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Before the United States Commission on Civil Rights
"Redistricting and the 2010 Census: Enforcing Section 5 of the VRA"
February 3, 2012

Biographical Information

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Professor Charles teaches and writes in the areas of constitutional law, civil procedure, election law, law and politics, and race. His articles have appeared in *Constitutional Commentary*, *Cornell Law Review*, The *Michigan Law Review*, The *Michigan Journal of Race and Law*, The *Georgetown Law Journal*, the *Journal of Politics*, the *California Law Review*, The *North Carolina Law Review*, among many others. He was the Stanley V. Kinyon Teacher of the Year 2002-2003 at the University of Minnesota Law School. He is the co-editor of RACE, REFORM AND REGULATION by Cambridge University Press and the NEW FACE OF RACE IN AMERICA by the New Press. He is also the co-author of the casebook, with James Gardner, of ELECTION LAW AND POLITICS with Aspen Press.

He was a member of the National Research Commission on Elections and Voting and the Century Foundation Working Group on Election Reform. Professor Charles is a reviewer for Stanford University Press, University of Chicago Press, and NYU Press. He is a public commentator on issues relating to constitutional law, election law, campaign finance, redistricting, politics, and race. He has taught at Columbia, Duke, Georgetown, Toledo and Virginia.

Mr. Chairman and members of the Commission, it is my pleasure to be before you today and to assist you in assessing the Department of Justice's performance in enforcing Section 5 of the Voting Rights Act in the wake of the 2010 census and this latest round of redistricting.

In 2006 Congress reauthorized and amended Section 5 of the Voting Rights Act ("VRA") by promulgating the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ('VRARA").[1] In addition to the extension of the language assistance requirements and the provision for federal election observers, the VRARA had three goals. First, it reauthorized the preclearance requirement for covered jurisdictions for the next 25 years. Second, it reversed the Supreme Court's decision in *Reno v. Bossier Parish* ("*Bossier II*"),[2] which held that the Department of Justice (the "Department") was required to preclear a redistricting plan that may have been enacted with a discriminatory but not retrogressive purpose. Congress disagreed that a retrogressive purpose was necessary and clarified that any discriminatory purpose was a violation of Section 5. Third, it rejected the Court's contextual approach in *Georgia v. Ashcroft*,[3] where the Court concluded that jurisdictions covered by section 5 may trade-off safe districts for influence or coalition districts. Congress instead provided that any redistricting plan 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 [because they are a member of a language minority group] . . . to elect their preferred candidates of choice" is a violation of Section 5.[4] Moreover, Congress expressly noted that the purpose of the amendment to Section 5 is "to protect the ability of such citizens to elect their preferred candidates of choice."[5]

Per the Commission's briefing concept memo, I will address three issues in my testimony today. First, I will discuss my sense of the effectiveness of the Department's guidelines for ascertaining discriminatory purpose. Second, I will provide my assessment of the Department's guidelines for determining retrogression. Lastly, I will address the relatively new development by states to file preclearance submissions with the United States District Court for the District of Columbia. With respect to the purpose prong inquiry, I will conclude that even though the Department attempts to apply the any discriminatory purpose inquiry in good faith, it effectively applies the purpose to retrogress

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[1] Public Law 109-246, 120 Stat. 577 (2006).
[2] 528 U.S. 320 (2000).
[3] 539 U.S. 461 (2003).
[4] 42 U.S.C.A. § 1973c(b).
[5] 42 U.S.C.A. § 1973c(d).

standard outlined in *Bossier II* because it is easier to apply.[6] With respect to the retrogression inquiry, I will conclude that the Department is applying that standard consistent with Congress' intent to restore the pre-*Georgia v. Ashcroft* approach. However, I will also note that as racial bloc voting decreases and crossover voting increases, the Department may not have a choice but to conduct a contextual analysis that looks very much like the Court's approach in *Georgia v. Ashcroft*. Finally, I will offer some suggestions with respect to current propensity by covered jurisdictions to submit their redistricting plans exclusively to the United States District Court for the District of Columbia.

A. Discriminatory Purpose

The United States Department of Justice's Civil Rights Division has adopted guidelines to address both substantive changes to the VRA per the requirements of the VRARA. With respect to the reversal of *Bossier II* and the standard of discriminatory purpose, the Department has explained that it "will examine the circumstances surrounding the submitting authority's adoption of a submitted voting change, such as a redistricting plan, to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote" on the basis of the categories prohibited by the Act.[7]

The Department has explained that it will be guided in its discriminatory purpose analysis by the set of factors outlined by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[8] In *Arlington Heights* the Court noted that where state action is "unexplainable on grounds other than race," discriminatory purpose could be easily inferred.[9] This is especially so where discriminatory intent is combined with racial disparate impact.[10] Where discriminatory purpose is not easily inferred, the Court noted, courts will have to rely on more circumstantial considerations such as the historical background of state action, the sequence of events that led to the government's action, departures from traditional procedures, or contemporary statements by the members of the decisionmaking body.[11] The Court identified these as non-exhaustive factors that might indicate whether the government's action was motivated by a discriminatory purpose.[12]

Of about twenty objection letters that the Department has interposed since 2007, eight relied, at least in part, on the discriminatory purpose inquiry as part

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[6] Moreover, it has the added benefit of insulating the Department's inquiry from constitutional challenge.

[7] 76 FED. REG. 7470 (Feb. 9, 2011).

[8] 429 U.S. 252 (1977).

[9] *Id*. at 266.

[10] *Id*.

[11] *Id*. at 267-68.

[12] *Id*. at 268.

of the Department's basis for interposing an objection. None of those cases involved a statewide redistricting plan.

Moreover, notwithstanding Congress' amendment of Section 5 to expand the discriminatory purpose inquiry beyond the purpose to retrogress and the Department's good faith effort to implement that standard, the reversal of *Bossier II* may matter less than some may have assumed. There were not many objection letters that can be justified on the basis of any discriminatory purpose. Almost all of them could be justified under the *Bossier II* "purpose to retrogress" standard. Indeed, in an objection letter responding to a submission to preclear the redistricting plan for Lowndes County, Georgia, the Department explicitly referred to and applied the "purpose to retrogress" standard instead of the broader discriminatory purpose standard.

This is observation is not intended as a criticism of the Department. In fact, by applying the intent to retrogress, the Department has essentially anchored its guidelines for understanding discriminatory purpose squarely in standard equal protection doctrine. As such, the Department has likely insulated this inquiry from constitutional challenge. Furthermore, discriminatory purpose is notoriously difficult to ascertain and discover.[13] State actors are extremely sophisticated in their ability to mask invidious intent. It is rare in this day and age to find explicit discriminatory statements by state actors. Moreover, given the multiple pretexts available in a redistricting context, it is the most uncouth government official who will reveal true intentional discriminatory intent. Thus, notwithstanding the fact that the burden is on the covered jurisdiction to show that the proposed change was not animated by any discriminatory purpose, it will not be easy for the Department to definitively ferret out evidence of discriminatory purpose writ large.

Additionally, we have seen a decline in racial discrimination in voting by state actors.[14] Thankfully, we are no longer living in the era where state actors in covered jurisdictions can be counted upon routinely to invent ingenious ways to discriminate against voters of color. As such, the purpose inquiry will mainly be put to the service of thwarting the efforts of jurisdictions that are both racist and unsophisticated in masking their racist intent. This is why I think the Department will assert few objections to redistricting plans on the grounds that the plans were enacted with a broad discriminatory intent and why the purpose to retrogress, a much more administrable inquiry, will be the effective standard, the standard that is applied in fact.

B. Retrogression

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[13] Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575 (2010)
[14] Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349 (2010).

The Department has also adopted guidelines to provide covered jurisdictions guidance on the retrogression inquiry. The retrogression inquiry essentially asks whether a racial or language minority group is worse off under a proposed redistricting plan as compared to a benchmark plan. The benchmark plan is usually the last legally operative plan. The fundamental inquiry under the amended Section 5 is determining whether racial or language minority groups' "ability to elect their preferred candidate of choice" has been diminished.

According to the Department, that assessment is made by engaging in "a functional analysis of the electoral behavior within the particular jurisdiction or election district."[15] This functional inquiry takes into account demographic data as well as data on "differing rates of electoral participation within discrete portions of a population."[16] The inquiry also includes comparative registration and turnout data by race. Presumably, the Department compares the proposed plan and the benchmark plan along the parameters noted above. Additionally, the Department has outlined a number of other factors that it thinks relevant in the Section 5 inquiry. These include whether the proposed plan reduces the voting strength of the racial or language minority group in question; whether they are packed into particular districts or cracked into multiple districts; and whether the covered jurisdiction considered alternative plans that would have achieved its stated redistricting goals.[17]

The Department's application of the new Section 5 standard is fairly conventional. The Department applies the standard to essentially preserve either majority-minority districts or districts that are not strictly majority-minority districts because a racial minority does not constitute more than 50% of the district but were performing districts—the district enable the racial group to elect its candidate of choice—under the benchmark plan. The Department presumably uses the benchmark plan to identify performing or majority-minority districts and then examines the effectiveness of the proposed plan in light of the benchmark plan.

This approach enables the Department to easily apply the ability to elect standard. The Department can look at the benchmark plan and ascertain whether the racial group in question has been able to elect its candidate of choice in the relevant district or districts. The Department then has to ascertain whether the proposed plan maintains the current ability to elect or diminishes the ability to elect. This is a more manageable and predicable inquiry with the benchmark plan as a baseline.

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[15] 76 FED. REG. 7470 (Feb. 9, 2011).

[16] *Id*.

[17] *Id*.

To illustrate the Department's approach, consider its objection letter to a redistricting plan for East Feliciana Parish, Louisiana.[18] The Department's analysis showed that under the benchmark plan, black voters—who constituted 45% of the total population and 44% of the eligible voter population—had the ability to elected the candidate of their choice in four districts, district 2, 3, 5, and 7. Under the proposed plan, black voters maintained their ability to elect in districts 2,3, and 7, but not in district 5.

The Department objected to the fact that the Parish's proposed plan reduced the total black population and reduced the percentage of black voting age population and the black registered voter population. As a consequence of this reduction, the Department concluded, black voters "will no longer have the ability to elect a candidate of choice to office."[19] Thus, applying the new standard, the Department concluded that the proposed plan, in comparison to the benchmark plan, was retrogressive. The Parish revised its redistricting plan and remedied the defect identified by the Department. The Department subsequently precleared the revised plan.

The Department's interpretation of amended Section 5 is consistent with Congress' intent in amending Section 5, which is to restore the *status quo ante Georgia v. Ashcroft*. The status *quo* before *Georgia v. Ashcroft* privileged majority-minority districts as against coalition and influence districts. It limited, if not eliminated, the ability of covered jurisdictions to make trade-offs among different types of electoral arrangements. *Georgia v. Ashcroft* could have permitted covered jurisdictions to swap, for example, one majority-minority district for, as an example, two coalition districts. Additionally, as noted above, the pre-*Georgia v. Ashcroft* standard was easy to apply: one only had to count the number of majority-minority and/or performing districts in the proposed plan with those on the benchmark plan and do the arithmetic. If the benchmark plan had two 47% black performing districts, the proposed plan needed to have at least maintained those districts, otherwise, the plan could be deemed retrogressive.

Though Congress clearly intended to restore the status *quo ante Georgia v. Ashcroft*, it did not provide any guidance on the substantive standard: namely how one determines the racial group's or language minority's preferred candidate of choice. The difficult issue presented in *Georgia v. Ashcroft* is determining whether state actors are moving voters of color around so as to enhance their electoral prospects or whether they are moving them around so as to deprive them of their candidate of choice. All of the Justices in *Georgia v. Ashcroft* agreed that in light of changed circumstances, in particular some

[18] Section 5 Objection Letter from Thomas E. Perez, Assistant Attorney General, October 3, 2011.
[19] *Id*.

appreciable decrease in racial bloc voting in covered jurisdictions, some moving around could be warranted. Depending upon the factual circumstances, for example, a 60% black district could be vote dilution by packing.

In light of changed factual circumstances, the fundamental question was figuring out whether if, for example, a state is reducing a majority-minority district to create two coalition districts the racial group has a significant chance of electing two candidates of its choice or whether the state is dismantling the majority-minority district because it is trying to deprive the racial group of the opportunity to elect its preferred candidate of choice. Depending upon the factual circumstances on the ground, it might be the case that a majority-minority district is vote dilution by packing. Fundamentally, the VRA does not tell us how to engage in this inquiry and Congress failed to provide any guidance on this very crucial issue.

The best that can be said is that Congress proceduralized the issue by creating an even stronger presumption against change. Put differently, one can view the Congressional override of the Court's approach in *Georgia v. Ashcroft* as Congress' attempt to send a very strong signal that covered jurisdictions ought to bear the uncertainty costs of change. To the extent that we are uncertain about progress, the risk of uncertainty should be located on the state and not on voters of color. One might view Congress' override as a very noisy signal.

This signal might point the Department in a general direction, but that is all that it does. This lack of guidance compels decision makers, in this case the Department, to place a greater emphasis on contextual factors and variables. This is because determining the candidate of choice is an endogenous contextual inquiry that requires an assessment of the totality of the circumstances on the ground. Without a proper understanding of the context, it is difficult, under most circumstances, to determine the candidate of choice. Moreover, this inquiry becomes even more difficult to the extent that we are uncertain about the degree of racial bloc and crossover voting.

Consider as an illustrative example the Department's objection to a submission seeking preclearance of a redistricting plan for the board of supervisor and election commissioner districts for Amite County, Mississippi.[20] The Department identified two districts, Districts 2 and 3, from the benchmark plan as performing districts because they permitted African-American voters to elect their candidate of choice. The Department then objected to the County's reduction of the black population in District 3, which from the Department's perspective "eliminated" the black community's ability to elect its candidate in that district. The County sought to swap District 3 with District 5 as the new

[20] Section 5 Objection Letter from Thomas E. Perez, Assistant Attorney General, October 4, 2011.

district within which voters of color would be able to elect their candidates of choice.

The Department rejected that swap for two reasons. First, "black voters in proposed District 5 turnout to vote a lower levels of electoral cohesiveness than is present in benchmark District 3."[21] Moreover and relatedly, "there has been a nearly complete lack of any minority political activity for the past two and half decades in the area that would comprise District 5."[22] Second, the Department conducted interviews with individuals on the ground, including those involved in the redistricting process. It concluded from those interviews and the on-the-ground investigation that the reduction of the black population in District 3 was to prevent the black community in that district from electing its candidate of choice.

Though the Department categorized that fact under its discriminatory purpose prong, its on-the-ground investigation is at least as useful to ascertain the viability of District 5 as performing district and thus to determine the effectiveness of the attempted trade-off between District 5 and District 3. For example, the Department might be right that District 5 will not be a performing district. But the Department might also be mistaken. If turnout is endogenous, the fact that black voters in District 5 turned out at lower rates in the past, when they did not have a chance to elect a candidate of choice, may be irrelevant. Given a new District in which black voters might elect a candidate of choice, an electoral entrepreneur will emerge to organize voters and get them to turnout. Moreover, it might be the case that black voters in District 3 can form an alliance with a small but critical group of voters in District 3, which might enable black voters to elect their candidate of choice in the proposed District 3 as well. The question really is who should bear the burden of the risk that comes with this probabilistic inquiry. Congress' override can be understood as placing the risk on covered jurisdictions.

Nevertheless, to the extent that racial bloc voting continues to decrease and crossover voting continues to increase the Department will need to continue to assess contextual factors on the ground in order to determine whether a redistricting plan has diminished or enhanced the ability to elect of targeted communities to elect the representative of their choice. Ultimately, it may the case that as a matter of interpreting the VRA, the Department's interpretation of Section 5's retrogression standard might be much more similar to the Court's understanding in *Georgia v. Ashcroft* than to whatever Congress might have had in mind in overriding *Georgia*.

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[21] *Id.*

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C. Preclearance Submissions

Finally, I would like to make one observation with respect to the fact that a number of covered jurisdictions are filing preclearance submissions with the United States District Court for the District of Columbia instead of or in addition to filing with the Department of Justice. From the publicly available data, there are six states that have filed preclearance requests with both the Department and the United States District Court. These are Alabama, Louisiana, Georgia, North Carolina, South Carolina, and Virginia. Two states, Michigan and Texas, have filed their request with the District Court only. Alaska has filed its request with the Department only. The Department has precleared the state legislative and congressional redistricting plans of Georgia, Louisiana, North Carolina, and South Carolina.[23] The Department has precleared the state legislative redistricting plans of Virginia and Alaska. The Department has precleared Alabama's congressional redistricting plan. As far as I can tell, the Department has responded to and precleared all statewide redistricting requests. The Department has been expeditious in responding to statewide preclearance requests.

Moreover, when one compares the experience of Texas, which opted to submit exclusively to the District Court, with that of the jurisdictions that opted to submit to the Department either additionally or exclusively, the efficiencies of administrative preclearance are easy to see. The Department is statutorily required to respond within 60 days or otherwise the submission is precleared by default. By contrast, litigation takes time; it is not an expeditious process. As demonstrated by the current Texas redistricting saga, because litigation is a slow process, a state's election machinery may be in limbo when it cannot get its redistricting plan precleared on time. Furthermore, again as demonstrated by current Texas imbroglio, when one considers the possibility of Section 2 litigation in the local district court, which is ever present following the passage of a redistricting plan, in combination with Section 5 litigation in the D.C. District Court, the uncertainly levels are raised significantly. You have two different courts addressing related but different aspects of the plan and each on their own timetable.

One possible resolution would be to amend the VRA and treat statewide redistricting plans as special cases. In those cases we would (a) permit covered jurisdictions to file redistricting preclearance requests in their local district courts and (b) require covered jurisdictions to submit redistricting preclearance requests to the Department. Covered jurisdictions would maintain the option of a judicial bypass with the additional benefit of having the issue determined by their local district courts, which could be given the authority to consolidate both Section 5

[23] http://www.justice.gov/crt/about/vot/sec_5/statewides.php.

and Section 2 actions. Moreover, by compelling preclearance of redistricting, and only redistricting, submissions to the Department, the VRA can preserve the possibility of expedited review of redistricting requests. If covered jurisdictions are unsatisfied with the Department's resolution of the redistricting submission they always have the district courts as a backup option. If on the other hand the Department preclears the redistricting submission expeditiously, as it has in this round of submissions, the judicial action becomes moot.