­­Chapter VI--Voting Affirmative Action

**Voting Rights and Affirmative Action: President Trump and Obama**

**The Voting Rights Act of 1965 (VRA)[[1]](#footnote-1) was transformative. It enabled large numbers of Blacks to vote. As a consequence, African Americans –and other minority groups--constitute key constituencies invoked by candidates for electoral success. President Obama supported the Act vigorously.[[2]](#footnote-2) President Trump presented no public opposition both to the VRA’s creation of minorities as a major force in American politics, and to its creation of a nation replete with racial and ethnic majority-minority voting districts. Further, President Trump worked to increase minority electoral support. Neither Trump nor his Administration have adopted the view that America is systemically racist—a view that has been prevalent in the creation and operations of the VRA. The argument that President Trump is reducing minority voting by his support of such measures as voter ID’s lacks substantiation.**

 **Obama’s presidential race was supported overwhelmingly by Blacks and other minorities, and it is not surprising that he opposed the U.S. Supreme Court’s ending of the Section 5 requirement in the Voting Rights Act that electoral changes by states and localities be acceptable to Federal officials before being implemented. And he also made clear that he was opposed to other electoral changes that might interfere with minority access to the polls. [[3]](#footnote-3) Staunch advocates of minority voting insist that such changes as requiring voter ID’s; the purging from voter rolls of those who did not exercise their vote for some time; and the elimination of early voting mechanisms -while presented in neutral terms and as promoting integrity--could harm minority turnout. All of this is yet to be proven. These mechanisms are not prohibited directly by the VRA. But Trump has opposed enhanced voter-turnout schemes on the unproven grounds that it might harm Republican candidates.[[4]](#footnote-4) Additionally, Trump is much concerned about fraud at the polls, and he promoted voter ID regulations to reduce cheating which he also felt would be enhanced by mail balloting.[[5]](#footnote-5) (Mail-in cheating and the absence of voter-id’s have yet to be shown to be associated with substantial fraud, but counting mail-ins has produced problems,[[6]](#footnote-6) and allegations of mail fraud in Patterson, N.J., resulted in a court-order for a revote[[7]](#footnote-7).) Doubtless, President Trump’s insistence that the decennial census ask about citizenship status was designed to reduce non-citizens from voting and thus cheating. Trump has felt that he was cheated out of majority support in the 2016 election. As noted, whether Trump’s voting-change efforts violate the VRA is yet to be determined.**

**Race/ethnic affirmative-action objectives were actively pursued by the Obama Administration and its predecessors in their implementation of the 1965 Voting Rights Act (VRA).[[8]](#footnote-8) During the Obama years, however, the long-time rationale for the VRA’s affirmative-action regulations, namely that­ White systemic antiminority-animus badly undercuts minority voting and its effectiveness, was rejected by the Supreme Court. In *Shelby County v. Holder,[[9]](#footnote-9)*a slim majority of five--in abandoning the VRA’s preclearance formula (applicable only to such areas where minority turnout/registration was low) but leaving the remainder of the Statute intact-- insisted that America has cast off its historic antiminority venom preventing Black/Hispanic participation in voting and office-holding. That majority view was rejected in vigorous dissents by four members of the High Court; by the Obama Administration; and by many others. Undaunted by *Shelby,* the Obama Administration continued to pursue affirmative-action undertakings enabled by other portions of the VRA. These included the cultivation of majority-minority districting meant to impede minority vote-dilution, and other potential barriers to minority voting.**

**The Literacy and Language Minority[[10]](#footnote-10) Dimensions of VRA’s Sections 203 and 204**

**At the onset of the VRA in 1965, its Section 4 abolished literacy tests in states and/or their political jurisdictions where less than 50% of the voting-age population was registered to vote or voted for President in the 1964 election. The former Confederate States were targeted by this formula, and much of that region was prohibited from using literacy tests to prevent Blacks from voting. The covered jurisdictions were required to *preclear* any changes in voting procedures with either the U.S. Attorney General, or a special three-member U.S. District Court located in the District of Columbia. Later extensions of the “fewer than 50% of the voting-age population” formula were applied to states and/or their political jurisdictions within states (e.g., cities and counties) for the Presidential elections of 1968 and 1972. Additionally, the 1975 Congress, (in VRA’s Section 203) attempted to mitigate the systemic discriminatory burdens placed on language minorities statutorily defined as Asians, Hispanics, and Native Americans. The VRA requires that voting materials be provided in English *and* the applicable minority language in jurisdictions where the defined language minorities constitute more than 10,000 in number or 5% of the jurisdiction’s population, but only if that language minority suffers an illiteracy rate higher than the National average. Illiteracy is defined as the inability “to speak or understand English adequately enough to participate in the electoral process"[[11]](#footnote-11) in English. About 19 million language minorities of voting age reside in covered jurisdictions, and these language-minority districts were also subject to Federal preclearance.[[12]](#footnote-12) As a consequence of these VRA voting participation/registration, and/or language minority requirements, Alabama, Georgia, Mississippi, South Carolina, Louisiana, Florida, Texas, Alaska, Arizona, and portions of California, North Carolina, New York, New Mexico, New Hampshire, Ohio, South Dakota, and Michigan were required to abolish literacy tests and/or preclear changes in voting procedure with the attorney general or the special three-member District court in D.C.[[13]](#footnote-13) Dramatically large numbers of African Americans, Hispanics, and Asians gained suffrage by these VRA provisions. By 1976, the voter registration rate for all citizens in the preclearance areas equaled that of the National average. Sixty-eight percent of the Black population in the original 1965 preclearance zones was registered to vote for the 2004 Presidential election--a rate higher than in the nation’s population as a whole.[[14]](#footnote-14)**

 **The VRA literacy-test abolition, preclearance, and language-minority requirements were the progeny of statistically low voting rates believed to be the effect of systemic race/ethnic discrimination. The demonstration of intentional racism by any particular VRA-covered jurisdiction was not required. Congress extended this presumption of systemic rot countrywide when it abolished literacy tests for voting nationally in 1975.**

 **The Obama Administration has emphasized the value of the VRA preclearance function which the Court nullified in *Shelby v. Holder.[[15]](#footnote-15)*  In his exultation over the preclearance mechanism of the VRA (important in the affirmative-action creation of majority-minority legislative districts designed to elect minorities), U. S. Attorney General Holder viewed these majority-minority districts with other civil rights accomplishments. These civil rights advances, the Attorney General accentuated, have opened doors to previously excluded groups, “helping to ensure equal access to schools and public spaces, to restaurants and workplaces, and – perhaps most important of all – to the ballot box. Our great nation was transformed.”[[16]](#footnote-16) "We are a better nation now than we were because more people are involved in the electoral process,'' Holder said in an interview. "The beauty of this nation, the strength of this nation, is its diversity,” Holder continued, “and when we try to exclude people from being involved in the process . . . we weaken the fabric of this country.''[[17]](#footnote-17)**

**The head of the Obama Civil Rights Division of the Department of Justice, in 2012, had this to say about the Division’s concern with VRA’s language-minority provisions[[18]](#footnote-18):**

**In the past two years, the Department has successfully resolved violations of the language minority requirements to protect limited English proficient citizens all around the country:**

**We've resolved separate lawsuits to protect Spanish-speaking voters in Cuyahoga County, Ohio, and Lorain County, Ohio (Cuyahoga is the Cleveland metro area, it's the largest county in the state; and Lorain is just to the west - part of the greater Cleveland area).**

**A few months ago we reached a settlement with Alameda County, California - the East Bay area, including Oakland and Berkeley - to protect the voting rights of Spanish-speaking and Chinese-speaking citizens.**

**We also reached an innovative settlement with Shannon County, South Dakota, which was the Justice Department's first new case in more than a decade to protect Native American voters with limited English proficiency. Shannon County is within the Pine Ridge Reservation of the Oglala Sioux Tribe, and includes part of the Badlands National Park. It has the largest Native American population in the state. It's also among the poorest counties in the entire country, so resolving concerns about language access in election administration presented unique challenges. We were ultimately able to achieve a great result in this case, in part by identifying available state funds, and with innovative remedies that include a Lakota-language audio ballot for voters who need one.**

**We had two other important cases recently regarding Native American voters, one in Cibola County, New Mexico, and one in neighboring Sandoval County, New Mexico. In both counties we negotiated extensions to earlier settlement agreements to ensure that all phases of the election process were as accessible to Native American populations as they are to the remainder of the counties' populations. These cases involved a number of different Native American languages, including Keresan, Navajo, and Towa, which are all traditionally unwritten languages; and so our remedy also required oral instructions or assistance where necessary.**

**And just a few weeks ago, a court approved a settlement agreement to resolve a lawsuit we filed against Colfax County, Nebraska, to protect Spanish-speaking voters in that county.**

**Colfax County is a great example of the importance of strong enforcement of the language minority provisions of the Voting Rights Act. The Hispanic population in Colfax has increased from about 26% of the county population ten years ago to about 41% of the county population today.**

**And a significant portion of those citizens are limited English proficient - which, for purposes of the Voting Rights Act, means "unable to speak or understand English adequately enough to participate in the electoral process." This is a perfect example of the importance of our voting rights laws - nearly half of the Colfax County population is Hispanic, and a significant portion of those Hispanic citizen voters would be unable to participate meaningfully in elections without bilingual ballots, polling place notices, and other election materials.**

**And as I have said, our efforts to secure compliance with voting rights laws are not limited only to litigation. We currently are engaged in outreach to every jurisdiction covered by the minority language requirements and are working with them to explain their obligations and bring them into compliance.**

**So when we talk about ensuring access to the ballot and guaranteeing nondiscrimination in election administration, the language minority provisions are a critical aspect of the Justice Department's enforcement efforts. We'll continue to enforce these provisions around the country - from the Bay Area to the Badlands, from Cleveland down to Colfax County, Nebraska.**

**Preclearance and its Abolition in *Shelby v. Holder* (2013)**

 **The preclearance/coverage formula of VRA’s Section 4 was found unconstitutional in *Shelby County v. Holder* (2013).[[19]](#footnote-19) That Section’s affirmative-action assumption that various areas of the country were systemically racist and particularly prone to pursue prohibited racial/ethnic voting discrimination was found by the Supreme Court to be outdated. “*Our country has changed*,” the Supreme Court’s majority opinion declared, “and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.” [[20]](#footnote-20) The coverage/preclearance dimension of Section 4 does not conform with the country’s current racial/ethnic conditions and attitudes, especially those in the former Confederate areas where White supremacy attempts were most prevalent. Central portions of the *Shelby* majority opinion follow:[[21]](#footnote-21)**

**Nearly 50 years …[since the passage of the VRA], things have changed dramatically. … In the covered jurisdictions,"[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." The tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years.**

**Those conclusions are not ours alone. Congress said the same when it reauthorized the Act in 2006, writing that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." The House Report elaborated that "the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and noted that "[i]n some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters." That Report also explained that there have been "significant increases in the number of African-Americans serving in elected offices"; more specifically, there has been approximately a 1,000 percent increase since 1965 in the number of African-American elected officials in the six States originally covered by the Voting Rights Act.**

**The following chart, compiled from the Senate and House Reports, compares voter registration numbers from 1965 to those from 2004 in the six originally covered States. These are the numbers that were**

**before Congress when it reauthorized the Act in 2006:**

|  |  |  |
| --- | --- | --- |
|  | **1965** | **2004** |
|  | **White** | **Black** | **Gap** | **White** | **Black** | **Gap** |
| **Alabama** | **69.2** | **19.3** | **49.9** | **73.8** | **72.9** |  **0.9** |
| **Georgia** |  **62.[6]** | **27.4** | **35.2** | **63.5** | **64.2** | **-0.7** |
| **Louisiana** | **80.5** | **31.6** | **48.9** | **75.1** | **71.1** |  **4.0** |
| **Mississippi** | **69.9** |  **6.7** | **63.2** | **72.3** | **76.1** | **-3.8** |
| **South Carolina** | **75.7** | **37.3** | **38.4** | **74.4** | **71.1** |  **3.3** |
| **Virginia** | **61.1** | **38.3** | **22.8** | **68.2** | **57.4** | **10.8** |

**The 2004 figures come from the Census Bureau. Census Bureau data from the most recent election indicates that African-American voter turnout exceeded white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent. The preclearance statistics are also illuminating. In the first decade after enactment of §5, the Attorney General objected to 14.2 percent of proposed voting changes. In the last decade before reenactment, the Attorney General objected to a mere 0.16 percent.**

**Section 5 Preclearance Prior to *Shelby v. Holder***

**As noted, covered jurisdictions under Section 4 of the VRA were required by Section 5 (of the original Act to submit changes in voting procedures for Federal preclearance. Voting changes, under the initial Statute, “could not have the *purpose* and will not have the *effect* of denying or abridging the right to vote on account of race or color….”[[22]](#footnote-22) In 1969, the Supreme Court, in *Allen v. State Board of Elections*[[23]](#footnote-23) interpreted denial/abridgment of the right to vote to incorporate any voting change *diluting* the right to an effective vote.[[24]](#footnote-24) *Allen*'s ruling established that *all* electoral changes--including post-census redistricting-- were to be submitted for preclearance. And the Department of Justice (DOJ) administered preclearance in an affirmative-action fashion by insisting that not only was the minority vote to be guaranteed, but also that minorities be given the opportunity to elect minorities. To that end, DOJ insisted that redistricting by preclearance jurisdictions incorporate majority-minority districts. [[25]](#footnote-25) Early on, DOJ's preclearance policy was to withhold approval of potentially discriminatory redistricting plans unless the redistricters agreed to include some form of majority‑minority districting.[[26]](#footnote-26) Since 1982, DOJ promotion of majority-minority districting has been conducted largely under amended VRA Section 2 which remained intact after *Shelby v. Holder*. Race‑based districting has applied to Hispanic groups as well as African Americans,[[27]](#footnote-27) with the goal of achieving minority elected officials proportionate to their population size without the need to prove invidious anti-minority animosity.[[28]](#footnote-28) The Obama Administration remained committed to majority-minority districts as a means of enhancing the ability of Blacks and Hispanics to elect representatives of their choice. [[29]](#footnote-29)**

 **Attorney General Holder along with his former Assistant Attorney General, the head of the Department of Justice’s Civil Rights Division (responsible for the VRA’s implementation), referred to Section 5 as the “keystone” of the Voting Rights Act.[[30]](#footnote-30) Before preclearance was made moribund by *Shelby v. Holder,* the Obama DOJ employed an amended Section 5/preclearance to challenge voting requirements which either had “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… to elect their preferred candidates of choice denies or abridges the right to vote ….”[[31]](#footnote-31) These Obama DOJ challenges included a Texas and a South Carolina voter ID requirement; a Texas redistricting plan; and the establishment of nonpartisan election in Kinston, North Carolina.**

**In the case of the Texas and South Carolina voter ID laws, the Attorney General concluded, in true, statistical disparate-impact fashion, that the *effect* of the state identification requirements disproportionately burdened protected minorities, and retrogressively diminished their ability to elect persons of their choice. (Here the *purpose/intent* prong was not addressed.) Rejection letters sent to these states on behalf of the Attorney General included the following which do not evaluate the broad variety of acceptable voter ID’s and the capacity of those without one to vote provisionally[[32]](#footnote-32) :**

**South Carolina--**

**When disaggregated by race, the state’s data show that 8.4% of white registered voters lacked any form of DMV-issued ID, as compared to 10.0% of non-white registered voters. In other words, according to the state’s data, which compare the available data in the state’s voter registration database with the available data in the state’s DMV database, minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by Act R54’s new requirements. We note that the voter registration data matched against the DMV database, and provided to us by the state, does not include several categories of existing registered voters listed as inactive voters, and hence, the number of registered voters without DMV-issued ID may well be higher than even these numbers suggest….Because we conclude that the state has failed to meet its burden of demonstrating that section 5 of Act R54 will not have a retrogressive effect, we do not make any determination as to whether the state has established that the proposed changes to its voter identification requirements were adopted with no discriminatory purpose.[[33]](#footnote-33)**

**Texas--**

 **[A]ccording to the state's own data, a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack this identification. Even using the data most favorable to the state, Hispanics disproportionately lack either a driver's license or a personal identification card issued by [the Department of Public Safety], and that disparity is statistically significant…. In conclusion, the state has not met its burden of proving that …the proposed [voter identification] requirement will not have a retrogressive effect, or that any specific features of the proposed law will prevent or mitigate that retrogression. Additionally, the state has failed to demonstrate why it could not meet its stated goals of ensuring electoral integrity and deterring ineligible voters from voting in a manner that would have avoided this retrogressive effect. Because we conclude that the state has failed to meet its burden of demonstrating that the proposed law will not have a retrogressive effect, we do not make any determination as to whether the state has established that the proposed changes were adopted with no discriminatory purpose.[[34]](#footnote-34)**

 **Later, in 2012, the Obama DOJ challenged the Texas legislative redistricting plan when that plan was submitted to the D.C. District Court for preclearance. Texas had gained four Congressional seats resulting from a population increase reported in the 2010 decennial census. Most of this population increase was Hispanic, but, to the DOJ, no additional Hispanic ability-to-elect districts had been created by the Republican-dominated Texas legislature--thus having the *effect* of diminishing Hispanic capacity to choose a preferred candidate. Likewise, the new Texas plan had moved low-turnout Hispanics into some districts, while moving high-turnout Hispanics into other districts, thus, according to DOJ, showing a *purpose* to discriminate on the basis of ethnicity.[[35]](#footnote-35) (Caution is essential at this juncture, as one person’s purpose to racially/ethnically discriminate improperly is another person’s appropriate quest for partisan advantage, and no law or bureaucratic protest can take politics out of politics. How to distinguish between racial/ethnic discrimination and partisan advantage in the redistricting process is a most difficult if not impossible task.)**

**Another salient DOJ Section 5 preclearance rejection of considerable notoriety concerned Kinston, North Carolina, a community with a Black majority population which had voted to adopt a nonpartisan ballot for local elections. The DOJ preclearance rejection (later withdrawn) complained that the absence of a Democratic ballot label could impede White voting for a Black because African-American candidates are typically Democrats, and a Democratic label could provide helpful policy cues for White Democrats to vote for an African American, typically the preferred candidate of the Black community. According to the impassioned Obama DOJ, nonpartisanship, once the darling of American Progressives, diminished the capacity of Kinston’s Black population to select preferred Black candidates.[[36]](#footnote-36)**

**The Obama Administration and VRA’s Section 2[[37]](#footnote-37) After *Shelby***

**Section 2 of the VRA, unaffected by *Shelby County v. Holder*, remained an Obama Administration vehicle for pursuing voting-rights affirmative action by attacking what was believed to be societally/systemically driven anti-minority practices. The Obama DOJ has employed Section 2 to promote minority-districting and to attack supposed minority voter-impediment policies like voter ID’s, the shortening of early voting days, and the elimination of the capacity to vote and register on the same-day.[[38]](#footnote-38) The President complained about voter impediments in his 2015 remarks to Congress,[[39]](#footnote-39) and, in his analysis of a potential Supreme Court rejection of Section 5 preclearance he referred to VRA’s other voting-interference remedies.[[40]](#footnote-40)**

**Sirius XM host Joe Madison: “If the Supreme Court were to strike down Section 5 of Voting Rights Act [in the current case of *Shelby v. Holder*]…what are the consequences, in particular to the Black and Latino communities?”**

**President Barack Obama: “Historically, the voting rights act was the lynchpin of expanding our democracy during the civil rights movement. By passing the Voting Rights Act what you did was to ensure that those regions of the country, those areas that had a history of preventing African-Americans or Latinos or other ethnic groups from voting, they would have to be cleared by the Justice Department in any changes they had to their voting practices. And the idea was, basically, not only would you outlaw the kinds of tools that were used in the past—like charging people fees for voting or poll taxes and things like that—but what you would also then catch would be any new mechanisms that prevented people from voting. If Section 5 of the Voting Rights Act is struck down, then that pre-clearance process would go away. Now, you’d still have laws in place that would insist that everybody has the right to vote, but the difference is that you’d now have to wait until after…some of these mechanisms had been put into place before you filed suit to try to get them struck down. And obviously, if it’s after an election, it’s a lot harder to give people relief and there are some parts of the country where obviously folks have been trying to make it harder for people to vote, and so generally speaking, you’d see less protection before an election with respect to voting rights and people could keep coming up with new schemes each election, even if ultimately they were ruled to violate the Voting Rights Act, it would be hard for us to catch those things up front to make sure that elections are done in an equitable way.**

 **Now this is part of the reason why at my State of the Union I said it’s very important that we work together to make sure everybody gets a chance to vote, and we clear away a lot of this nonsense. And if we have some national guidelines and rules working with states [and] counties to make sure that people aren’t waiting in line for six, seven hours [and] that there aren’t new tricks that discourage people from voting. If we’ve got those in place, then obviously it’s not as good as if we keep Section 5 of the Voting Rights [Act] in place, which I think we should, but I think it’s still possible obviously to make us to make sure that everybody is able to exercise their rights.”…**

 **But [preclearance is] not the only tool that we have. It’s a critical tool, but it’s not the only tool. I know in the past some folks have worried that somehow, if the Supreme Court strikes down Section 5 of the Voting Rights Act, somehow people are going to lose the right to vote. That’s not the case.  People will still have the same rights to not be discriminated against when it comes to voting, you just won’t have this mechanism, this tool, that allows you to kind of stay ahead of certain practices that may discourage people from voting.**

**The Results Test of VRA’s Section 2 and Majority-Minority Districts**

 **Section 2 bars a voting requirement “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. …”[[41]](#footnote-41) The *results* test has been interpreted by the Supreme Court and the DOJ in a disparate-impact fashion as prohibiting voting procedures that dilute minority voting power, irrespective of the intent to discriminate against them. Central in this connection are voting districts established to increase the election of minorities. Justice Brennan --speaking for the Supreme Court in *Thornburg v. Gingles* (1986)[[42]](#footnote-42)--led the way by interpreting Section 2 as requiring minority-dominated districts under the conditions cited in the quote immediately below, none of which require demonstrating the intent to discriminate against minorities:**

 ***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 as to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.[[43]](#footnote-43)**

 **The championing of the results/disparate-impact test by the Supreme Court in *Thornburg v Gingles* was seen by Justice O’Connor as endorsing rough racial/ethnic proportionality in the election of minorities.[[44]](#footnote-44) *Gingles* did indeed conclude that the generally appropriate vehicle for minority representation was the single-member district.[[45]](#footnote-45) The *Gingles*’ *results/no need to show intent test* assisted the pre-Obama DOJ and the courts in their embrace of racially/ethnically gerrymandered, majority-minority districting. The DOJ motivation was the achievement of minority proportionality among those who were elected.[[46]](#footnote-46)And since the 1965 passage of the VRA, the number of African-American and Hispanic publicly-elected office holders has risen dramatically, largely as a consequence of majority-minority districting. At the VRA’s onset, there were less than 200 Black-elected officials nationwide. By 1990, there were 7,370.[[47]](#footnote-47) A significant African American and Hispanic presence in public office has continued into the new millennium.[[48]](#footnote-48) There were five African Americans and three Hispanics in the 1965 Congress. [[49]](#footnote-49) In 2015, there were 46 African Americans and 32 Hispanics.[[50]](#footnote-50) In States where African Americans and Hispanics constituted more than 10% of the population (as counted in the year 2000 census), their state legislative office holding numbers rose significantly.[[51]](#footnote-51)**

**In his *Holder v. Hall* (1993)[[52]](#footnote-52) concurrence, Justice Clarence Thomas exposed many of the issues associated with the creation of majority-minority districts and similar devices meant to increase the number of minority elected officials. These issues are serious ones and should be discussed by the public, but thus far the discussion has been largely restricted to a small group of scholars interested in voting rights. Excerpts from the Thomas opinion follow:**

 **Only a “voting qualification or prerequisite to voting, or standard, practice, or procedure” can be challenged under § 2. … In my view, however, the only principle limiting the scope of the terms “standard, practice, or procedure” that can be derived from the text of the Act would exclude, not only the challenge to size advanced today, but also challenges to allegedly dilutive election methods that we have considered within the scope of the Act in the past. …**

 **A review of the current state of our cases shows that by construing the Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory—questions judges must confront to establish a benchmark concept of an “undiluted” vote. Worse, in pursuing the ideal measure of voting strength, we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success. In doing so, we have collaborated in what may aptly be termed the racial “balkaniz[ation]” of the Nation. …**

**If one surveys the history of the Voting Rights Act, 42 U. S. C. § 1973 *et seq.,* one can only be struck by the sea change that has occurred in the application and enforcement of the Act since it was passed in 1965. The statute was originally perceived as a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks’ ability to register and vote in the segregated South. Now, the Act has grown into something entirely different. In construing the Act to cover claims of vote dilution, we have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups. In the process, we have read the Act essentially as a grant of authority to the federal judiciary to develop theories on basic resort to political theory that can enable a court to determine which electoral systems provide the “fairest” levels of representation or the most “effective” or “undiluted” votes to minorities. …**

**The Court’s decision in *Allen* v. *State Bd. of Elections,* 393 U. S. 544 (1969), however, marked a fundamental shift in the focal point of the Act. In an opinion dealing with four companion cases, the *Allen* Court determined that the Act should be given “the broadest possible scope.” *Id.,* at 567. Thus, in *Fairley* v. *Patterson,* the Court decided that a covered jurisdiction’s switch from a districting system to an at-large system for election of county supervisors was a “standard, practice, or procedure with respect to voting,” subject to preclearance under § 5. *Id.,* at 569. Stating that the Act “was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race,” *id.,* at 565, the Court reasoned that § 5’s preclearance provisions should apply, not only to changes in electoral laws that pertain to registration and access to the ballot, but to provisions that might “dilute” the force of minority votes that were duly cast and counted. See *id.,* at 569. The decision in *Allen* thus ensured that the terms “standard, practice, or procedure” would extend to encompass a wide array of electoral practices or voting systems that might be challenged for reducing the potential impact of minority votes.**

 **As a consequence, *Allen* also ensured that courts would be required to confront a number of complex and essentially political questions in assessing claims of vote dilution under the Voting Rights Act. … But in setting the benchmark of what “undiluted” or fully “effective” voting strength should be, a court must necessarily make some judgments based purely on an assessment of principles of political theory. As Justice Harlan pointed out in his dissent in *Allen,* the Voting Rights Act supplies no rule for a court to rely upon in deciding, for example, whether a multimember at-large system of election is to be preferred to a single-member district system; that is, whether one provides a more “effective” vote than another. “Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers.” *Allen, supra,* at 586 (opinion concurring in part and dissenting in part). The choice is inherently a political one, and depends upon the selection of a theory for defining the fully “effective” vote—at bottom, a theory for defining effective participation in representative government. In short, what a court is actually asked to do in a vote dilution case is “to choose among competing bases of represe ultimately, really, among competing theories of political philosophy.**

 **Perhaps the most prominent feature of the philosophy that has emerged in vote dilution decisions since *Allen* has been the Court’s preference for single-member districting schemes, both as a benchmark for measuring undiluted minority voting strength and as a remedial mechanism for guaranteeing minorities undiluted voting power. Indeed, commentators surveying the history of voting rights litigation have concluded that it has been the objective of voting rights plaintiffs to use the Act to attack multimember districting schemes and to replace them with single-member districting systems drawn with majorityminority districts to ensure minority control of seats. …**

**The obvious advantage the Court has perceived in single member districts, of course, is their tendency to enhance the ability of any numerical minority in the electorate to gain control of seats in a representative body. See *Gingles, supra,* at 50–51. But in choosing single-member districting as a benchmark electoral plan on that basis the Court has made a political decision and, indeed, a decision that itself depends on a prior political choice made in answer to Justice Harlan’s question in *Allen.* Justice Harlan asked whether a group’s votes should be considered to be more “effective” when they provide *influence* over a greater number of seats, or *control* over a lesser number of seats. See 393 U. S., at 586. In answering that query, the Court has determined that the purpose of the vote—or of the fully “effective” vote—is controlling seats. In other words, in an effort to develop standards for assessing claims of dilution, the Court has adopted the view that members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body. Under this theory, votes that do not control a representative are essentially wasted; those who cast them go unrepresented and are just as surely disenfranchised as if they had been barred from registering. Such conclusions, of course, depend upon a certain theory of the “effective” vote, a theory that is not inherent in the concept of representative democracy itself.**

**In fact, it should be clear that the assumptions that have guided the Court reflect only one possible understanding of effective exercise of the franchise, an understanding based on the view that voters are “represented” only when they choose a delegate who will mirror their views in the legislative halls. See generally H. Pitkin, The Concept of Representation 60–91 (1967).But it is certainly possible to construct a theory of effective political participation that would accord greater importance to voters’ ability to influence, rather than control, elections. And especially in a two-party system such as ours, the influence of a potential “swing” group of voters composing 10% to 20% of the electorate in a given district can be considerable.Even such a focus on practical influence, however, is not a necessary component of the definition of the “effective” vote. Some conceptions of representative government may primarily emphasize the formal value of the vote as a mechanism for participation in the electoral process, whether it results in control of a seat or not. …**

 **Under such a theory, minorities unable to control elected posts would not be considered essentially without a vote; rather, a vote duly cast and counted would be deemed just as “effective” as any other. If a minority group is unable to control seats, that result may plausibly be attributed to the inescapable fact that, in a majoritarian system, numerical minorities lose elections. …**

**Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim is an assertion that the group in question is unable to control the “proper” number of seats—that is, the number of seats that the minority’s percentage of the population would enable it to control in the benchmark “fair” system. The claim is inherently based on ratios between the numbers of the minority in the population and the numbers of seats controlled. As Justice O’Connor has noted, “any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large.” *Gingles,* 478 U. S., at 84 (opinion concurring in judgment). As a result, only a mathematical calculation can answer the fundamental question posed by a claim of vote dilution. And once again, in selecting the proportion that will be used to define the undiluted strength of a minority—the ratio that will provide the principle for decision in a vote dilution case—a court must make a political choice.**

**The ratio for which this Court has opted, and thus the mathematical principle driving the results in our cases, is undoubtedly direct proportionality. …**

**The dabbling in political theory that dilution cases have prompted, however, is hardly the worst aspect of our vote dilution jurisprudence. Far more pernicious has been the Court’s willingness to accept the one underlying premise that must inform every minority vote dilution claim: the assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well. Of necessity, in resolving vote dilution actions we have given credence to the view that race defines political interest. We have acted on the implicit assumption that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own “minority preferred” representatives holding seats in elected bodies if they are to be considered represented at all.**

**It is true that in *Gingles* we stated that whether a racial group is “politically cohesive” may not be assumed, but rather must be proved in each case. See 478 U. S., at 51, 56. But the standards we have employed for determining political cohesion have proved so insubstantial that this “precondition” does not present much of a barrier to the assertion of vote dilution claims on behalf of any racial group.[[53]](#footnote-53) Moreover, it provides no test—indeed, it is not designed to provide a test—of whether race itself determines a distinctive political community of interest. According to the rule adopted in *Gingles,* plaintiffs must show simply that members of a racial group tend to prefer the same candidates. There is no set standard defining how strong the correlation must be. …**

**As a result, *Gingles*’ requirement of proof of political cohesiveness, as practically applied, has proved little different from a working assumption that racial groups can be conceived of largely as political interest groups. And operating under that assumption, we have assigned federal courts the task of ensuring that minorities are assured their “just” share of seats in elected bodies throughout the Nation.**

**To achieve that result through the currently fashionable mechanism of drawing majority-minority single-member districts, we have embarked upon what has been aptly characterized as a process of “creating racially ‘safe boroughs.’” We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of “political apartheid.” *Shaw*, 509 U. S., at 647. See also *id.*, at 657 (noting that racial gerrymandering “may balkanize us into competing racial factions”). Blacks are drawn into “black districts” and given “black representatives”; Hispanics are drawn into Hispanic districts and given “Hispanic representatives”; and so on. Worse still, it is not only the courts that have taken up this project. In response to judicial decisions and the promptings of the Justice Department, the States themselves, in an attempt to avoid costly and disruptive Voting Rights Act litigation, have begun to gerrymander electoral districts according to race. …**

**The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution. “The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.” *Wright* v. *Rockefeller,* 376 U. S. 52, 66 (1964) (Douglas, J., dissenting). Despite Justice Douglas’ warning sounded 30 years ago, our voting rights decisions are rapidly progressing toward a system that is indistinguishable in principle from a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race. Cf. *id.,* at 63–66. Under our jurisprudence, rather than requiring registration on racial rolls and dividing power purely on a population basis, we have simply resorted to the somewhat less precise expedient of drawing geographic district lines to capture minority populations and to ensure the existence of the “appropriate” number of “safe minority seats.”**

**That distinction in the practical implementation of the concept, of course, is immaterial.The basic premises underlying our system of safe minority districts and those behind the racial register are the same: that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view. Such a “system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant.” *Id.,* at 66. Justice Douglas correctly predicted the results of state sponsorship of such a theory of representation: “When racial or religious lines are drawn by the State, . . . antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan.” *Id.,* at 67. In short, few devices could be better designed to exacerbate racial tensions than the consciously segregated districting system currently being constructed in the name of the Voting Rights Act.**

**As a practical political matter, our drive to segregate political districts by race can only serve to deepen racial divisions by destroying any need for voters or candidates to build bridges between racial groups or to form voting coalitions. “Black-preferred” candidates are assured election in “safe black districts”; white-preferred candidates are assured election in “safe white districts.” Neither group needs to draw on support from the other’s constituency to win on election day. As one judge described the current trend of voting rights cases: “We are bent upon polarizing political subdivisions by race. The arrangement we construct makes it unnecessary, and probably unwise, for an elected official from a white majority district to be responsive at all to the wishes of black citizens; similarly, it is politically unwise for a black official from a black majority district to be responsive at all to white citizens.”**

**As this description suggests, the system we have instituted affirmatively encourages a racially based understanding of the representative function. The clear premise of the system is that geographic districts are merely a device to be manipulated to establish “black representatives” whose real constituencies are defined, not in terms of the voters who populate their districts, but in terms of race. The “black representative’s” function, in other words, is to represent the “black interest.” …**

**In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day.**

**Abolishing the affirmative action dimensions of the VRA and their assumption of White racist and ethnic venom would be a way of conforming to the Thomas critique recited above. Arguably, the majority opinion in *Shelby County v. Holder* annulled the White-venom rationale of affirmative action for minority voting. Perhaps the VRA should be restricted to prohibiting that which can be solidly proven (and not assumed) to be an intentional effort to block minority voting? Of course the scope of the VRA is debatable. For example, the four-member minority dissent in *Shelby County v. Holder* (2013) lamented (over 37 pages),[[54]](#footnote-54) that there still exists an amplitude of anti-minority animosity that should prevent any change in Section 5, yet alone Section 2. Of course, the public should be concerned with whether Justice Thomas’ provocative critique should be adhered to. But we get little help from the Obama and Trump Administrations. Those Administrations did not publicize the racial/ethnic Balkanization dimensions of the VRA, and they have not helped the public evaluate the merits of the Federal antidilution-voting thrust.**

**At this juncture, Adlai Stevenson’s acceptance of the Presidential nomination in 1952 should be recalled. “Let’s face it. Let’s talk sense to the American people. Let us storm walls of ignorance through truth, courage and morality, contemptuous of lies, half truths, circuses and demagoguery.”[[55]](#footnote-55) Much of America is deeply resentful of and opposed to affirmative action-- all the more reason for our political leaders to vent critical voting-rights issues. If a majority opposes VRA’s affirmative action, this attitude might be changed through a thoughtful discussion of the issues led by our political leaders. Democratic theory holds that there is a great morality in conforming to majoritarian consent and dissent. Informed majoritarianism should help remedy the “disappointing” unprofessionalism and “deep ideological polarization” which the DOJ’s Inspector General (in 2013) found in the DOJ’s Voting Rights Section of the Civil Rights Division—a Section which administers the VRA.[[56]](#footnote-56) Reportedly, during the Trump Administration, the DOJ’s Voting Rights Section has been largely moribund.[[57]](#footnote-57) However, there was sufficient life in DOJ to drop its Obama-era opposition to the Texas voter ID’s. The Trump DOJ also dropped its opposition to Ohio’s voter-list purge. [[58]](#footnote-58)**

 **Among the issues of the VRA that should be publicly discussed are:**

* **Has White America really changed in terms of allowing nonwhites the ability to vote and participate in political activities as they see fit. Or is this political activity badly impeded by White anti-minority attitudes?**
* **Is it socially desirable for Government to create legislative districts based on a population’s color or ethnicity?**
* **Do minorities require minority office-holding to be afforded good government?**
* **Should forbidden discrimination be assumed through statistical analysis as disparate-impact theory allows? Should not the demonstration of intentional anti-minority animosity be required?**
* **Does not the VRA Section 203 requirement of providing voting materials in non-English languages to language minorities undercut social cohesiveness? Should not literacy in English be required?**
* **Do restrictions on voting enhancement (e.g., voter-ID’s; purging of voter lists; prohibitions against ex-cons from voting; early voting schemes; mail-in ballots) impede minority turnout at the polls? How is electoral cheating to be reduced?**

**The Trump 2016 Presidential Election; The Voting Rights Act Revisited**

**President Trump won the presidential election of 2016 not through the popular vote, but via the Electoral College. He received loyal support of the less educated (no college degree and usually only some high school) who opposed affirmative action. [[59]](#footnote-59) This grouping is regarded as racist, but it has expressed an understanding that many minorities are subject to substantial discrimination.[[60]](#footnote-60) A further difficulty here is that many of these people who voted for Trump often also voted for Obama.[[61]](#footnote-61) Perhaps part of the answer is that there was dislike of the fact that affirmative action frequently permits people to get preferences, enabling them to get “ahead” in the line for life’s benefits. A common view is that such preferences are unfair.[[62]](#footnote-62)**

**President Trump is often referred to as a racist[[63]](#footnote-63) which he denies.[[64]](#footnote-64) In any event, he has repeatedly commented upon the increased employment of minorities (before the coronavirus restraints) which he claimed his policies helped produce, and –among other things-- he has been a champion of the Historically Black Colleges and Universities as well as a staunch supporter of the “First Step Act”[[65]](#footnote-65) meant to help get minorities out of jail. He insists that he deserves, and will get increased minority support in the presidential election of 2020. In short, rather than opposing the major role which minorities obtained through the VRA, he has sought to cultivate minority support.**

**President Trump has guessed that his failure to win the popular vote in 2016 was a function of illegal voting by undocumented immigrants. He appointed an electoral commission (now defunct) to investigate fraudulent voting, and this was seen by his critics as a scheme designed to intimidate immigrants and keep them from voting which many are registered to do. [[66]](#footnote-66) All of which was proclaimed as discriminatory against minorities and contrary to the Voting Rights Act of 1965. Such discrimination, it is alleged, was undertaken by enemies of minority voting once *Shelby v. Holder* (2013)[[67]](#footnote-67) ended Federal preclearance of new pre voting procedures.[[68]](#footnote-68) It is clear that President Trump wanted to reduce the presence of illegal aliens, and his effort to add a citizenship question to the 2020 Census was surely designed to impede illegals from voting through fright; to limit the undocumented minority count; and thus potentially reducing the number of majority-minority districts and the Federal dollars spent to subsidize the people in them. The formal reason for the citizenship question was that it was needed to implement the Voting Rights Act of 1965. This reasoning was judged by the U.S. Supreme Court (which rejected the citizenship question) to be seemingly contrived.[[69]](#footnote-69) Had the citizenship question been added, the potentiality that minority aliens would have been undercounted was strong, and Trump might have “weaponized” the Voting Rights Act to potentially reduce majority-minority (and Democrat) districts as the Obama Administration had “weaponized” the Voting Rights Act to increase the number of majority-minority districts.[[70]](#footnote-70)**

**President Trump responded to the Supreme Court rejection of the reasoning behind the citizenship question with an argument as delineated in his Executive Order[[71]](#footnote-71) below:**

**Section 1.  Purpose.  In *Department of Commerce v. New York*, No. 18-966 (June 27, 2019), the Supreme Court held that the Department of Commerce (Depart­ment) may, as a general matter, lawfully include a question inquiring about citizenship status on the decennial census and, more specifically, declined to hold that the Secretary of Commerce’s decision to include such a question on the 2020 decennial census was “substantively invalid.”  That ruling was not surprising, given that every decennial census from 1820 to 2000 (with the single exception of 1840) asked at least some respondents about their citizenship status or place of birth.  In addition, the Census Bureau has inquired since 2005 about citizenship on the American Community Survey — a separate questionnaire sent annually to about 2.5 percent of households.**

**The Court determined, however, that the explanation the Department had provided for including such a question on the census was, in the circumstances of that case, insufficient to support the Department’s decision.  I disagree with the Court’s ruling, because I believe that the Department’s decision was fully supported by the rationale presented on the record before the Supreme Court. The Court’s ruling, however, has now made it impossible, as a practical matter, to include a citizenship question on the 2020 decennial census questionnaire.  After examining every possible alternative, the Attorney General and the Secretary of Commerce have informed me that the logistics and timing for carrying out the census, combined with delays from continuing litigation, leave no practical mechanism for including the question on the 2020 decennial census. …**

**I am also ordering the establishment of an interagency working group to improve access to administrative records, with a goal of making available to the Department administrative records showing citizenship data for 100 percent of the population.  And I am ordering the Secretary of Commerce to consider mechanisms for ensuring that the Department’s existing data-gathering efforts expand the collection of citizenship data in the future.**

**Finally, I am directing the Department to strengthen its efforts, consistent with law, to obtain State administrative records concerning citizenship.**

**Ensuring that the Department has available the best data on citizenship that administrative records can provide, consistent with law, is important for multiple reasons, including the following.**

**First, data on the number of citizens and aliens in the country is needed to help us understand the effects of immigration on our country and to inform policymakers considering basic decisions about immigration policy.  The Census Bureau has long maintained that citizenship data is one of the statistics that is “essential for agencies and policy makers setting and evaluating immigration policies and laws.”**

**Today, an accurate understanding of the number of citizens and the number of aliens in the country is central to any effort to reevaluate immigration policy.  The United States has not fundamentally restructured its immigration system since 1965.  I have explained many times that our outdated immigration laws no longer meet contemporary needs.  My Administration is committed to modernizing immigration laws and policies, but the effort to undertake any fundamental reevaluation of immigration policy is hampered when we do not have the most complete data about the number of citizens and non-citizens in the country.  If we are to undertake a genuine overhaul of our immigration laws and evaluate policies for encouraging the assimilation of immigrants, one of the basic informational building blocks we should know is how many non-citizens there are in the country.**

**Second, the lack of complete data on numbers of citizens and aliens hinders the Federal Government’s ability to implement specific programs and to evaluate policy proposals for changes in those programs.  For example, the lack of such data limits our ability to evaluate policies concerning certain public benefits programs.  It remains the immigration policy of the United States, as embodied in statutes passed by the Congress, that “aliens within the Nation’s borders [should] not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations” and that “the availability of public benefits [should] not constitute an incentive for immigration to the United States” (8 U.S.C. 1601(2)).  The Congress has identified compelling Government interests in restricting public benefits “in order to assure that aliens be self-reliant in accordance with national immigration policy” and “to remove the incentive for illegal immigration provided by the availability of public benefits” (8 U.S.C. 1601(5), (6)).**

**Accordingly, aliens are restricted from eligibility for many public benefits.  With limited exceptions, aliens are ineligible to receive supplemental security income or food stamps (8 U.S.C. 1612(a)).  Aliens who are “qualified aliens” — that is, lawful permanent residents, persons granted asylum, and certain other legal immigrants — are, with limited exceptions, ineligible to receive benefits through Temporary Assistance for Needy Families, Medicaid, and State Children’s Health Insurance Program for 5 years after entry into the United States (8 U.S.C. 1613(a)).  Aliens who are not “qualified aliens,” such as those unlawfully present, are generally ineligible for Federal benefits and for State and local benefits (8 U.S.C. 1611(a), 1621(a)).**

**The lack of accurate information about the total citizen population makes it difficult to plan for annual expenditures on certain benefits programs.  And the lack of accurate and complete data concerning the alien population makes it extremely difficult to evaluate the potential effects of proposals to alter the eligibility rules for public benefits.**

**Third, data identifying citizens will help the Federal Government generate a more reliable count of the unauthorized alien population in the country.  Data tabulating both the overall population and the citizen population could be combined with records of aliens lawfully present in the country to generate an estimate of the aggregate number of aliens unlawfully present in each State.  Currently, the Department of Homeland Security generates an annual estimate of the number of illegal aliens residing in the United States, but its usefulness is limited by the deficiencies of the citizenship data collected through the American Community Survey alone, which includes substantial margins of error because it is distributed to such a small percentage of the population.**

**Academic researchers have also been unable to develop useful and reliable numbers of our illegal alien population using currently available data.  A 2018 study by researchers at Yale University estimated that the illegal alien population totaled between 16.2 million and 29.5 million.  Its modeling put the likely number at about double the conventional estimate.  The fact is that we simply do not know how many citizens, non-citizens, and illegal aliens are living in the United States.**

**Accurate and complete data on the illegal alien population would be useful for the Federal Government in evaluating many policy proposals.  When Members of Congress propose various forms of protected status for classes of unauthorized immigrants, for example, the full implications of such proposals can be properly evaluated only with accurate information about the overall number of unauthorized aliens potentially at issue.  Similarly, such information is needed to inform debate about legislative proposals to enhance enforcement of immigration laws and effectuate duly issued removal orders.**

**The Federal Government’s need for a more accurate count of illegal aliens in the country is only made more acute by the recent massive influx of illegal immigrants at our southern border.  In Proclamation 9822 of November 9, 2018 (Addressing Mass Migration Through the Southern Border of the United States), I explained that our immigration and asylum system remains in crisis as a consequence of the mass migration of aliens across our southern border.  As a result of our broken asylum laws, hundreds of thousands of aliens who entered the country illegally have been released into the interior of the United States pending the outcome of their removal proceedings.  But because of the massive backlog of cases, hearing dates are sometimes set years in the future and the adjudication process often takes years to complete.  Aliens not in custody routinely fail to appear in court and, even if they do appear, fail to comply with removal orders.  There are more than 1 million illegal aliens who have been issued final removal orders from immigration judges and yet remain at-large in the United States.**

**Efforts to find solutions that address the immense number of unauthorized aliens living in our country should start with accurate information that allows us to understand the true scope of the problem.**

**Fourth, it may be open to States to design State and local legislative districts based on the population of voter-eligible citizens.  In *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016), the Supreme Court left open the question whether “States may draw districts to equalize voter-eligible population rather than total population.”  Some States, such as Texas, have argued that “jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline — including total population and voter-eligible population — so long as the choice is rational and not invidiously discriminatory”.  Some courts, based on Supreme Court precedent, have agreed that State districting plans may exclude individuals who are ineligible to vote.  Whether that approach is permissible will be resolved when a State actually proposes a districting plan based on the voter-eligible population.  But because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population. …**

**In the above-cited order (under “fourth”), Trump addressed the issue of potentially establishing legislative districts on the basis of eligible voters rather than total population. He has sought the non-counting of illegal aliens in the 2020 Census so that the House could be apportioned without taking that population into account.[[72]](#footnote-72) Critics of *Shelby v. Holder’s* elimination of Federal preclearance have argued that the states have come up with new “tricks” --to use an Obama-mouthed word-- including: constructing legislative districts by using eligible voters (rather than all residents) through “gerrymandering.” The law divides gerrymandering into partisan gerrymandering and racial gerrymandering. The former consists of efforts to improve Democratic or Republican strength; the latter is concerned with the creation of majority-minority districts. The Supreme Court addressed the issue of partisan gerrymandering in 2019, concluding that it lacked standards for rejecting partisan gerrymandering, and establishing such standards was a job for Congress.[[73]](#footnote-73) Previously, in 2018,[[74]](#footnote-74) the Supreme Court denied new majority-minority districts in Texas absent a demonstration that the requirements of *Thornburg v. Gingles* had been met. To quote from the Syllabus of that case--*Abbott v. Texas*[[75]](#footnote-75):**

**To make out a §2 “effects” claim, a plaintiff must establish the three “Gingles factors”: (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority’s preferred candidate. Thornburg v. Gingles, 478 U. S. 30, 48–51. A plaintiff who makes that showing must then prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group.**

 **The advocates of new majority-minority districts had failed to meet the *Gingles* standards. One must wonder whether the standards are clear, and –if unclear—the Supreme Court should leave the task for Congress as it has done with partisan gerrymandering. The Supreme Court has allowed a continuation of the Trump plan not to count illegals in the 2020 Census. To the Court , tbe issue was premature. [Adam Liptak, *Government Pursues Immigrant Census Plan*, The New York Times, December 19, 2020, p. 22.]**

# **President Trump opposes voter-enhancement schemes which might hurt his Republican Party.[[76]](#footnote-76) Thus, he has supported voter ID’s[[77]](#footnote-77) which are regarded as impediments to minority voting. The Trump Department of Justice dropped its opposition to the Texas Voter ID .which the Obama Administration opposed.[[78]](#footnote-78) Trump supported the purging voter rolls of those reasonably believed to be ineligible.[[79]](#footnote-79) The Supreme Court upheld Ohio’s voter-roll purge of those who had failed to vote in two previous elections and failed to return a notification that the person involved had not moved.[[80]](#footnote-80) The purging of voter rolls is regarded as negatively affecting minority-voting capacity, as is opposition to early voting and election- day registration schemes. President Trump is very much concerned about cheating at the polls, particularly by illegal aliens. Even during the pandemic, President Trump opposed using mail-ins, allegedly because of potential fraud.[[81]](#footnote-81) Whether Trump’s opposition violates the VRA remains to be determined. The same VRA conclusion is applicable to the effort by President Trump to overturn the 2020 presidential election of 2020. Trump’s focus was on cities with large Black populations—Detroit, Atlanta, Milwaukee, and Philadelphia.[ Jim Rutenberg and Nick Corosanti, *Republicans Rewrite Playbook on Disenfranchising Black Americans*, The New York Times, November 22, 2020, p. A1 ff.]**

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9. *Shelby County v. Holder*, Slip Opinion, No. 12-96 (2013). At <http://www.supremecourt.gov/opinions/12pdf/12-96_6k47.pdf> [↑](#footnote-ref-9)
10. U.S. Department of Justice, *The Minority Language Requirements of the VRA* at <https://www.justice.gov/crt/about-language-minority-voting-rights> [↑](#footnote-ref-10)
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14. Id. at 193. [↑](#footnote-ref-14)
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