avoiding the challenge to the constitutionality of section 5 of the VRA by finding that the utility district was a "political subdivision" under section 5 of the Act and extending the "bailout provisions" to encompass such entities and allow them the opportunity to withdraw or "bail out" of the requirements of section 5); League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399 (2006) (finding that aspects of Texas's mid-decade redistricting violated section 2 of the VRA).

\textsuperscript{28} See Voinovich v. Quilter, 507 U.S. 146, 152 (1993) ("Congress enacted § 2 of the Voting Rights Act of 1965 to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall 'be denied or abridged . . . on account of race, color, or previous condition of servitude.'" (citations omitted)).

\textsuperscript{29} Thornburg v. Gingles, 478 U.S. 30, 46 (1986) (citations omitted).
dilution and vote denial cases. Vote dilution occurs when a person is allowed to cast a ballot, but that ballot is not counted as equally as other votes. Such a voting practice or procedure dilutes the effectiveness of that vote and generally refers to the group’s right or ability to participate in the democratic process. Vote denial occurs when an individual is not allowed to cast a ballot due to some voting practice, procedure or voting mechanism, such as election administration measures or felon disenfranchisement. Race-conscious districts have provided a remedy for vote dilution situations in jurisdictions throughout the country. Indeed, the VRA is a race-conscious statute that prohibits discrimination based on, inter alia, race. In 1982, Congress amended section 2 of the VRA to underscore that this portion of the Act prohibited voting laws or practices that denied minority voters an equal opportunity “to participate in the political process and to elect representatives of their choice.”

Section 2 of the VRA provides voters with the ability to challenge racially discriminatory districting practices that dilute the minority group’s ability to participate equally in the electoral process. Thornburg v. Gingles established the framework for vote dilution claims. To challenge a method of election that allows for large voting districts, i.e., at-large or multi-member systems, plaintiffs must satisfy all three preconditions set out in Gingles: geographic compactness, political cohesion, and legally significant white bloc voting. If

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30 Professor Daniel P. Tokaji makes a similar distinction in The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. REV. 689, 691-95 (2006) (describing voter ID cases as “the new vote denial” and exploring the application of section 2 to these cases).
31 Gilda R. Daniels, A Vote Delayed is a Vote Denied: A Proactive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters, 47 U. LOUISVILLE L. REV. 57, 66 (2008); see also Tokaji, supra note 30, at 691.
33 See Voinovich, 507 U.S. at 152 (“Congress enacted § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, to help effectuate the Fifteenth Amendment’s guarantee that no citizen’s right to vote shall ‘be denied or abridged . . . on account of race, color, or previous condition of servitude.’” (citations omitted)).
35 See id.
37 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
plaintiffs succeed in satisfying these preconditions, courts are required to consider the totality of the circumstances and to determine, considering both past and contemporary examples of discrimination, whether the political process is equally open to minority voters. Plaintiffs may provide other examples of inequality in the electoral system or instances of historical discrimination and disparities in proving the totality of circumstances.

Vote dilution cases under section 2 of the VRA have been extremely helpful in ensuring that all Americans have equal access to the electoral process. The use of section 2 to combat racially discriminatory redistricting schemes has evolved beyond the black-white binary and encompassed other minority groups in their pursuit of equal opportunity. States must have a compelling reason before they

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minority candidate running unopposed... usually to defeat the minority’s preferred candidate.

Id. at 50-51.

38 In Gingles, the Supreme Court adopted several factors that the Senate Judiciary Committee suggested should be considered in determining the totality of circumstances analysis:

The history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 44-45.

39 In the 1980s and 1990s, voting rights attorneys waged a vigorous assault on practices and procedures, such as at-large districts, that tended to exclude African Americans from the political structure. See, e.g., Holder v. Hall, 512 U.S. 874, 878-80 (1994) (challenging under section 2 size of governing bodies); Grove v. Emison, 507 U.S. 25 (1993) (challenging under section 2 single-member districts); Chisom v. Roemer, 501 U.S. 380, 384-85 (1991) (challenging under section 2 state multi-member judicial districts); United States v. Charleston Cnty., 365 F.3d 341 (4th Cir. 2004) (alleging that county’s at-large election of its council diluted minority voting strength in violation of section 2); Harper v. City of Chicago Heights, 223 F.3d 593 (7th Cir. 2000) (involving African-American voters bringing class action under VRA challenging city’s at-large system for electing city council members and park district board; after finding that at-large system violated Act, court ordered establishment of at-large system that used cumulative voting and awarded attorney fees to voters); Goosby v. Town Bd. of Hempstead, 180 F.3d 476 (2d Cir. 1999) (challenging successfully at-large voting practice used to select members of Town Board).

40 Hispanics and Native Americans have also found success with challenging redistricting schemes under section 2. Accordingly, one trend has been the move west in bringing section 2 results claims pursuant to Gingles. See, e.g., Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006) (challenging the State of South Dakota legislative redistricting plan as violative of section 5 and section 2 of the VRA; the Court of Appeals affirmed the District Court’s opinion that the plaintiffs had made the appropriate showing under Gingles that Native-Americans were politically cohesive and that white majority voting bloc usually defeated Indian-preferred candidate, and the totality of circumstances indicated violation of section 2); United States v.
may intentionally draw a district using race as a predominant factor.\textsuperscript{41} The Supreme Court has found adherence to the VRA compelling.\textsuperscript{42} 

B. \textit{Section 5 and Redistricting}

Section 5 of the VRA also addresses discrimination, but does so in a more preemptive manner.\textsuperscript{43} After hearing a plethora of testimony regarding the discriminatory practices implemented throughout the South, Congress included section 5 in the VRA and required specific jurisdictions, commonly referred to as “covered jurisdictions,”\textsuperscript{44} to submit all voting changes to either the Attorney General of the United States or the U.S. District Court for the District of Columbia. Once received, the Attorney General or the court reviews the submission to determine whether the change has the purpose or effect of denying the right to vote based on race, color or language minority status.\textsuperscript{45} The covered jurisdiction’s submission is also reviewed for retrogression, i.e., whether the new plan places minority voters in a worse position than before the redistricting.\textsuperscript{46} Whether the jurisdiction chooses to submit the change to the Attorney General or the District Court for the District of Columbia, it must demonstrate that the submitted change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language minority group].”\textsuperscript{47}

Blaine Cnty., 363 F.3d 897 (9th Cir. 2004) (holding that the at-large voting system for electing members to county commission as violative of Native American residents’ rights under VRA); Ruiz v. City of Santa Maria, 160 F.3d 543 (9th Cir. 1998) (challenging city’s at-large city council election system under VRA).


\textsuperscript{43} See Daniels, supra note 31, at 68-70 (discussing section 5’s preemptive powers).

\textsuperscript{44} 42 U.S.C. § 1973b(b) (2000) (defining “covered jurisdictions” as those jurisdictions that on November 1, 1964 utilized a “test or device” that restricted the right to vote and where less than fifty percent of the voting age population were registered to vote on November 1, 1964, or less than fifty percent of registered voters actually voted in the 1964 presidential election); Lopez v. Monterey Cnty., 525 U.S. 266, 269 (1999) (“Congress enacted the Voting Rights Act under its authority to enforce the Fifteenth Amendment’s proscription against voting discrimination. The Act contains generally applicable voting rights protections, but it also places special restrictions on voting activity within designated, or ‘covered,’ jurisdictions.”); see also Section 5 Covered Jurisdictions, U.S. DEP’T JUST., http://www.justice.gov/crt/voting/sec_5/covered.php (last visited Dec. 23, 2010) (providing map of all section 5 covered jurisdictions).


\textsuperscript{46} See Beer v. United States, 425 U.S. 130, 141 (1976).

\textsuperscript{47} 42 U.S.C. § 1973c(a).
purpose or effect. If a jurisdiction decides to submit the change to the Attorney General, he has sixty days to review the change and either preclear or object. If the Attorney General does not take any action within the sixty-day period, the change is deemed precleared. Further, if the Attorney General takes an action, his subsequent preclearance or objection is not subject to judicial scrutiny.

The Supreme Court has found that legislators may draw majority-minority districts in an attempt to comply with sections 2 and 5 of the VRA. As discussed above, however, the use of race in redistricting has become extremely suspicious when it is used to improve the electoral positions of racial minorities.

II. RACE AND REDISTRICTING

Courts have analyzed the use of race-conscious redistricting and the import of sections 2 and 5 in the redistricting process. However, the use of race-based constitutional challenges in the 1990s seemed to threaten gains.

A. That Was Then: Shaw and Its Progeny

In Shaw v. Reno, plaintiffs charged that the “State had created an unconstitutional racial gerrymander” in violation of the Fourteenth


49 See Morris v. Gressette, 432 U.S. 491, 504-05 (1977) (holding section 5 decisions final and not subject to judicial review).

50 In Bush v. Vera, Justice O’Connor stated:

[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.


52 509 U.S. 630.
Amendment. They argued that the two districts were 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." With regard to the equal protection claim, the Court stated that certain redistricting schemes that are "adopted with a discriminatory purpose and have the effect of diluting minority voting strength" will violate the Fourteenth Amendment. However, the Court made very clear that this was not a vote dilution case because appellants never alleged that the plan "unconstitutionally diluted white voting strength." Although a facial challenge, the Court concluded that because the newly-drawn districts were "so bizarre," they were "unexplainable on grounds other than race"; thus, strict scrutiny would be the appropriate standard of review.

An important element of Shaw is that the jurisdiction forwarded that its purpose in drawing the districts was to avoid retrogression. In voting rights nomenclature, jurisdictions retrogress when they adopt plans that put minority groups in a worse position. In this instance, the Court rejected that argument and found that the plan was not narrowly tailored and admonished jurisdictions to only do what is "reasonably necessary" to avoid retrogression.

Many advocates were dismayed with the Supreme Court's decision and saw Shaw and subsequent decisions as the beginning of the end for majority-minority districts. Yet, it was not to be so. The emphasis on

53 Id. at 636.
54 Id. at 637 (internal quotations omitted).
55 Id. at 641.
56 Id. (internal quotations omitted).
57 Id. at 644 (internal quotations marks omitted).
58 The State suggested its legislative purpose was a "compelling interest," that being the creation of "majority-minority districts" to comply with VRA's section 5 "nonretrogression principle." Id. at 653-54.
59 See Beer v. United States, 425 U.S. 130, 141 (1976) (finding that section 5 prohibited voting changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise"); see also Michael J. Pitts, Redistricting and Discriminatory Purpose, 59 AM. U. L. REV. 1575 (2010) (arguing for an expansion of the discriminatory purpose standard beyond retrogression in certain circumstances).
60 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.
61 Most troubling were situations where black voters were in a position to gain a district or where the legislature was in a position where it could create a majority-minority district but did not. Under the facts in Bossier II, 528 U.S. 320 (2000), the current board did not have any African Americans, yet Bossier Parish had a considerable minority population. Id. at 341 (Thomas, J., concurring). The School Board, nonetheless, submitted a plan under section 5 of the VRA to the Attorney General for preclearance and the NAACP submitted an illustrative plan that included at least one majority-minority district. Id. at 324. The Department of Justice objected.
shape tended to cast dispersions on oddly shaped districts with black majorities, while no such scrutiny was placed on majority white districts with bizarre or odd shapes. The Court, however, in its discussions, made it clear that race could serve as a consideration, but legislators had to balance those considerations with other traditional redistricting principles, such as incumbency and party affiliation.

In *Lawyer v. Department of Justice*, the Court seemed to reassure advocates that racial considerations were allowable in the redistricting process. In *Lawyer*, the Supreme Court examined whether Florida unconstitutionally considered race in drafting its redistricting plan. The Court found it did not. Appellants argued that race predominated because the district at issue encompassed more than one county, crossed a body of water, was oddly shaped, and had a much higher percentage of black voters than other counties. The Court, however, 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.

B. *This Is Now: Georgia and Bartlett*

In this new millennium, advocates' fears were, for the most part, not realized. Yet the Supreme Court allowed the fracturing of majority-minority districts in *Georgia v. Ashcroft*. In the 2001 redistricting cycle, Democrats in Georgia decided to "unpack" heavy majority-minority districts to create influence districts. Influence...
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 districts require minority voters to rely upon whites to join them in voting for their preferred candidate in order to be successful. The opponents to influence districts argued that the fracturing of minority districts violated section 2 of the VRA. The Court, as it had in *Bossier I*, refused “to equate a § 2 vote dilution inquiry with the § 5 retrogression standard.” The Court provided that states could create what it called “safe districts,” which make it “highly likely that minority voters will be able to elect the candidate of their choice”; or create “influence districts,” which allow for more districts, but it is “not quite as likely as under the benchmark plan [] that minority voters will be able to elect candidates of their choice.”

The Court seemed to move further away from majority-minority districts and the preservation of electoral gains in *Bartlett v. Strickland*, in which it concluded that section 2 did not require states to maintain minority crossover and influence districts. Here, a North population of at least 50%, with the black voting age population exceeding 50% in [twelve] of those districts.” *Id.* at 469. The new plan had thirteen majority-minority districts, thirteen other districts where black voting age population was between thirty and fifty percent, and four additional districts with a black voting age population of between twenty-five and thirty percent. *Id.* at 470.

[T]he new plan reduced by five the number of districts with a black voting age population in excess of 60% . . . yet increased the number of majority-black voting age population districts by one, and it increased the number of districts with a black voting age population of between 25% and 30% by four.

*Id.* at 470-71.

71 See *id.* at 483 (“Section 5 leaves room for States to use these types of influence and coalitional districts.”); see also *id.* at 492 (Souter, J., dissenting) (defining “coalition districts” as those “in which minorities are in fact shown to have a similar opportunity [to elect candidates of their choice] when joined by predictably supportive nonminority voters” (citation omitted)); Luke C. McLoughlin, Note, Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims, 80 N.Y.U. L. REV. 312, 314 (2005) (arguing for the use of “so-called ‘coalitional districts,’ where consistent support from the minority bloc, along with crossover support from white voters, may result in electoral success despite the absence of a fifty-percent majority”).


73 *Ashcroft*, 539 U.S. at 478 (noting that “a plan that merely preserves current minority voting strength is entitled to § 5 preclearance,” even a plan “with a discriminatory but nonretrogressive purpose or effect does not violate § 5 . . . no matter how unconstitutional it may be”). The Court stated that “[p]reclearance under § 5 affirms nothing but the absence of backsliding.” *Id.* at 477.

The State argued that a plan satisfying section 2 should automatically satisfy section 5 for preclearance. *Id.* at 477-78. The Court reiterated its holding from *Bossier I*, where it held that a “violation of § 2 is not an independent reason to deny preclearance under § 5.” *Id.* at 478.

74 *Id.* at 480 (citations omitted) (internal quotation marks omitted). The Court first stated that the “power to influence the political process is not limited to winning elections,” a statement that leads right into the Court’s discussion of influence districts. *Id.* at 482 (citations omitted) (internal quotation marks omitted). An “influence district” is one in which minorities “play a substantial, if not decisive, role in the electoral process.” *Id.* When looking at the effectiveness of these types of districts, the Court considered “the likelihood that candidates elected without decisive minority support would be willing to take the minority’s interests into account.” *Id.* (internal quotation marks omitted).

75 129 S. Ct 1231 (2009).

76 The Court explained:
Carolina county argued that section 2 of the VRA required it to split counties in order to maintain a majority-minority district that had fallen below fifty percent minority.\textsuperscript{77} County officials attempted to maintain the district despite the fact that state law prohibited splitting counties because they believed that the VRA required it to draw a district that could sustain an opportunity for minorities to elect their candidate of choice.\textsuperscript{78} The Court reiterated that section 2 can require the creation of majority-minority districts, where the \textit{Gingles} preconditions are met.\textsuperscript{79}

The Court found that section 2 does not require a jurisdiction to maintain minority districts where minorities constitute less than a majority.\textsuperscript{80} Moreover, it found that the reconstituted district did not meet the first prong of \textit{Gingles},\textsuperscript{81} which requires that the minority group be geographically compact enough to constitute a majority within the district. The North Carolina county could not draw a district that created a majority-minority district and as such, the Court held, it could not argue that section 2 required that result because it could not meet the \textit{Gingles} standard.\textsuperscript{82}

The Supreme Court's idea of post-racial redistricting seems to lie in the hopes of crossover, influence, and coalition districts. These alternatives, however, do not offer minority voters a clear opportunity to elect. They merely offer an opportunity to influence an outcome that is reliant upon nonminority voters joining their preferred candidate. Clearly, as the Court has stated, the VRA does not assure an outcome, and minority voters are expected to make the same types of political trades as other voters, but the history of voting in America and the ability of lawmakers and others to manipulate the election process to adversely affect the success of minority candidates is troubling. Nonetheless, in order to maintain the gains that have been made under the VRA and to encourage legislators to maintain districts that are less than majority, voting rights advocates should, \textit{inter alia}, consider using \textit{Bartlett} as a means to prevent backsliding.

\textsuperscript{77} Id. at 1242.
\textsuperscript{78} Id. at 1239.
\textsuperscript{79} See supra note 37 and accompanying text.
\textsuperscript{80} \textit{Bartlett}, 129 S. Ct. at 1243-45.
\textsuperscript{81} Id. at 1241-42, 1249.
\textsuperscript{82} Id. at 1249.
III. POST-RACIAL REDISTRICTING AND THE PRESERVATION OF MINORITY ELECTORAL DISTRICTS

The VRA has endured forty-five years of various iterations and generational waves of success. Now, the VRA can also endure the current claims of post-racialism and the need to eliminate race-conscious remedies in many respects, including voting. Unfortunately, we live in a country where race still matters and it certainly still matters in voting. The race of the candidate and the demographics of the political district can determine the winner of the election before a vote is ever cast.

Voting rights advocates must first recognize that the post-racial era supporters will continue the crusade to eliminate the VRA and minority electoral gains. VRA advocates can address those concerns by highlighting present day realities that demonstrate a need for continued VRA protections. Accordingly, advocates must embrace various methods, including: (1) utilizing the Supreme Court’s language in Bartlett to argue for the maintenance of crossover and influence districts; (2) litigating and supporting cases under sections 2 and 5 of the VRA that will prevent backsliding in majority-minority districts; and (3) participating in the administrative process under section 5 and providing redistricting information, such as maps and grassroots information, that can assist the Department of Justice or the United States District Court for the District of Columbia in making a determination whether to preclear a submitted redistricting plan.

A. Are We Post-Racial Yet?

While considerable progress has been made, we have not reached the elimination of racial considerations in the redistricting process. The calls for the end of racial considerations are premature and centered upon the election of Barack Obama to the Presidency of the United States as the seminal event that altered the racial paradigm in America. 83 These assertions also fail to recognize the role that the VRA continues to play in the elimination of electoral barriers.

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For example, the VRA is an example of race conscious legislation adopted to address race discrimination in the area of voting. The passage of the VRA greatly impacted African Americans’ ability to register to vote and seek public office. Its adoption provided a tool to address the disparities between white and nonwhite voters. The number of black elected officials also increased tremendously. Today, more than 10,000 minorities hold federal, state, and local offices. At the time that Congress passed and President Lyndon B. Johnson signed the VRA, less than 100 African Americans held any public office across the country. In 2006 and 2007, there were approximately 6000 African American, 4000 Latino, and considerably more Asian and Native American elected officials across the country. These gains can be attributed, in large part, to the passage and implementation of the VRA and its dismantling of racially discriminatory voting practices.

Additionally, while the VRA has certainly removed barriers, obstacles remain to a truly post-racial election process. For example, although President Obama’s election serves as a symbol of progress, it also demonstrates the role race continues to play in elections. We can measure the level that race plays in elections by performing a regression analysis. This analysis can measure the level of racially polarized voting in any jurisdiction in which there is a significant minority

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84 See, e.g., Bossier II, 528 U.S. 320, 361 (2000) (“This evil in Congress’s sights was discrimination, abridgment of the right to vote, not merely discrimination that happens to cause retrogression, and Congress’s intent to frustrate the unconstitutional evil by barring a replacement scheme of discrimination from being put into effect was not confined to any one subset of discriminatory schemes.”).

85 Scholars such as Professor Pamela Karlan characterize the VRA as an important step toward solving what they call the “first-generation problem of formal disenfranchisement.” See Pamela S. Karlan, The Impact of the Voting Rights Act on African Americans: Second and Third Generation Issues, in VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 122 (Mark E. Rush ed., 1998).


88 Id.

population and minority candidates running for office. As evidence that race remains a strong consideration, one needs to look no further than the same historical presidential election. Post-racial proponents neglect to mention that while President Obama certainly received votes from all races of people, he did not win any state in the Deep South, where racially polarized voting continues to predominate. The regression analysis provides an explanation as to reasons why President Obama was unable to capture white voters in the South, and points to his race as the predominate factor. Nonetheless, while President Obama's election is a clear sign of progress, the VRA continues to serve as a centerpiece for ensuring continued steps forward toward complete equality in the election process, particularly in the areas of redistricting and the creation of election districts.

B. Using the VRA's Influence

While section 2 of the VRA cannot mandate influence districts, the Bartlett decision can offer advocates a slight glimmer of hope for maintaining these and other less-than-majority districts at sustainable levels. Curiously, the Court tends to instruct jurisdictions on ways to deconstruct majority-minority districts to create influence or crossover districts. It reminds states that they have the discretion to create influence districts, even where majority-minority districts are present but not required.

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92 See Bartlett v. Strickland, 129 S. Ct. 1231, 1248 (2009) ("When we address the mandate of § 2, however, we must note it is not concerned with maximizing minority voting strength, and, as a statutory matter, § 2 does not mandate creating or preserving crossover districts." (citing Johnson v. DeGrandy, 512 U.S. 997, 1017, 1022 (1994))).

93 Bartlett, 129 S. Ct. at 1238-48. The Court stated:

[Majority-minority] districts are only required if all three Gingles factors are met and if Section 2 applies based on a totality of the circumstances.

... In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third Gingles precondition—bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place; and in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate.

Id. at 1238, 1248 (internal citation omitted).
In *Bartlett*, the Court seems to embrace post-racial notions that race has become less of a factor in the electoral process. Under the Supreme Court’s suggested scheme, minority voters would lose majority status in those districts without substantial support from white voters. The process of securing that support results in minorities losing the opportunity to influence a broader set of decisions that white voters may not support. Granted, minority voters have always had the responsibility to campaign and educate voters about the process and to make political trade-offs. This scheme, however, is not a trade-off but surrender.

The Court neglects to recognize the historical significance in the redistricting process and moves minority voters and their intentions as inconsequential players in a game of political football. The continued existence of racially polarized voting makes the type of coalition voting required improbable in many parts of the country, such that the effect is essentially the loss of minority voting strength.

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The legislative history of the Voting Rights Act, including its contemporary charge, makes clear that its mission to eradicate enduring racial disparities in political power and electoral access looms large and remains unfulfilled. Racial minorities in majority-minority districts are left with the dilemma of forcibly uniting behind a single candidate in order to demonstrate political cohesion and avoid fragmentation of their vote or voting their consciences and, thereby, risking absolute defeat in the collective . . . . Doctrinally, the Voting Rights Act allows minorities an opportunity to aggregate their votes as a group and attain electoral success, but in doing so, does not safeguard against defeat in which the non- or least-preferred candidate wins because of vote fragmentation.

Id. at 1310-11.

See Heather K. Gerken, *Second-Order Diversity*, 118 Harv. L. Rev. 1099, 1105 (2005) (noting that districts in which minorities must collaborate with majority voters to elect their representatives comes at the cost of losing the chance to influence a wider agenda).

Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994) (“[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground.”); see also Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 Mich. J. Race & L. 513, 534-35 (2007) (“The concept of a preclearance requirement presupposes a broken political market, where political actors are unable to bargain with similarly situated participants. This is no longer the world we live in. Unlike the political milieu that gave rise to the act [sic] in 1965, this is a time when communities of color can do their bidding through the traditional workings of the political process. In fact, it may be said that the recent amendment and extension of the Act offer conclusive proof for this proposition.”).

See Terry Smith, *Disappearing Districts: Minority Vote Dilution Doctrine as Politics*, 93 Minn. L. Rev. 1680, 1691, 1695 (2009) (arguing that the purpose of section 2 is to “provide protection for racial and language minorities who are effectively locked out from this system because racially polarized voting prevents the formation of electoral coalitions”; however, the decision in *Bartlett* effectively “imposed additional hurdles to the formation of multi-racial electoral coalitions,” namely, the requirement that in a section 2 challenge, a plaintiff must show the minority group in question constitutes a voting age majority).
local officials have extremely important decisions to make regarding the configuration of voting districts and their demographic consistencies. Any decision to maintain current levels of influence and crossover districts, especially those where the difficult balance of black and white support allows for the election of minority-preferred candidates, should be maintained under the Supreme Court’s logic that these districts help eliminate the significance of racial disparities. Indeed, the Court provided instructions on ways to “unpack” districts with “substantial minority population,” which allow majority-minority districts to create influence districts.99 “Substantial minority population” seems to suggest that the Court would carve out an exception for supermajority districts, those districts that include minority populations in excess of sixty-five percent, to ensure an opportunity to elect.100 This suggestion is troubling in that it encourages legislatures to unpack or crack those minority districts that may have successfully elected a minority candidate of choice. In Bartlett, Justice Souter suggested that jurisdictions demonstrate that minorities would have “effective influence” before “shifting” from majority-minority to influence districts.101

In consideration of the Court’s language, advocates should embrace the preservation of existing crossover and influence districts, particularly where a majority-minority district is unavailable. In those instances, advocates should argue that the dismantling of existing crossover districts runs afoul of the Supreme Court’s idea of creating a race neutral environment. Accordingly, their continued maintenance is required and efforts to dissolve their configurations contravene Supreme Court jurisprudence.

99 See Bartlett v. Strickland, 129 S. Ct. 1231, 1248 (2009) (“Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create two crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal.”).

100 Bullock & Dunn, supra note 68, at 1214 (citing the “sixty-five percent rule,” as the percentage of African American voters traditionally needed to maintain an equal opportunity to participate).

101 Justice Souter writes:

Before a State shifts from majority-minority to coalition districts . . . [it] bears the burden of proving . . . not merely that minority voters in new districts may have some influence, but that minority voters will have effective influence translatable into probable election results comparable to what they enjoyed under the existing district scheme. And to demonstrate this, a State . . . must show that the probable voting behavior of [white] voters will make coalitions with minorities a real prospect. If the State’s evidence fails to [do so], a reduction in supermajority districts must be treated as . . . fatally retrogressive . . . .

C. DOJ’s Influence

The Supreme Court has questioned the viability of the VRA, particularly, section 5. And its recent section 2 case, Bartlett, has weakened the Act. Moreover, the Department of Justice’s role in the section 5 process and its interpretation of Georgia v. Ashcroft, Bartlett, and Congress’s amendment to the 2006 VRA reauthorization could mean the difference between maintenance of gains and retrogression.

The choices of the state legislators make it even more important that the Department of Justice enforce the VRA and adhere to its purpose “to protect the ability of such citizens to elect their preferred candidates of choice.” The 2011 redistricting serves as the first where a Democratic administration will review the section 5 submissions after a decennial census since the passage of the VRA. All other post-decennial redistricting had Republican administrations at the helm of the Department of Justice. Accordingly, this Department of Justice will also serve as the first to review redistricting plans under Congress’s Georgia v. Ashcroft fix, which would allow it to object to redistricting plans that discriminate in purpose or effect and that diminish the minority population’s ability to elect its candidate of choice.

102 In NAMUDNO, the Supreme Court, while not ruling on the issue, called section 5's constitutionality into question. NAMUDNO v. Holder, 129 S. Ct. 2504, 2508 (“Our usual practice is to avoid the unnecessary resolution of constitutional question . . . We therefore . . . do not reach the constitutionality of § 5.”); see also Joshua A. Douglas, The Voting Rights Act Through the Justices’ Eyes: NAMUDNO and Beyond, 88 TEX. L. REV. 1, 4 (2009).

103 The Court discussed the different applications of sections 2 and 5 in Bartlett. See Bartlett, 129 S. Ct. at 1249 (“The inquiries under §§ 2 and 5 are different. Section 2 concerns minority groups’ opportunity ‘to elect representatives of their choice,’ while the more stringent § 5 asks whether a change has the purpose or effect of ‘denying or abridging the right to vote.’” (citing 42 U.S.C. §§ 1973(b), 1973c (2006); League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 446 (2006))).

104 Fuentes-Rohwer & Charles, supra note 97, at 534-35.


106 Previous administrations have been criticized for involvement in previous redistricting cycles. See, e.g., Miller v. Johnson, 515 U.S. 900, 924 (1995) (“Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts.”); Michael J. Pitts, Georgia v. Ashcroft: It’s the End of Section 5 as We Know It (And I Feel Fine), 32 PEPP. L. REV. 265, 276-77 (2005) (describing the Department of Justice’s zealous involvement in the redistricting process).

107 See Benjamin E. Griffith, Reinforcing the Formidable Arsenal: Restoration of Purposeful Discrimination as a Basis for Denial of Section 5 Preclearance Under the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments of 2006, 29 U. ARK. LITTLE ROCK L. REV. 705, 724 (2007) (“Section 5 of the Voting Rights Act is now a more potent weapon than ever before as part of the federal government’s ‘formidable arsenal’ in
How the current Department of Justice will interpret the 2006 reauthorization and the Supreme Court’s recent cases will determine whether covered jurisdictions will maintain the minority gains that have been made during the 2011 round of redistricting.\(^\text{108}\)

During the 2006 reauthorization of the VRA,\(^\text{109}\) Congress included a legislative fix to the Supreme Court’s decision in \textit{Georgia v. Ashcroft} that allowed states to “unpack” majority-minority districts and create influence districts.\(^\text{110}\) This “fix” in the 2006 reauthorization may serve as the only answer to preempt attempts to diminish majority-minority districts. The fix, however, only applies to section 5 jurisdictions. Essentially, only those jurisdictions that are covered under section 5 will be reviewed to determine whether the redistricting plan diminishes the minority population’s ability to elect its preferred candidate. Effectively, in section 5 states that currently have majority-minority districts, the \textit{Ashcroft} fix would prohibit states from unpacking majority-minority districts to create influence districts.

While voters in covered jurisdictions may rely on section 5 to preempt diminished electoral opportunity, jurisdictions that are not covered must rely on section 2’s nationwide prohibition against purposeful discrimination. Under section 2, minority voters could bring actions against the legislature where it decreases the majority-minority district to create more influence districts, which can serve as a gargantuan task considering the costs and length of section 2 litigation. Accordingly, the Department of Justice’s interpretation and enforcement of the protections within section 5 of the Act can serve as a valuable nonpartisan tool in enforcing the VRA.

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\(^\text{108}\) See, \textit{e.g.}, Themstrom, \textit{supra} note 9, at 75, 77 (arguing that the DOJ is ill-prepared to “resolve complicated questions involving race and representation,” especially in the short time required by law, and that majority-minority districts “that DOJ forces... act as a brake on racial change on the greater integration of black voters... into American mainstream politics”).


\(^\text{110}\) \textit{See} 42 U.S.C. § 1973c(b), which states:

Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [42 U.S.C. § 1973b(f)(2)], to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.
CONCLUSION

Have we reached the post-racial promised land? Not yet. However, we are closer than we were forty-five years ago when the VRA was passed. Should we consider race in the election process? If those considerations lead us to an electoral process that allows all citizens to participate equally in the political process, then absolutely. The 1965 VRA has maintained equality as its aim and primary purpose. Its continued existence is crucial to ensuring equal access at the polls. Some have questioned the use of race in the redistricting process. While Bartlett causes some concern, advocates are not without hope. Proponents have tools in their arsenal to combat backsliding in the redistricting process. Protections under the VRA provide the best measures to maintain current levels of minority electoral success. Clearly, the VRA remains a central tool to protect previous electoral gains.

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112 Lisa Erickson, The Impact of the Supreme Court’s Criticism of the Justice Department in Miller v. Johnson, 65 MISS. L.J. 409, 410 (1995) (stating that one of the purposes of the VRA was to further the Fifteenth Amendment).