THE VOTING RIGHTS ACT: DEFENDING A SECTION 2 CASE — THE ISSUE REVISITED

Vincent R. Fontana*

INTRODUCTION

Defending a Section 2[1] case, or any civil rights case, does not begin with service of a summons and complaint. It begins long before. In my first article on this subject written in this *Review* in 1992,[2] I described how to defend a section 2 case when a suit is actually filed against a municipality and its public officials. Those recommendations are valid today.[3]

However, now I am taking a different, more expansive ap-

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* Partner, Wilson, Elser, Moskowitz, Edelman & Dicker, New York, New York. J.D., Fordham University Law School, 1964; B.S., College of the Holy Cross, 1960. Mr. Fontana specializes in the area of municipal liability. His publications include *Municipal Liability: Law and Practice* and *Municipal Liability: Law and Practice Forms*, both published by John Wiley & Sons.

1. *See* The Voting Rights Act of 1965, § 2, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1994)), *reprinted in* 1982 U.S.C.C.A.N. 177. The Act reads in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
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> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, 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 protected by subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1994).

2. *See* Vincent R. Fontana, *Section 2 Case: Defendants' Perspective*, 21 STETSON L. REV. 771 (1992).

3. *See id.*

proach. I like to call it a "risk management" approach. The idea here is to create a political and social environment that makes a suit unnecessary, or, failing that, improves the municipality's chance of success when a suit is brought.

Once a minority group that has been shut out of the electoral process exceeds ten to fifteen percent of the total population, a section 2 suit becomes exceedingly hard to defend. When defendants have been successful, two principles have emerged.

Defendants can win if: one, the minority community is too small or too diverse;[4] or, two, the remedy creates a distorted, noncompact majority-minority district, defined by race, not politics.[5] Outside these circumstances, defendants have not enjoyed great success. I believe their failure comes from not planning.

Even if suit is filed, all is not lost. Both sides must deal with the same mountain of information. And both must bear costs in time and money that can strain a municipality's or plaintiff's budget to the breaking point. Because of the cost, municipalities may concede liability and litigate only the remedial phase, giving plaintiffs the edge. The better course by far is to begin defending a suit before it is filed by planning ahead, possibly forestalling litigation altogether.[6]

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4. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 48–51 (1986); Campos v. City of Baytown, 840 F.2d 1240, 1241 (5th Cir. 1988); Reed v. Town of Babylon, 914 F. Supp. 843, 863 (E.D.N.Y. 1996); Buchanan v. City of Jackson, 683 F. Supp. 1515, 1526 (W.D. Tenn. 1988); Romero v. City of Pomona, 665 F. Supp. 853, 857–58 (C.D. Cal. 1987).

5. *See*, *e.g.*, Shaw v. Hunt, 116 S. Ct. 1894, 1901 (1995).

6. Those unfortunate enough to go to court will find that most federal judges, zealous to "do what is right," view the Voting Rights Act as a vehicle for proportional representation of all population groups, despite statutory language to the contrary. *See* 42 U.S.C. § 1973(b) (1994). Courts have not publicly acknowledged this unconscious bias, but it can be reasonably inferred from the cases. *See, e.g.*, Collins v. City of Norfolk, 605 F. Supp. 377 (E.D. Va. 1984), *rev'd*, 816 F.2d 932 (4th Cir. 1987), *on remand to* 679 F. Supp. 557 (E.D. Va. 1988), *rev'd*, 883 F.2d 1232 (4th Cir. 1989). The original trial court in *Collins* found African-Americans constituted 35% of the total population and 31% of the voting age population. *See id*. at 382. Among other factors, the court noted that the City Council at that time had two African-American members out of a total of seven, or 29%. *See id*. at 382, 405. The court held for the defendants. *See id*. at 407. I do not suggest conscious predisposition toward plaintiffs, but a desire to level the playing field that can take a turn unintended by the Act's framers. *See* 42 U.S.C. § 1983 (1994). The section provides a private cause of action for deprivation of civil rights under color of law. *See id*.

The common practice of researching the judge takes on more importance under such circumstances. Unfortunately, most judges have no Voting Rights Act history. Other information may substitute. Section 1983 cases, *see* 42 U.S.C. § 1983 (1994) (providing a private cause of action for deprivation of civil rights under color of law), and housing, *see*

REVIEW CENSUS DATA

The planning process — and the defense of any Section 2 case — begins with the dawn of each new decade and census. Census data should be analyzed as soon as it becomes available. Many communities, especially larger cities with significant minority populations, begin this analysis even before the final figures are available. Cities must note the possibility of an undercount. Undercounts affect the number of congressional delegates to be elected from the area and the amount of money that may be available from the federal government. Many cities have sued the Census Bureau because of a perceived undercount of minorities.[7]

The undercount problem tends to occur more in Hispanic communities because of the existence of undocumented workers, illegal aliens, or simply a population that fears authority. Areas with a significant or rapidly growing Hispanic population may well have census data inaccurate as to it. Costly litigation aside, an undercount can become ammunition for an attack on voting districts drawn using census figures.[8] Further, resources and services allocated according to the census may be misallocated, also bolstering a suit.

Implicit in this discussion is the imperative that simply reviewing the census data each decennial is not enough. The information must be reviewed by the appropriate authorities with the expectation that someone is going to do something with it.

Every department head, every elected official, and the town, village, city attorney or corporation counsel, whatever his or her title, must be given a copy of the census data, along with the census data for the prior decennial. Each must review this information to

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Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in sections of 18, 25, and 42 U.S.C.), or school desegregation, *see* Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 514 (codified as amended at 20 U.S.C. §§ 1701–1758), cases share many issues with Voting Rights Act cases.

A judge's prior political life can be revealing. In one case I tried, the judge was a legislator in a previous life and had sponsored legislation to change the form of government of the very city I was defending. As it turned out, he did judicially what he could not do legislatively. Had we known this in time, we might have considered a motion to recuse.

7. *See*, *e.g.*, City of New York v. United States Dep't of Commerce, 34 F.3d 1114 (2d Cir. 1994).

8. *See* sources cited *infra* notes 9–20 and accompanying text.

determine if any services or policies should be changed. They should determine where minorities live, any indications of present or future political involvement, and overall trends. Planners try to discern trends that were either implied or assumed during the years since the last census. If these assumptions were the basis of executive or legislative decisions, their validity must be determined.

In a striking example, for about ten years I represented the City of Pittsburgh in a Voting Rights Act case[9] brought against it. Before trial, a referendum was passed to adopt a single-member district system.[10] Previously, the City had at-large voting.[11] In creating the districts in the late 1980s, 1980 census data was used even though it was considered out of date.[12] The new census was to be released within three years. Although the City and the plaintiffs had no choice but to use the old census data, as did the court in evaluating whether the proposed districting plan satisfied the Voting Rights Act, the parties assumed the 1990 census would show a significant increase in minorities.[13] The plan created two majority-minority districts.[14] The minority community sought to have a three majority-minority district plan adopted on the assumption that the 1980 census did not reflect the true picture.[15] The plaintiffs assumed that the minority population had grown enough between the 1980 census and the drawing of lines in 1987 to justify creating the third district. There was an assumption that the rate of growth as reflected in censuses prior to the 1980s would carry on into the 1980s. However, the City refused to create three majority-minority districts. The plaintiffs eventually accepted the two district plan, which was approved by the court.[16] Acceptance by the plaintiffs reflected, in part, their expectation that the new census would support redistricting after 1990 with a third majority-minority district.[17]

However, the 1990 census showed the City's total population

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9. *See* Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 686 F. Supp. 97 (W.D. Pa. 1988).
10. *See id*. at 99.
11. *See id*.
12. *See id*. at 100.
13. *See id*. at 102.
14. *See id*. at 100.
15. *See Metropolitan*, 686 F. Supp. at 100.
16. *See id*. at 101.
17. *See id*. at 103.

had declined.[18] The African-American population also decreased, but at a lower rate than the white decline.[19] Thus, the African-American percentage of the total population increased slightly.[20]

As a result of the new census, a faction of the minority community sought to redistrict to create a third majority-minority district.[21] The proposal was again rejected by the City and the City's two majority-minority district plan was approved by the court and affirmed on appeal.[22] The evidence showed that the increase in the African-American community simply was not enough to justify more majority-minority districts.[23] It was clear that the third district would not contain enough minorities to create an effective majority or even an "influence" district. Furthermore, the court recognized that the minority group is not entitled to the best possible plan, only one that does not violate the Voting Rights Act.[24]

In this case, where the government used voting districts, evaluation of the new census data was critical in getting the court to approve the 1990 redistricting plan proposed by the City. The same analysis, of course, may indicate an increase in the number of majority-minority districts. If the municipality already has a districting plan in place, it must be prepared to show why an increase is not warranted. Whether reducing the number of districts would be appropriate in a particular circumstance has not been decided in any of the cases this Author has either read or of which he has been a part. If the occasion did arise the court would have to deal with such opposing concepts as "retrogression,"[25] "proportionate representa-

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18. *See* Dan Donovan, *Black Population Decreases Here, but Percentage Rises*, PITT. PRESS, Feb. 20, 1991, at A1.

19. *See id*.

20. *See id*.

21. *See* Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 68 F.3d 456 (3d Cir. 1995) (unpublished table decision); Tom Barnes, *Black Voter Percentage Debated*, PITT. POST-GAZETTE, Mar. 24, 1993, at B4.

22. *See* Barnes, *supra* note 21, at B4.

23. *See* Lawrence Walsh, *U.S. Judge Upholds 2 Black-Majority Council Districts*, PITT. POST-GAZETTE, Aug. 8, 1993, at C7.

24. *See, e.g.*, Prosser v. Elections Bd., 793 F. Supp. 859, 865 (W.D. Wis. 1992).

25. *See, e.g.*, Beer v. United States, 425 U.S. 130, 140–41 (1976). "Retrogression" describes the dilution or abridgement of minority voting rights by enactment of a new discriminatory law after the prior one has been successfully challenged. *See id*. The practice is intended to be prevented by § 5 of the Voting Rights Act. *See id*.; Voting Rights Act of 1965, § 5, Pub. L. No. 89-110, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973c (1994)).

tion"[26] and districts based on "racial criteria alone."[27]

The United States Supreme Court has rejected districting plans that contain distorted districts designed primarily or solely to create or increase minority representation.[28] The Court is likely to reject a plan that abandons the readily accepted standards of redistricting, such as compactness and common political or social interests. Therefore, not merely numbers, but also geographic distribution of minority populations must be evaluated. Districting plans must consider these elements and others, including: geography, the protection of incumbents, the use of natural boundaries, and the makeup of the population. Such evaluation lets planners avoid systems that dilute minority power and risk lawsuits.

The municipality with an at-large system looks at census data from a somewhat different perspective. Part of a municipal attorney's job is to prevent suits, if possible, or to put the municipality in a position to minimize losses. It is called "risk management." Risk management is one of the best tools to successfully defend a Voting Rights Act case. But it requires planning ahead; and that planning process begins with an in-depth analysis of the latest census data.

The data show where minorities live and what is the relevant and/or rising minority community. A review of census data is the best way for a municipality to learn whether one minority group has remained static while another minority has grown to the point where its numbers have to be recognized in voting systems. The growth of any minority community can lead to claims by that "new" minority that it now is denied an equal opportunity to participate in the electoral process and elect representatives of its choice.

This information on minority growth or decline must be shared with the school board so it can evaluate whether and why the school system is becoming segregated. The data can show, for example, whether poor reading scores show up in segregated schools. If so, the relevant political entity can deal with the problem. These figures are

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26. *See, e.g.*, Buchanan v. City of Jackson, 683 F. Supp. 1515, 1521 (W.D. Tenn. 1988). The court noted that no group has a right to proportional representation. *See id*. The language approximates that of the statute. *See* 42 U.S.C. § 1973(b) (1994).

27. *See, e.g.*, Solomon v. Liberty County, 957 F. Supp. 1522, 1550 (N.D. Fla. 1997). Lack of racial bias is merely some evidence of minority access to electoral rights, but is not, by itself, dispositive. *See id*.

28. *See, e.g.*, Shaw v. Hunt, 116 S. Ct. 1894, 1899 (1995).

just the beginning. You can review the school budget and take measures to determine, if challenged, whether you have a unified or segregated educational system and whether it can withstand constitutional review. Get your school authorities involved. How many minority teachers do you have? How many minorities are in school administration? If the numbers don't work — do something about it now. Check graduation statistics and years of schooling as reflected in the census data. What is being done to keep minority children in school? I can guarantee you that plaintiff's attorneys in Voting Rights Act cases will look at these numbers and use them against you, as they are relevant in the socio-economic and responsiveness analysis required by *Zimmer v. McKeithan*.[29] It is not uncommon for municipal officials not to have direct supervision over the schools. However, they usually have the power of the purse to force some changes.

Next, using the census data, look to see what recreational facilities are available in the burgeoning minority community. Are they equal to what is available in the predominantly white community? Show these statistics to your parks and recreation department. Let them review their budget and programs. Also, look over parks and recreation personnel. Usually minorities are your lower level employees. What are you doing about hiring recreational counsellors in your minority areas? What are you doing about getting minorities elevated to higher positions within this and all other departments? What does the minority community say about their parks and recreational needs? Are you talking with them to determine what needs to be done to be "responsive"?

Another reason to study recent census data is to determine if sanitation pickup, road maintenance, and street lights are as consistently provided in the majority-minority areas as in the white areas. Once this data is available, a municipal attorney should discuss these issues with the appropriate department head. Again, responsiveness under *Zimmer*[30] is a critical element in defending a Voting Rights Act case.

One of the most critical of the responsiveness issues involves

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29. 485 F.2d 1297 (5th Cir. 1973). The court stated that a lack of responsiveness to minority needs by legislators and discrimination generally would strongly support a vote dilution charge. *See id*. at 1305.

30. *See id*.

housing. Although this issue does not necessarily tie in directly with census figures it can put you on notice to review the municipality's programs of low income housing development. Remember, your judge will look at housing segregation issues in this case. That is why we suggest you research the judge's prior decisions on this issue.

For an example of how patterns of low income housing development can insidiously impact the successful defense of a Voting Rights Act case, you only have to turn to the Yonkers school and housing desegregation case.[31] While that case did not involve the Voting Rights Act, it did result in a finding of housing discrimination that required significant, if not impossible, redeployment of housing throughout the City.[32] In *Yonkers*, the City tried to argue that segregation of minority housing was supported by the minority community.[33] Unfortunately for the City, a federal district court judge did not accept this justification and found intentional discrimination in housing.[34]

The court also found that the schools were segregated[35] — not surprising once the court found that housing was segregated. The school system was ordered desegregated.[36] That was easier to accomplish than the housing problem. However, it did result in significant white flight from the school system. White flight is not limited to parents keeping children out of public schools. It can also result in whites leaving the community itself, and that has a ripple effect on the entire political process.

If there is time and land available, a conscious effort should be made to disperse low income housing throughout a community. Admittedly, that may be an unpopular political decision, but the more dispersed your minority community, the more difficult it will be to meet the first *Gingles* test of geographical compactness.[37] If you can prove that the minority community cannot create at least

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31. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985) [hereinafter *Yonkers I*].

32. *See* United States v. Yonkers Bd. of Educ., 635 F. Supp. 1577 *passim* (S.D.N.Y. 1986) [hereinafter *Yonkers II*].

33. *See Yonkers I*, 624 F. Supp. at 1331–33.

34. *See id*. at 1376.

35. *See Yonkers II*, 635 F. Supp. at 1537, 1545.

36. *See id*. at 1538, 1540.

37. *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

one district where it will be a majority, the *Gingles* preconditions cannot be met and the suit fails.

HISTORY OF CANDIDATE SELECTION

The next prelitigation issue to review is the history of minority success at the polls. The number of cases in which a political party uses the Voting Rights Act to break the monopoly of the other party is growing. For example, the Town of Hempstead in Long Island recently lost a Voting Rights Act case.[38] Republicans had controlled the Town Council for decades.[39] So in 1988 African-Americans sued, claiming violation of the Voting Rights Act because African-American voting strength was diluted.[40] African-Americans are historically Democrats. The court rejected the Town's argument.[41]

The reason may lie in the history of African-Americans in the Republican Party in Hempstead and their recognition, or the lack thereof, by the political power structure. In today's racial and political climate, any community with a significant, compact minority and an at-large voting scheme should look at every political decision as one to be defended in the future. However, a whole set of different political dynamics apply when districts are involved.

When one political party dominates totally or nearly so, there is a tendency to rule absolutely and to enjoy a certain amount of insulation. The choice of candidates to run for political office is often based more on whether the person selecting the candidate feels he or she can control that candidate or whether that candidate brings to the table of power a segment of the community that is needed to maintain that power. What happens is that the least influential segment of the community gets short shrift. For example, in a community where Republican enrollment is 4-1 to Democrats and no Democrat has won election for the last forty years, the Republicans can feel that the "1" in the ratio can be effectively ignored. Now, if that "1" represents a racial minority protected under the Voting Rights Act, you ignore them at your peril.

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38. *See* Goosby v. Town Bd., 956 F. Supp. 326, 329 (E.D.N.Y. 1997).

39. *See id*. at 332. The court found that since 1907, every official elected townwide was a Republican. *See id*.

40. *See id*. at 328. The municipality's "town" status belies its nature. As of 1990, Hempstead's population exceeded 700,000. *See id*. at 331.

41. *See id*. at 353.

Successful politicians generally are not stupid. They can often see a shift in political power before it becomes evident at the polls. (Note: an analysis of the census data would also give the astute politician a glimpse of what is to come in this regard.) Let us say, for example, that in a heavily Republican community you see a population shift. More middle- and lower-income people, and more minorities, are moving in. You note from the census data that the numbers of middle class and those in the higher income levels constitute a smaller percentage of the whole than they did before. Like census information, this data should tell you that you must recognize this growing segment of your population. It may also indicate that the political philosophy, stated or unconscious, is becoming more liberal than conservative; more Democratic than Republican.

Once you make this analysis, what do you do? You reach out — let us say to the minority community. You get them politically involved. You determine who are the movers and shakers in that community. Usually, it will be ministers. As the minority population percentages reach ten percent or higher, you take steps to learn of their needs. You evaluate these needs in conjunction with evaluating the needs of the white community.

If you decide to select a member of the minority community to sit on boards or commissions, listen to the community's choice to fill that vacancy. That does not mean that the minority community's selection must always be adopted. Nor does it suggest that the minority community should have veto power over the choice of candidates. However, it does mean that if the choice of the minority community is rejected by the candidate selection committee, you should have a good reason. That reason will be carefully scrutinized by an unfriendly federal court judge.

It is not uncommon for the entrenched power structure to give lip service to the demands of the minority community by appointing or supporting a minority representative for a minor post. I had that very problem in a case I tried for the City of Chattanooga.[42] That City had a commission form of government and for several years one of five commissioners was black.[43] That gave the minority community almost proportional representation.[44] The plaintiffs argued that

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42. Brown v. Board of Comm'rs, 722 F. Supp. 380 (E.D. Tenn. 1989).
43. *See id*. at 382–83.
44. *See id*. at 382. Blacks composed 32% of the City's population in 1980. *See id*.

the black commissioner was a token,[45] an "Uncle Tom" if you will. His position had the least power of any of the commissioners[46] and the majority of the commissioners, little by little, had usurped the most significant aspects of his job.

During the trial, this very dedicated, competent public servant sat in the courtroom and looked his detractors straight in the eye. He knew that what they were saying was not true, but I am sure it hurt nonetheless. I told him he had to testify, but I would understand if he felt it would put too much of a strain on him personally and with respect to his standing in the community. He decided to testify, and did very well. He explained how he ran citywide; how he garnered increased recognition from the black and white voters; and that he had a real, meaningful vote and voice on the Commission. In at least one election, he garnered the second highest number of votes, which made him the deputy mayor. Alas, the nay-sayers won the day.[47]

But what this man's candidacy tells us is that if you are going to look to minorities who are elected, make sure they are elected to posts powerful enough to have a meaningful voice. For example, appointment or election to all positions but the top legislative body will not be sufficient to carry the defense to victory.

When a minority representative is selected by the political power structure, review that person's standing in the white and minority communities. In the *Town of Hempstead* case, for example, when vacancies arose on the Town Board, the Republican power structure selected two whites to fill the positions.[48] When the African-American community strenuously objected, an African-American was appointed as executive assistant to the Town Board, but not to fill one of the legislative vacancies.[49] It was a position of questionable importance. What made matters worse was the fact that this person lived in a white neighborhood and played tennis with the person who had the power of appointment;[50] still worse, it was not the person the African-American community wanted or the post the

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45. *See id*. at 394. The court concluded the black commissioner was not a token. *See id*.

46. *See id*.

47. *See id*. at 397.

48. *See Goosby*, 956 F. Supp. at 340.

49. *See id*.

50. *See id*.

African-American community sought.[51] When another seat on the Town Board became available, the African-American executive assistant was appointed to fill the vacancy, notwithstanding the fact that he was found not qualified by the African-American community who wanted someone else appointed who had greater direct ties to the African-American community.[52]

Question: What does this behavior demonstrate to the Court?

Answer: That the African-American community is shut out of the candidate slating process!

What is even more remarkable about this series of events is the fact that the challenge to the at-large system of electing Town Board members had been pending for years.[53] Usually, when such a suit is brought it causes the relevant politicos to give greater lip service to the minority community. Of course, courts rarely are fooled by these sham appointments. However, it is rarer still to have the challenged politicos totally ignore the concerns of the people suing them.

Because many courts will not consider attempts at increasing minority power *during* a lawsuit, it is necessary to review this strategy even before a suit is filed, such as when new census data is released. This is not a form of affirmative action. Rather, it reflects the political reality.

REMEDY PHASE

One way to challenge a proposed districting plan is to argue that the deviation from the largest proposed district to the smallest is greater than ten percent. Less than a ten percent deviation would presumably be constitutional and satisfy the one-person, one-vote requirement.[54] From ten percent or more, the presumption is that the plan violates the one-person, one-vote requirement.[55] However, a deviation greater than ten percent can be acceptable if you cannot create a districting plan with a smaller deviation.[56] The concept of deviation must also be reviewed in the context of geographical

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51. *See id*.
52. *See id*. at 340–41.
53. *See id*. at 328, 340.
54. *See* Connor v. Finch, 431 U.S. 407, 417–18 (1977); Seastrunk v. Burns, 772 F.2d 143, 150 (5th Cir. 1985).
55. *See Seastrunk*, 772 F.2d at 150.
56. *See Connor*, 431 U.S. at 418.

compactness.[57]

Because the second and third *Gingles* factors[58] involve an analysis of polarized voting by whites and the relevant minority, defendants must address such issues as: preferred candidates of the relevant minority and whether the relevant minority can constitute an "effective" majority in a particular district.

To determine whether the minority community can constitute an effective majority, you must calculate the total number of minorities, the voting age, and the turnout rate. When that analysis is complete you can determine whether that critical element has been met. For it matters not that you can geographically create a single-member district system, but the plaintiff must prove that the minorities have been unsuccessful solely because of the present system. If you cannot change the outcome by instituting a new system, the defendant wins. As an advocate for defendants, I find most regrettable the fact that courts generally only consider race in determining racially polarized voting patterns and totally ignore other, at least in my view, relevant issues. What I am particularly referring to is political affiliation.

CONCLUSION

It is very difficult to design a defensive strategy for a Voting Rights Act case in a vacuum. Each case is very fact sensitive. However, I have attempted to provide the reader with some general thoughts on this very complex subject. In doing so I cannot urge strongly enough the need to plan ahead in the design of a defense strategy. This Essay is designed to help the practitioner in the planning stage. My first article in 1992[59] should be a help in defending a case once suit is actually brought.

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57. *See* Abrams v. Johnson, 117 S. Ct. 1925, 1939 (1997).

58. The second factor is political cohesiveness of the minority group. *See Gingles*, 478 U.S. at 51. The third factor is bloc voting by the majority. *See id*.

59. *See* Fontana, *supra* note 2.