Redistricting and the Voting Rights Act

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Voting Rights Act of 1965 ("VRA")

- Passed by the 89th United States Congress at the height of the 1960s civil rights movement
  - The White House increased its support for voting rights legislation after the March on Selma in March of 1965
- Signed into law by President Johnson on August 6, 1965
- Has since been amended five times to expand its protections

VRA Section 5

Not dead, but dormant

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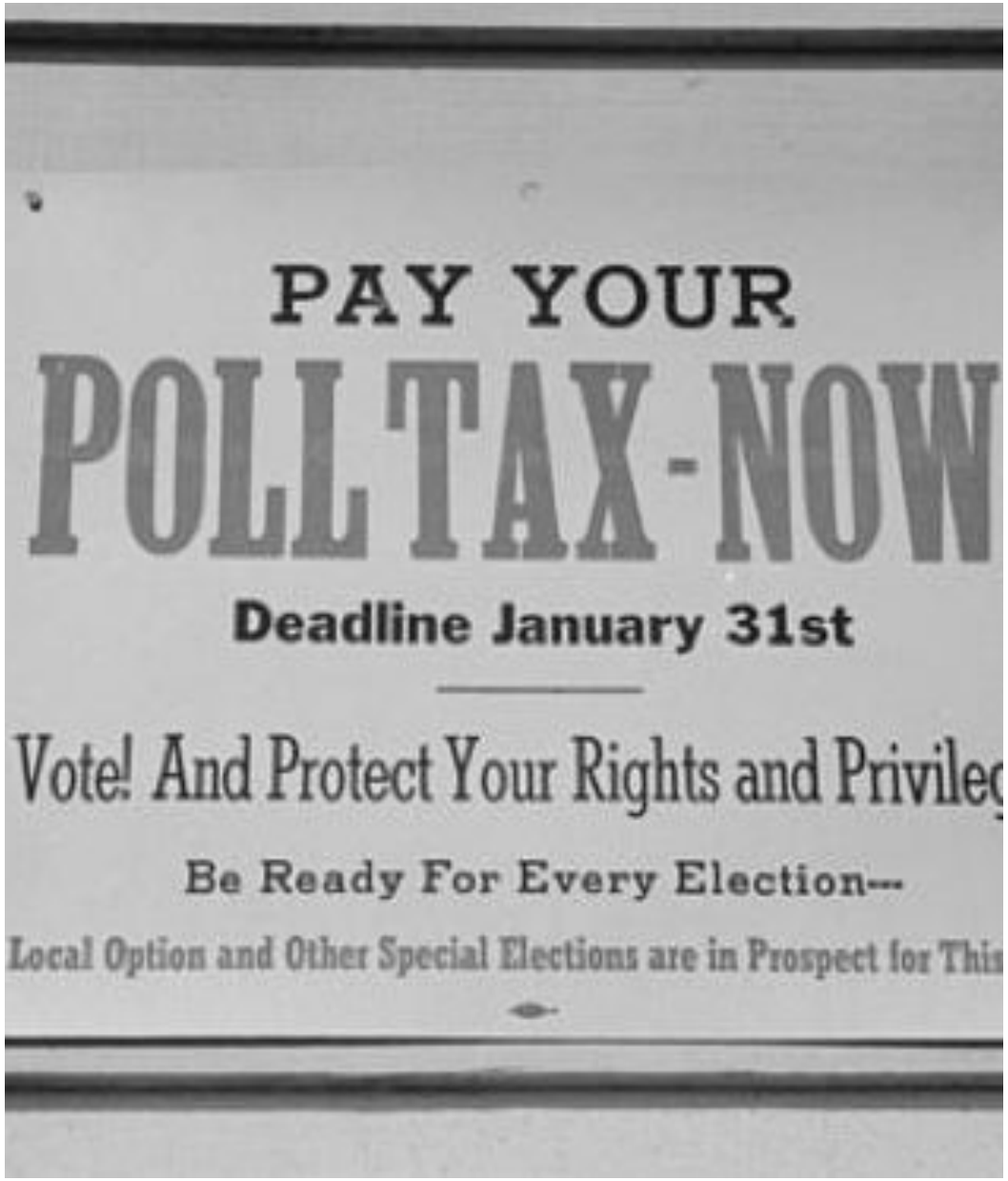
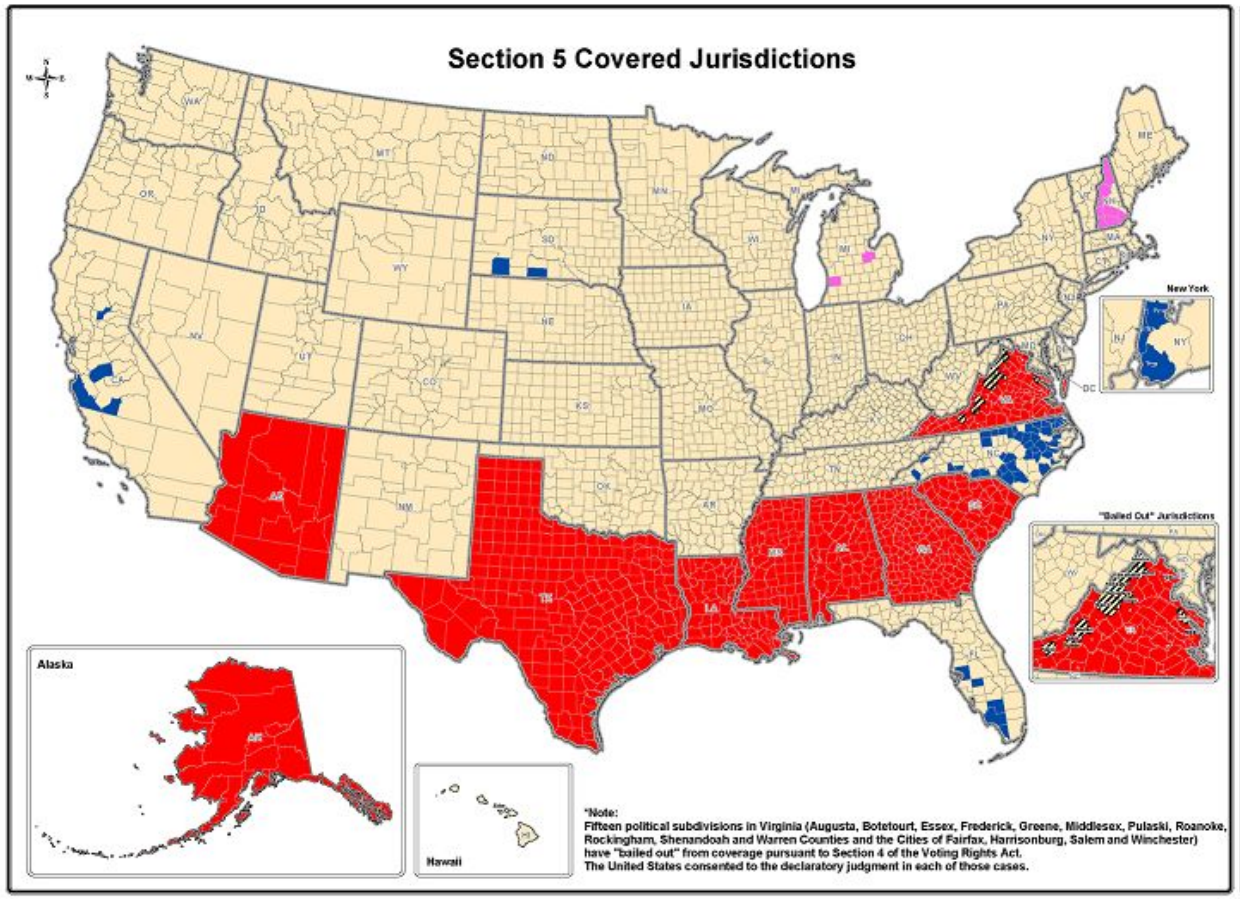
VRA Section 5

- An expansive exercise of federal power
  - The purpose of this "strong medicine," *Shelby County v. Holder*, 570 U.S. 529 (2013), was to end a game of whack-a-mole between federal courts and states determined to preserve white electoral dominance
    - Change the case-by-case approach of the Civil Rights Acts of the late 1950s and early 1960s
  - Bring an end to the discriminatory voting practices of the Jim Crow era



VRA Section 5

- Required certain states and local jurisdictions ("covered jurisdictions") to seek prior approval ("preclearance") from the federal government to "enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting"
  - Redistricting required preclearance
  - "Covered jurisdictions" were determined by a coverage formula in Section 4



VRA Section 5 – Covered Jurisdictions

- Section 4 coverage formula
  - Included states and local jurisdictions that, as of the 1964 general election:
    - Employed a discriminatory "test or device," including literacy tests, good character requirements, etc., and
    - In which fewer than 50% of voting-age residents were registered to vote or voted in the 1964 presidential election.
  - Applied mostly to Jim Crow states of the Deep South
    - Congress later extended the preclearance requirement to states like Texas, Alaska, and Arizona.
    - Cited Arizona's policy of providing voting materials only in English and its use of a literacy test, discontinued in 1975

VRA Section 5 – Compliance & Nonretrogression

- Section 5 prohibits covered jurisdictions from implementing any electoral change "that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color" to vote.
  - A redistricting plan is impermissible if it has a ***discriminatory purpose*** OR an innocent purpose but ***discriminatory effect***
  - Discriminatory effect evaluated by the principle of "nonretrogression"
    - "Whether the ability of minority groups to participate in the political process and to elect their choices to office is . . . [d]iminished . . . [b]y the changes affecting voting" implemented since the last election. *Beer v. United States*, 425 U.S. 130, 141 (1976)
    - Typically focuses on whether a redistricting plan expands (or at least preserves) the number of districts in which minority voters are able to elect the candidates of their choice.
      - While Section 5 is moot, this inquiry is still important under VRA Section 2

Invalidating the Coverage Formula: *Shelby County*

- Congress continuously amended and reauthorized the VRA, but retained the Section 4 coverage formula, based on the elections of 1964-1972.
- In 2013, the United States Supreme Court found the coverage formula unconstitutional because it could not justify application of a formula "based on decades-old data and eradicated practices." *Shelby County v. Holder*, 570 U.S. 529, 551 (2013).
  - Section 5 was not declared unconstitutional, but without a preclearance formula, no jurisdiction is subject to its requirements
  - Congress ***could*** create a new preclearance formula and revive Section 5, but it would likely be subject to legal challenge, as the Court suggested that Section 5 may also be unconstitutional in practice

VRA Section 2

The core of the modern Voting Rights Act

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VRA Section 2

- Post-*Shelby County*, Section 2 is the major remainder of the VRA
- Prohibits any "voting qualification or prerequisite to voting or standard, practice or procedure . . . [w]hich results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."
  - Vote denial claims and vote dilution claims
    - Applies to redistricting, primarily in the form of a "vote dilution" claim
- Denial or abridgement occurs when: "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Section 2 vs. Section 5

"Section 2 is a legal *sword* that enables minority voters to *improve* their electoral position, while Section 5 is a *shield* that prevents minority voters' position from *worsening*." ELECTION LAW: CASES AND MATERIALS (6th ed. 2017).

	Section 5	**Section 2**
Standard	Nonretrogression (i.e. a procedure can't result in a minority group losing ground)	Whether a group's members "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"
Scope of application	Applies only to covered jurisdictions	Applies to every voting jurisdiction
Initiation of proceedings	Preclearance put onus on government	Without preclearance, requires plaintiffs to bring challenges

Section 2: Vote Denial Claims vs. Vote Dilution Claims

- **Vote denial** – challenger alleges that a voting procedure has resulted in not being able to exercise the right to vote at all
  - *Brnovich v. Democratic National Committee* (currently pending before the United States Supreme Court) will clarify the standard
- **Vote dilution** – challenge alleges that a voting procedure has resulted in having less opportunity to exercise political power equal to that of a member of a different group
  - More common in redistricting challenges
  - When "the dispersal of [racial minorities] into districts in which they constitute an ineffective minority of voters or from the concentration of [racial minorities] into districts where they constitute an excessive majority" *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

Section 2: Vote Dilution Claims

- Most often arise when minority voting power is diluted by the creation of insufficient "majority-minority districts"
  - Majority-Minority District contains more constituents who are members of an ethnic minority group than constituents who are White, Non-Hispanic
- Standard remedy for a vote dilution claim is the creation of a greater number of majority-minority districts where the minority group is reasonably assured of being able to elect the candidate of its choice
  - "Packing" members of the minority group creates *too few* majority-minority districts where minority voters may elect representation of their choice
  - "Cracking" divides the minority group into *too many* districts where they cannot achieve a majority

Section 2: Vote Dilution Claims

- *Thornburg v. Gingles* – test for vote dilution
  - First, is the minority population capable of electing a candidate of its choice in a hypothetical district according to a three-part test ("the *Gingles* factors")?
    - 1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district;
    - 2) the racial group is politically cohesive; and
    - 3) the majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate
  - Second, based on the totality of the circumstances, do the members of the racial group at issue in fact have less opportunity to elect the candidates of their choice?
    - Requires examination of factors listed in the Senate Report accompanying the 1982 amendments to Section 2

Vote Dilution Claims – the *Gingles* Factors

1. "Sufficiently large and geographically compact to constitute a majority in a single-member district"

- Size
  - Must be more than 50% of the voting age population
  - "Crossover" districts – where a minority group can usually elect the candidate of its choice with the help of "crossover" voting from White voters
    - Do not satisfy the *Gingles* prong
  - "Coalition" districts – where two or more racial minority groups may reach a majority
    - Can satisfy the *Gingles* prong, as long as the groups are sufficiently cohesive
- Compactness
  - Asks whether the minority community is sufficiently concentrated, taking into account principles such as maintaining communities of interest and respecting traditional boundaries
  - In *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), the Supreme Court found that a proposed district in Texas was not compact because it combined Latino voters near Austin and those in the Rio Grande Valley, 300 miles away

Vote Dilution Claims – the *Gingles* Factors

2. "Politically Cohesive"

- "Whether the minority group has expressed clear political preferences that are distinct from those of the majority." *Gomez v. Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988).
- Typically proven through expert testimony and statistical analysis showing correlation between minority status and candidate preference
  - Courts may also consider non-statistical evidence (i.e. observations and experiences of those involved)
- No quantitative threshold for how cohesive a group must be

Vote Dilution Claims – the *Gingles* Factors

3. Majority Bloc Voting

- Similar to Factor 2, but applied to the majority group
  - Factors 2 and 3 are often considered together, under the term "racial polarization"
- Whether "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—. . . to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

Vote Dilution Claims – the Senate Factors

- If a minority population satisfies all three *Gingles* requirements, the court examines whether, under the totality of the circumstances, "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."
- *Gingles* adopted specific factors for this portion of the inquiry
  - Factors listed in the Senate Report accompanying the 1982 amendments to the VRA
  - Plus "proportionality" – "the percentage of total [statewide] districts that are [minority] opportunity districts with the [minority] share of the citizen voting age population"
    - Protects against a state having *too many* majority-minority districts

Vote Dilution Claims – the Senate Factors

- The history of voting-related discrimination in the jurisdiction;
- Extent to which voting in the jurisdiction is racially polarized;
- Extent to which the jurisdiction has used voting practices or procedures that increase the opportunities for discrimination against the minority group;
- Exclusion of members of the minority group from the candidate slating process;
- Extent to which the minority group bears the effects of past discrimination in education, employment, and health;
- Use of overt or subtle racial appeals in political campaigns;
- Extent to which members of the minority group have been elected to public office in the jurisdiction;
- Evidence that elected officials are unresponsive to the minority group's needs;
- Evidence that the policy underlying the use of the contested practice is tenuous

Vote Dilution Claims – the Senate Factors

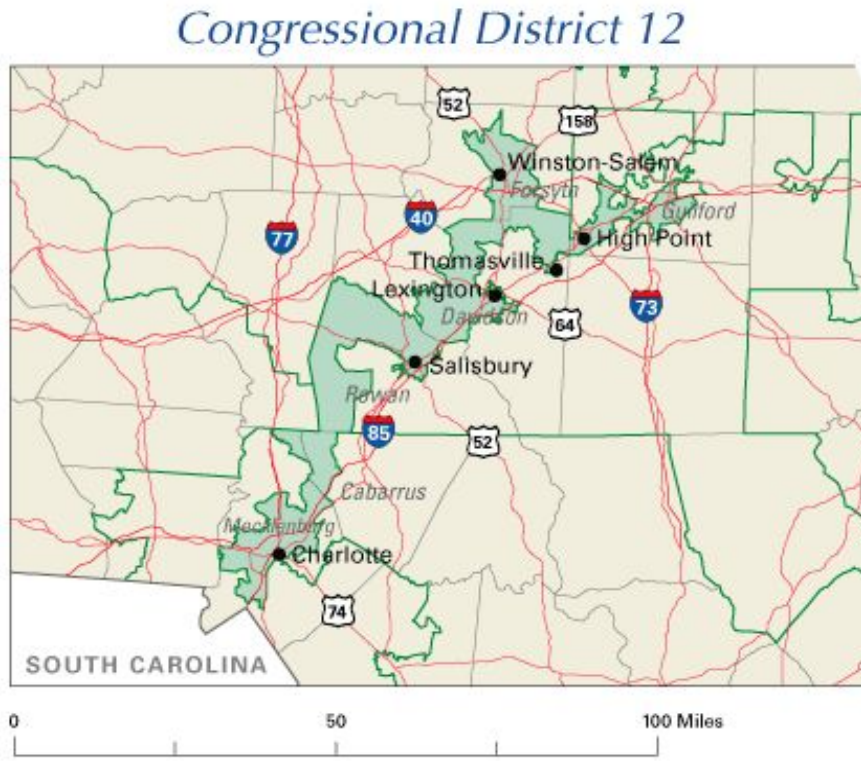
- Prioritizing the Senate Factors
  - No single factor is dispositive
  - The most important factors are:
    - Extent of racially polarized voting (proven the same way as racial polarization in the *Gingles* factors)
    - Extent to which minorities have been elected to public office in the jurisdiction
  - How to establish/prove the factors
    - Racial polarization – through statistical analysis used for the *Gingles* factors
    - Other factors are based largely on historical/social conditions, may be established by expert reports, testimony from historians and demographers

Racial Gerrymandering

- Gerrymandering is the practice of drawing lines to favor one group over another
- May be partisan or racial
  - Partisan gerrymandering is nonjusticiable (*Rucho v. Common Cause*, 139 S. Ct. 2484 (2019))
  - Racial gerrymandering implicates principles of Equal Protection Clause and VRA
  - Often related to vote dilution claims, but distinct

Racial Gerrymandering Claims

- "Negative racial gerrymandering" – where lines are drawn to prevent minorities from electing their preferred candidates
- "Affirmative racial gerrymandering" – where lines are drawn to favor racial groups
  - *Shaw v. Reno*, 509 U.S. 630 (1993) – first modern decision to permit a claim for racial gerrymandering
  - North Carolina's second majority-black district wound in a "snake-like fashion . . . [u]ntil it gobbles in enough enclaves of black neighborhoods"
  - Challengers did not argue the plan diluted majority voting rights, but that it was "an effort to segregate the races for the purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification."



Racial Gerrymandering Claims

- Arise where race "predominates" over other neutral criteria in a redistricting plan
- To withstand constitutional challenge, state must show plan is "narrowly tailored to meet a compelling state interest."
- Case law does not provide bright-line guidance
  - Generally, compliance with the VRA (e.g., drawing majority-minority districts) is a compelling state interest
  - The "prevailing view" is that a state must comply with the VRA, but do no more than necessary to meet those obligations
  - State should draw districts with consideration for *all* criteria, not just race


Questions?
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