

Redistricting Law 2010



NATIONAL CONFERENCE
of STATE LEGISLATURES

The Forum for America's Ideas



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Prepared by the
National Conference of State Legislatures



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The National Conference of State Legislatures is the bipartisan organization that serves the legislators and staffs of the states, commonwealths and territories.

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CONTENTS

Acknowledgments.	vii
Dedication.	ix
1. Introduction.	1
2. The Census.	7
Introduction.	7
Constitutional Provisions.	7
Statutory Law.	8
Case Law and Legal Issues.	10
2010 Census Procedures and Data Collection.	14
3. Equal Population.	22
Introduction.	22
One Person, One Vote—Background.	22
Two Different Standards for Congressional and Legislative Districts.	25
The Standard for Drawing Congressional Districts—Strict Equality.	26
The Standard for Drawing Legislative Plans.	30
Conclusion.	45
4. Racial and Language Minorities.	51
Introduction	51
Section 2 of the Voting Rights Act—General Protection of Voters’ Rights.	54
Minority District Terminology.	66
Racial Gerrymandering.	71
Traditional Districting Principles.	77
Section 5 of The Voting Rights Act: Preclearance Requirements.	78
Judicial Decisions.	89
Conclusion.	98
5. Traditional Districting Principles.	105
Introduction.	105
Two Types of Traditional Districting Principles.	105
Districting Principles for 2000s Plans.	106
Not Traditional Districting Principles.	113
The Foundation of a Defensible Plan.	113
6. Partisan Gerrymandering.	115

Introduction	115
The Argument for Justiciability.	116
In Search of a Standard.	120
Conclusion	126
7. Federalism.	129
Introduction	129
The Race Between State and Federal Courts	129
Federal Court Review of State Court Decisions.	132
Federal Court Deferral to State Remedies	134
Representing the Legislature in Federal Court	135
Conclusion	135
8. Multimember Districts.	136
Introduction.	136
Judicial Review of Multimember Districts.	137
Application of the Equal Protection Clause.	138
Challenges by Political Parties.	140
Districts Drawn by Courts.	140
Congressional Districts.	141
Conclusion.	142
9. Redistricting Local Governments.	145
10. Redistricting the Courts.	148
11. Enacting a Redistricting Plan.	150
Introduction.	150
What the States Have Done.	150
 Appendices	
A. Deadlines for Redistricting.	155
B. Redistricting Authority in Each State.	161
C. Redistricting Commissions: Legislative Plans.	163
D. Redistricting Commissions: Congressional Plans.	169
E. Districting Principles for 2000s Plans.	172
F. Cases Cited.	218
Glossary.	226

LIST OF TABLES AND FIGURES

Tables

1. Congressional Apportionment, 1990 and 2000.....	8
2. Statistical Terminology for Districting.	25
3. Population Equality of 2000s Districts.	47
4. Units of Geography Used to Draw 2000s Plans	49
5. Majority-Minority Districts in Each State.....	67
6. Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended.	80
7. Major Cases About Racial and Language Minorities.	101
8. Districting Principles for 2000s Plans.	106
9. Partisan Gerrymandering Cases.	127
10. Multimember Districts in Each State.	137
11. Multimember District Cases.	143
12. Method of Adopting Redistricting Plans in the 2000s.....	152

Figures

1. Congressional Apportionment, 1990 and 2000.....	9
2. 2010 Census Redistricting Data Program.	16
3. Census Residence Concepts.	19

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DEDICATION

The 2010 edition of *Redistricting Law* is dedicated to the memory of Marshall Turner. Marshall was a consummate public servant before his retirement from the U.S. Census Bureau earlier this decade. He was a great friend to NCSL and the national redistricting community. He will be missed.

1. INTRODUCTION

Since the earliest days of the republic, redrawing the boundaries of legislative and congressional districts after each decennial census has been primarily the responsibility of the state legislatures. Following World War I, as the nation’s population began to shift from rural to urban areas, many legislatures lost their enthusiasm for the decennial task and failed to carry out their constitutional responsibility.

For decades, the U.S. Supreme Court declined repeated invitations to enter the “political thicket”¹ of redistricting and refused to order the legislatures to carry out their duty. In 1962, however, in the seminal case of *Baker v. Carr*,² the Court held that the federal courts did have jurisdiction to consider constitutional challenges to redistricting plans. The next year, in *Gray v. Sanders*, Justice Douglas declared: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”³ In 1964, in *Wesberry v. Sanders*, the Court held that congressional districts must be redrawn so that “as nearly as is practicable one man’s vote in a congressional election is ... worth as much as another’s.”⁴ And, in *Reynolds v. Sims*, the Court held that the boundaries of legislative districts must be redrawn and that the “overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.”⁵

While the courts were striking down redistricting plans for inequality of population, Congress enacted the Voting Rights Act of 1965⁶ to remedy the inequality of opportunity afforded to racial and ethnic minorities to participate in elections. Section 2 of the act prohibited any state or political subdivision from imposing a “voting qualification or prerequisite to voting, or standard, practice or procedure to deny or abridge the right to vote on account of race or color.”⁷ Section 5 required a covered jurisdiction to preclear any changes in its electoral laws,

¹ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

² 369 U.S. 186 (1962).

³ 372 U.S. 368, 381 (1963).

⁴ 376 U.S. 1, 8 (1964).

⁵ 377 U.S. 533, 579 (1964).

⁶ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006).

⁷ *Id.* at sec. 2 (codified as amended at 42 U.S.C. § 1973 (2006).

practices or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia before it could take effect.⁸ The Justice Department began to use this new authority to require that redistricting plans be precleared.

In the 1970s, in *Gaffney v. Cummings*⁹ and *White v. Regester*,¹⁰ the Court developed a standard of population equality that required legislative districts to differ by no more than 10 percent from the smallest to the largest, unless justified by some “rational state policy.”

In 1975, Congress acted to facilitate drawing the new districts with equal populations by enacting Public Law No. 94-171, which required the secretary of commerce to report census results no later than April 1 of the year following the census to the governors and to the bodies or officials charged with state legislative redistricting.¹¹ It also required the secretary to cooperate with state redistricting officials in developing a nonpartisan plan for reporting census tabulations to them.

In the 1980s, in *Karcher v. Daggett*,¹² the Court developed a standard of equality for congressional districts that required them to be mathematically equal, unless justified by some “legitimate state objective.”

Although the Court’s work on rules for population equality was essentially completed in the 1980s, its rules for treatment of racial and ethnic minorities were far from settled. In the 1970s, in *Beer v. United States*,¹³ the Court had said that the Justice Department could refuse to preclear a redistricting plan if it would lead to a retrogression in the position of racial minorities, that is, if the plan would be likely to cause fewer minority representatives to be elected than before. The U.S. Supreme Court began the 1980s with *City of Mobile v. Bolden*,¹⁴ saying that a plan would not be found to violate the 14th Amendment or Section 2 of the Voting Rights Act unless the plaintiffs could prove that its drafters intended to discriminate against them. Congress was swift to react to this new limitation on how to prove racial discrimination. In 1982, after most of the plans based on the 1980 census had already been enacted, Congress amended Section 2 of the Voting Rights Act to make clear that it applied to any plan that results in discrimination against a member of a racial or ethnic minority group,¹⁵ regardless of the intent of the plan’s drafters.

⁸ *Id.* at sec. 5 (codified as amended at 42 U.S.C. § 1973c (2006)).

⁹ 412 U.S. 735 (1973).

¹⁰ 412 U.S. 755 (1973).

¹¹ Coded as amended at 13 U.S.C. § 141 (c).

¹² 462 U.S. 725 (1983).

¹³ 425 U.S. 130 (1976).

¹⁴ 446 U.S. 55 (1980).

¹⁵ Act of June 29, 1982, Pub. L. No. 97-205, sec. 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a) (2006)).

How were the courts to determine whether a redistricting plan would have discriminatory results? In the 1986 case of *Thornburg v. Gingles*,¹⁶ the Court set forth three preconditions a minority group must prove in order to establish a violation of Section 2:

1. That the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. That it is politically cohesive, that is, it usually votes for the same candidates; and
3. That, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.¹⁷

If the minority group could establish those three preconditions, it would be entitled to proceed to the next step: proving a Section 2 violation by “the totality of the circumstances.” Those circumstances would have to show that the members of the minority group had “less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice.”¹⁸

What did that mean, “less opportunity?” In North Carolina, where *Gingles* arose, it meant that multimember districts where Blacks were in the minority and had been unable to elect candidates to office had to be replaced with single-member districts where Blacks were in the majority. To the rest of the country, and to the state legislatures and commissions that would draw new districts after the 1990 census, it meant that wherever there was a racial or ethnic minority that was “sufficiently large and geographically compact to constitute a majority in a single-member district,”¹⁹ the state would have to draw a district for them or risk having the plan thrown out, even if the state acted without any intent to discriminate.

Being forewarned of the effects of Section 2, drafters of redistricting plans after the 1990 census went to great lengths to draw majority-minority districts wherever the minority population counts seemed to justify it. In states where redistricting plans could not take effect until they had been precleared by the Justice Department, the Justice Department encouraged the state to draw districting plans that created new districts where members of a racial or language minority group (primarily African Americans or Hispanics) were a majority of the population. These new “majority-minority” districts were intended to protect the states from liability under Section 2 for failing to draw districts that the minority group had a fair chance to win. As states drew the plans, they discovered that the Justice Department had little concern that majority-minority districts be compact. In some cases, the department refused to preclear a plan unless the state “maximized” the number of majority-minority districts by drawing them wherever pockets of minority population could be strung together. As the plans were redrawn to obtain preclearance, some districts took on bizarre shapes that caused them to be labeled “racial gerrymanders.”²⁰

¹⁶ 478 U.S. 30.

¹⁷ 478 U.S. at 50-51.

¹⁸ 42 U.S. C. § 1973(b) (2006).

¹⁹ 478 U.S. at 50-51.

²⁰ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

The racial gerrymanders were attacked in federal court for denying White voters their right to equal protection of the laws under the 14th Amendment.²¹ The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy in Georgia²² and held that a racial gerrymander must be subjected to “strict scrutiny” to determine whether it was “narrowly tailored” to achieve a “compelling state interest” in complying with Section 2.²³ Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed “traditional districting principles.”²⁴

The states redrew the districts once again. North Carolina, at the center of the political and legal storm over racial gerrymanders, was still in court defending the districts it drew based on the 1990 census after the results of the 2000 census had been released.²⁵

In the 2000s, race was again the most troubling issue for redistricters, as state legislatures, state courts, federal district courts, the U.S. Supreme Court and Congress disagreed with each other on what the law requires and what it prohibits.

The State of Georgia sought preclearance of its legislative and congressional plans by bringing a declaratory judgment action in district court for the District of Columbia. The district court denied preclearance of the Senate plan because it included a decrease in the Black voting age population in three districts.²⁶ In *Georgia v. Ashcroft*,²⁷ the Supreme Court reversed the district court. Justice O’Connor opined that, “[i]n assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice.”²⁸ She said that whether minority incumbents benefit by and support the plan is relevant to whether the plan is retrogressive.²⁹ Congress rejected this interpretation of Section 5. It amended the law to state explicitly that the purpose of Section 5 is “to protect the ability of [racial and language minorities] to elect their preferred candidates of choice.”³⁰

²¹ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); and *Lawyer v. Dept. of Justice*, 521 U.S. 567 (1997).

²² *Miller v. Johnson*, 515 U.S. 900, 924-25 (1995).

²³ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

²⁴ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996).

²⁵ See *Easley v. Cromartie*, 532 U.S. 234 (2001).

²⁶ *Georgia v. Ashcroft*, 195 F. Supp.2d 25 (D. D.C. Apr. 5, 2002).

²⁷ 539 U.S. 461 (2003).

²⁸ *Id.* at 480.

²⁹ *Id.* at 483-84.

³⁰ Pub. L. No. 109-246, sec. 5(d), 120 Stat. 581 (2006) (to be codified as amended at 42 U.S.C. § 1973c); see H.R. REP. NO. 109-478 at 93-94, reprinted in 2006 U.S.C.C.A.N. 618, 678-79.

North Carolina's constitution requires that legislative districts be composed of whole counties.³¹ In 2003, the General Assembly drew a State House district that divided a county in order to create a district that Blacks had a fair chance to win, on the understanding that failing to do so would be a violation of Section 2 of the Voting Rights Act.³² Black voters were not a majority of the voting age population, but they were a majority of the registered Democrats in a semi-closed primary system, and thus had an effective voting majority in the district. In *Pender County v. Bartlett*, the North Carolina Supreme Court struck the district down.³³ It recognized four distinct types of minority districts: 1) "majority-minority" districts, where a majority of the voting age population are members of a specific minority group, 2) "coalition" districts, where a minority group joins with voters from another minority group to elect a candidate, 3) "crossover" districts, where a minority group has support from a limited but reliable White crossover vote, and 4) "influence" districts, where a minority group is large enough to influence the election of candidates but too small to determine the outcome.³⁴ It observed that the courts of appeals in five federal circuits had held that nothing less than a majority-minority district was sufficient to make out a violation of Section 2, and that no circuit had held that Section 2 could be satisfied by the creation of a coalition, crossover or influence district.³⁵ The Court also noted that citizenship must be considered, so that a majority of the voting age population who are citizens is required.³⁶ It found the use of a "bright line rule" would be more practical than one requiring an assessment of past voting behavior and a prediction of future voting trends, and would provide the General Assembly with a safe harbor when drawing districts and foreclose marginal claims by minority groups with smaller populations.³⁷ The Court ruled that, since the district had a Black voting age population of only 39.09 percent, Section 2 did not require its creation.³⁸ On appeal, the U.S. Supreme Court affirmed.³⁹

The 2000s also brought a reminder that an overall range of less than 10 percent is not a safe harbor, even in a legislative plan. Where a court found that the Georgia General Assembly had systematically underpopulated districts in rural south Georgia and inner-city Atlanta and overpopulated districts in suburban areas in order to favor Democratic candidates and disfavor Republican candidates, that the plans systematically paired Republican incumbents while reducing the number of Democratic incumbents who were paired, and that the plans tended to ignore the traditional districting principles used in Georgia in previous decades—such as keeping districts

³¹ N.C. CONST., art. II, §§ 3(3), 5(3).

³² *Pender County v. Bartlett*, No. 103A06, slip op. at 5, 649 S.E.2d 364, 366 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).

³³ No. 103A06, 649 S.E.2d 364.

³⁴ *Id.*, slip op. at 16-17, 649 S.E.2d at 371.

³⁵ *Id.*, slip op. at 19-20, 649 S.E.2d at 372.

³⁶ *Id.*, slip op. at 14-16, 649 S.E.2d at 370-71.

³⁷ *Id.*, slip op. at 21-23, 649 S.E.2d at 373.

³⁸ *Id.*, slip op. at 24-25, 649 S.E.2d at 374.

³⁹ *Bartlett v. Strickland*, No. 07-689 (U.S. Mar. 9, 2009).

compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts—it struck the districts down as a violation of the [Equal Protection Clause](#).⁴⁰

This book attempts to explain the current state of redistricting law in a way that will help each state’s plan drafters meet their constitutional responsibility to draw new districts after the 2010 census.

Readers should note that the analysis of case law in this book is restricted to federal legal requirements. The case law analysis does not address state constitutional requirements or the decisions of state courts that have interpreted those requirements.

Readers are warned that a state’s constitution often imposes additional requirements beyond the federal law discussed in this book.

The law discussed in this book applies to legislative and congressional redistricting plans drawn by state legislatures or by commissions or boards set up under state law. Most of the law in this book applies with equal force to redistricting plans for local government, as explained in [chapter 9](#). Its application to the election of state judges is discussed in [chapter 10](#).

The reader’s attention is called to the online publication, *2000s Redistricting Case Summaries*, a state-by-state summary of all the 2000s cases in both state and federal courts relating to legislative and congressional redistricting.

This book, the case summaries and other publications of the Redistricting and Elections Committee can be located online at the NCSL Redistricting web site:

www.ncsl.org/Default.aspx?TabID=746&tabs=1116,115,786#1116

The online version of this book includes hyperlinks to the U.S. Supreme Court cases, the U.S. Code and the Code of Federal Regulations, as well as to many of the state constitutional provisions that set forth traditional districting principles. It is a resource to help democratic legislatures worldwide carry out their constitutional responsibility.

⁴⁰ *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff’d*, [542 U.S.947](#) (2004) (mem.).

2. THE CENSUS

Introduction

The information produced by the 2010 Census, the 23rd decennial count, will determine the apportionment of the 435 seats in the U.S. House of Representatives among the 50 states and prompt the drawing of new boundaries for congressional, state and local election districts. This chapter reviews some of the legal and practical issues that will affect the 2010 census. It discusses the mandate for the decennial census found in the U.S. Constitution and statute law, case law and issues that have created controversy about the conduct of the census, and an outline of how the 2010 census will be conducted and reported.

Three major issues dominated census developments during the decade of the 2000s. First, the 2010 Census will be a short-form-only census, asking only 10 questions to produce the apportionment and redistricting data counts.

Second, the American Community Survey (ACS) will collect the detailed demographic, housing and economic information previously collected by the decennial long form. The ACS is conducted on an ongoing basis, with the sample spread across the decade. This means a wealth of detailed ACS data will be available in time to complement the release of the 2010 Census redistricting data set. An added benefit of replacing the long form with the ACS is that it will simplify the 2010 Census.

The third major change for the 2010 Census is enhancement of the Master Address File/Topologically Integrated Geographic Encoding and Referencing System (MAF/TIGER). For Census 2000, the Census Bureau integrated MAF with TIGER so that census addresses were associated with census geography. For the 2010 Census, a concerted effort has been made to enhance the quality of this database.

Constitutional Provisions

The decennial census of 1790 began an unbroken series of nationwide population counts called for by [Article I, Section 2](#), Clause 3 of the U.S. Constitution:

Representatives ... shall be apportioned among the several states ... according to their respective Numbers which shall be determined by addition to the whole Number of Free Persons ... [and] three-fifths of all other persons The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent term of ten Years, in such manner as they shall by law direct.

Section 2 of the 14th Amendment to the U.S. Constitution eliminated the “three-fifths” requirement for counting slaves and provides that: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State”

Statutory Law

Congress has delegated responsibility for taking the census to the Department of Commerce and its Bureau of the Census in Title 13 of the United States Code. The law directs the secretary of commerce to “take a decennial census of population as of the first day of April . . . the ‘decennial census date’” in 1980, 1990, 2000, 2010, etc. The secretary must complete the census and report the total population, by state, to the president by December 31 of the census year. The purpose of the report is “the apportionment of Representatives in Congress among the several States” as required by Article I, Section 2, of the U.S. Constitution.⁴¹

The following table and maps show how the apportionment formula worked in 1990 and 2000 and how close the last few states came to gaining or losing a seat.

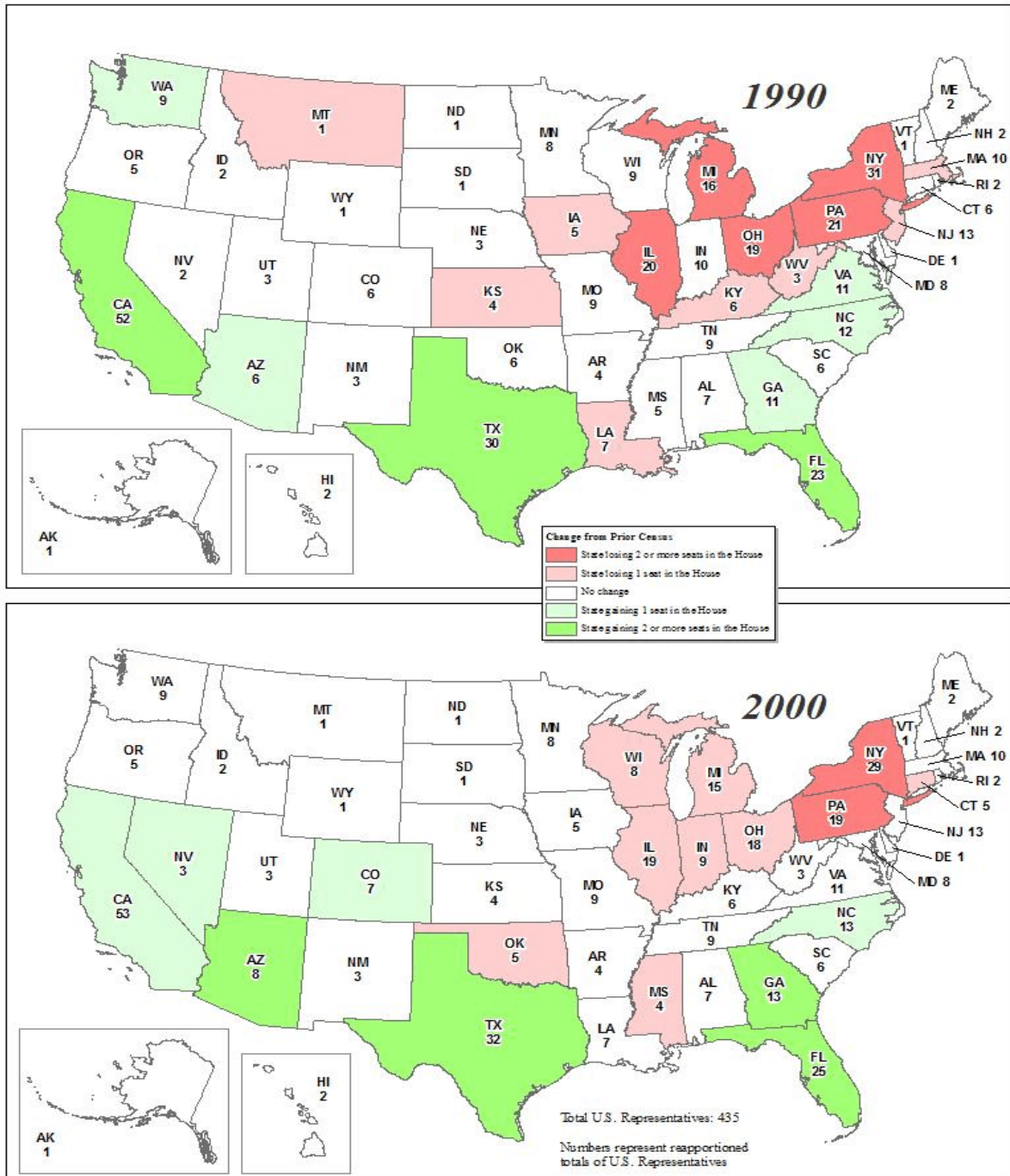
Table 1. Congressional Apportionment, 1990 and 2000

Seat	1990			2000	
430	MS	15,647	Last Six Seats Awarded with Number of People to Spare	GA	142,389
431	WI	29,003		IA	44,338
432	FL	72,489		FL	212,934
433	TN	18,899		OH	79,688
434	OK	9,035		CA	33,942
435	WA	10,199		NC	3,087
436	MA	-12,606	Next Six Seats Not Awarded with Number of People Missed By	UT	-856
437	NJ	-22,697		NY	-47,249
438	NY	-98,765		TX	-86,272
439	KY	-34,258		MI	-50,888
440	CA	-401,970		IN	-37,056
441	MT	-11,002		MT	-8,168

Source: Election Data Services Inc., 2008.

⁴¹ 13 U.S.C. § 141 (a) and (b). “Apportionment” or “reapportionment” refers to the allocation of seats among units, such as the allocation of congressional seats among the states. “Redistricting” concerns redrawing boundaries of election districts.

Figure 1. Congressional Apportionment, 1990 and 2000



Source: NCSL, 2008.

When Congress convenes in 2011, the president must transmit to that body a statement of the apportionment of the 435 representative seats among the states. The number of representatives allocated to each state is based on the census results and determined by the “method of equal proportions.” Each state is guaranteed at least one representative and the remaining 385 seats are apportioned among the states by assigning priority values to each seat.⁴²

Title 13, as amended by Public Law 94-171 (1975), also requires the secretary of commerce to report census results no later than April 1, 2011, to the bodies or officials charged with state legislative redistricting and to the governors. These reports contain the population data for various geographical areas within the state, including the smallest areas, the “census blocks.” The April 1 reports provide the basis for state and local decennial redistricting efforts and for redrawing congressional districts within each state.⁴³

Case Law and Legal Issues

Alternative Population Bases for Redistricting

Most jurisdictions rely on decennial census data to redistrict and most redistrict on a 10-year cycle keyed to the release of those data. Federal courts have upheld the use of alternative population bases for redistricting if the alternative database is used uniformly and if the results are comparable to those produced by a census population-based plan.

In *Burns v. Richardson*, the Supreme Court upheld Hawaii’s legislative redistricting, which was based on the number of registered voters.⁴⁴ Given Hawaii’s special military and tourist populations, the Court allowed the use of an alternative population base after finding that the results were not substantially different from results of a redistricting based on total citizen population. The Court, however, cautioned that the use of registered or actual voter bases could be susceptible to manipulation to maintain underrepresentation. Again, the Supreme Court cautioned in *Ely v. Klabr* that a new plan for Arizona legislative districts could use registered voter data only if the result would be a “distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.”⁴⁵ One court has specifically ruled that a plan based on registered voters is unconstitutional.⁴⁶

⁴² 2 U.S.C. § 2a and 2b (2006). The current method of apportioning seats, adopted in 1941, uses a mathematical formula to assign a priority value to each seat in the House. The formula uses the state’s population divided by the geometric mean of that state’s current number of seats and the next seat (the square root of $n(n-1)$). This formula distributes seats so that “leftover” fractions of excess population are factored into the apportionment. Previous formulas simply divided the national or state populations by the number of congressional seats, so a state could have fewer seats than its population warranted.

⁴³ 13 U.S.C. § 141 (c) (2006).

⁴⁴ 384 U.S. 73 at 92-96 (1966). See also *WMCA Inc. v. Lomenzo*, 377 U.S. 633 at 641, 653 (1964).

⁴⁵ 403 U.S. 108 at 116-117 (1971).

⁴⁶ In *Travis v. King*, 552 F. Supp. 554 at 563-573 (D. Hawaii 1982) the district court struck down Hawaii’s state legislative plans based on evidence that the use of a registered voter base did not “substantially approximate” the results of a plan based on total civilian population. The court also struck down the congressional plan and held that states must depend on total federal census figures for congressional redistricting.

In *Kirkpatrick v. Preisler*,⁴⁷ the Supreme Court implied that eligible voter population could be a valid factor to use in redistricting if identified properly and applied uniformly to an entire redistricting plan. In that case, the Court disapproved a Missouri congressional plan because the data had not been applied in a uniform manner. One divided court has rejected the proposition that the voting age population, rather than the total population, should be the principal basis for redistricting.⁴⁸

Some states have conducted their own censuses and courts have upheld use of those state population counts in redistricting.⁴⁹

Suits Against the Census Bureau

During every census since the enactment of Public Law 94-171, the Census Bureau has been sued over some aspect of the method by which it counted the population. The suits have concerned whether and how population counts might be adjusted following the actual enumeration and how certain groups of citizens, such as citizens living overseas, were counted. Aside from the statutory prohibition against the use of statistical sampling for apportioning the seats in the House of Representatives, the cases have uniformly upheld the authority of the Census Bureau over the “form and content” of the census.

Exclusion of Undocumented Aliens

Pennsylvania and other states have sought without success to require the Census Bureau to exclude undocumented aliens from the population counts used to apportion the members of Congress among the states.⁵⁰

Adjusting The Census: Sampling and Imputation

The count. The census is not, and cannot be, 100 percent accurate. The final estimates of the 2000 census indicate that there was an overall overcount of 0.49 percent, compared to an undercount of the 1990 census of 1.6 percent. The overcount or undercount is not uniform. A disproportionate number of racial and ethnic minorities were not counted in both the 1990 and 2000 censuses. The 2000 census showed a significant improvement in reducing the undercount of historically undercounted populations, including 1.84 percent of African Americans as compared to 4.4 percent in 1990, 0.71 percent of Hispanics as compared to 4.99 percent,

⁴⁷ 394 U.S. 526 (1969).

⁴⁸ *Garza v. County of Los Angeles*, 918 F. 2d. 763 (C.A. 9 (Cal.) 1990), cert. denied 498 U.S. 1028 (1991). See also Scot A. Reader, “One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts,” *Harvard Journal of Law and Public Policy*, 17 (1994) 521-565.

⁴⁹ See, for example, *Bacon v. Carlin*, 575 F. Supp. 763 (D. Kan. 1983), aff'd 466 U.S. 966 (1984) (mem.) and *McGovern v. Connolly*, 637 F. Supp. 111 (D. Mass 1986).

⁵⁰ See *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989); *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), appeal dismissed, 447 U.S. 916 (1980).

and 0.62 percent of American Indians living on reservations as compared to 12.2 percent. Non-Hispanic Whites were overcounted by 1.13 percent as compared to an undercount of 0.7 percent in 1990.⁵¹

To lessen the impact of the undercounting, at various times the Census Bureau and others have advocated the use of “statistical sampling” to improve the accuracy of the census. Two references to sampling in Title 13 appear to be in conflict. [Section 141](#) (a) directs the secretary of commerce to take the decennial census “in such form and content as he may determine, including the use of sampling procedures and special surveys.” [Section 195](#), however, directs the secretary to use sampling methods in fulfilling his duties under Title 13, “[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States.”

The 1980 Census. Following the 1980 census, approximately 50 states, municipalities and other political subdivisions sued the Census Bureau, arguing that the bureau should adjust population figures based upon statistical sampling conducted after the enumeration. None of the cases resulted in the Census Bureau adjusting its figures. In *Young v. Klutznick*,⁵² the 6th Circuit Court of Appeals found that the City of Detroit and its mayor did not have standing to challenge the census. In *Carey v. Klutznick*,⁵³ the 2nd Circuit Court of Appeals found that a suit brought by the State and City of New York seeking to have the counts in those locations adjusted through statistical sampling could not proceed without the joinder of 49 other states that would be affected by the adjustment.

The 1990 Census. Litigation before the 1990 census focused on the undercounting of population and the disproportionate effect of the undercount on minority groups. Plaintiffs representing undercounted areas sought statistical adjustments to the actual enumeration based on post-census surveys. The Department of Commerce agreed to conduct the surveys, but declined to report the statistically adjusted counts as the official census. In July 1991, the secretary of commerce announced there would be no statistical adjustment based on post-enumeration surveys to the apportionment and redistricting data released in early 1991. The secretary cited three rationales for his decision: First, an adjustment might improve numerical accuracy but would lessen the distributive accuracy of the census (the correct proportions of population in the various areas covered by the census); second, the long-standing practice of relying on an actual enumeration; and third, concern that statistical adjustments would be subject to future manipulation.

The court cases involving the 1990 census were finally resolved by the U.S. Supreme Court when it upheld the secretary of commerce’s 1991 decision in *Wisconsin v. City of New York* in 1996.⁵⁴ The Court ruled that the secretary’s decision was valid and that it bore “a reasonable relationship” to the task required by the U.S. Constitution. The Court cited the broad discretion lodged by the U.S. Constitution in Congress on the conduct of the census and the broad discretion given the secretary under Title 13 to determine the “form and content” of the census.

⁵¹ U.S. Census Bureau, *Summary of Accuracy and Coverage Evaluation for Census 2000* (Washington, D.C.: U.S. Census Bureau, Feb. 28, 2006).

⁵² 652 F.2d 617 (6th Cir. 1981), *cert. denied sub nom. Young v. Baldrige*, 455 U.S. 939 (1982).

⁵³ 653 F.2d 732 (2nd Cir. 1981), *cert. denied sub nom. Carey v. Baldrige*, 455 U.S. 999 (1982).

⁵⁴ [517 U.S. 1](#) (1996).

The U.S. Supreme Court left open the issue of whether sampling or adjusted census figures were forbidden by the U.S. Constitution's reference to an "actual enumeration."

The 2000 Census. Before conducting the 2000 census, in a reversal of its position in the *Wisconsin* case, the Census Bureau announced plans to use two forms of statistical sampling to improve the accuracy of the 2000 census. The U.S. House of Representatives filed one suit and four counties and citizens of 13 states filed a second suit seeking to enjoin the Census Bureau's use of sampling. The U.S. Supreme Court in *Department of Commerce v. U.S. House of Representatives*⁵⁵ ruled that 13 U.S.C. § 195⁵⁶ specifically prohibits the use of statistical sampling for purposes of reapportioning the seats of the House of Representatives.

Ultimately, based upon a recommendation of the Executive Steering Committee for Accuracy and Coverage Evaluation Policy,⁵⁷ the secretary of commerce decided against the use of statistical sampling for the 2000 census.

Following the 2000 census, the State of Utah sued the Census Bureau, alleging that "imputation" was a form of sampling prohibited by the same statute. Imputation had been used by the Census Bureau to estimate the number of people residing in an address that it had identified as a housing unit but for which it had not received a response. Imputation increased North Carolina's population by 0.4 percent but increased Utah's population by only 0.2 percent. The difference resulted in North Carolina receiving an additional representative and Utah receiving one less representative than if the Census Bureau had not used imputation. The U.S. Supreme Court upheld the Census Bureau's use of imputation in *Utah v. Evans*.⁵⁸ The Court held that imputation was different from "the statistical method known as 'sampling'" in that it was filling in blanks rather than using a subset of the population to estimate a larger population.

Counting The Overseas Population

1990 Census. The U.S. Constitution requires that the apportionment of seats in the House of Representatives be determined by an "actual enumeration" of people "in each State," conducted every 10 years.⁵⁹ In the 1990 census, the Census Bureau allocated the overseas employees of the Department of Defense to particular states, based on their "usual residence." Including these overseas military personnel in the counts of each state caused one congressional district to be shifted from Massachusetts to Washington. Massachusetts sued the secretary of commerce, alleging that the procedure was contrary to the language of the U.S. Constitution and was arbitrary

⁵⁵ 525 U.S. 316 (1999).

⁵⁶ 13 U.S.C. § 195 provides: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

⁵⁷ Recommendation Concerning the Methodology to be Used in Producing the Tabulations of Populations Reported to States and Localities Pursuant to 13 U.S.C. § 141 (c) (March 1, 2001).

⁵⁸ 536 U.S. 452 (2002).

⁵⁹ U.S. CONST. art. 1, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

and capricious in violation of the federal Administrative Procedures Act.⁶⁰ The Massachusetts federal district court agreed,⁶¹ but the U.S. Supreme Court reversed.⁶²

2010 Census Procedures and Data Collection

Overseas Enumeration

In response to congressional direction and stakeholder interest, the Census Bureau embarked on a research and evaluation program to determine its ability to count, as part of its 2010 census data collection process, U.S. citizens living overseas and their dependents. The Census Bureau selected, based on geographic diversity and estimates of U.S. citizens, France, Kuwait and Mexico for a 2004 test. A unique questionnaire for the overseas enumeration included “short form” questions asked of stateside respondents, including name, household relationship, age, sex, race, and Hispanic or Latino origin. Specific questions included citizenship, stateside address and items needed for evaluation purposes. Questionnaires were provided in English, and in Spanish for Mexico only. An Internet version of the English questionnaire also was made available.

The 2004 Overseas Enumeration Test was the first attempt to directly collect information from U.S. citizens living abroad, not just the military or federally affiliated. In the past, counts of federal civilian employees, U.S. military and their dependents were obtained from administrative records. The Census Bureau identified many implementation issues, including scheduling, data processing, geocoding responses, knowledge of the populations, foreign government policies, foreign mail systems, promotion and costs. The test demonstrated the infeasibility of counting U.S. citizens living in the three test countries. In addition, the Census Bureau concluded that:

1. Other countries’ laws and situations will complicate any future attempts to enumerate overseas Americans.
2. Future overseas census endeavors are unlikely to produce data of sufficient quality to permit use for traditional census purposes, such as apportionment, redistricting and federal funds distribution.
3. An overseas census in 2010 also has the potential to harm the stateside census.

Following the test, Congress did not further pursue counting U.S. citizens living abroad.

Tabulating Prisoners at Their “Permanent Home of Record” Address

As part of the Science, State, Justice, Commerce and Related Agencies Appropriations Act, 2006 ([Pub. L. No. 109-108](#)), Congress directed the Census Bureau to study tabulating prisoners at the address of their “permanent home of record,” rather than at their place of incarceration. In the course of its study, the Census Bureau considered a range of options and data sources, including administrative records data from the Federal Bureau

⁶⁰ 5 U.S.C. § 551 et seq.

⁶¹ *Massachusetts v. Mosbacher*, 785 F. Supp. 230 (D. Mass. 1992).

⁶² *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

of Prisons, and consulted corrections officials at the federal, state and local levels. The following uncertainties and challenges were identified.

1. There is not a generally agreed-upon definition of the concept “permanent home of record.”
2. Address information for prisoners would need to be collected either through individual enumeration procedures or through access to administrative records. A complete geocodable to the census block address is required and then must be verified if the residents are to be included in the redistricting data sets.
3. Full participation is required, calling for the support and coordination of thousands of correctional facilities. Security considerations and detailed scheduling of interviews would make complete enumeration very difficult.
4. Administrative records are incomplete, inconsistent and not updated.
5. Consistency among other group quarters enumeration might affect the tabulation of college students, nursing home residents and others who reside in group quarters.
6. It is not clear how the Census Bureau can satisfy its legal obligation to report the whole number of people in each state for apportionment purposes if it tabulates prisoners at an address other than where they are confined.
7. The cost implications are 1,200 percent higher than the cost of enumerating prisoners in the Census 2000.
8. The census operations required to tabulate prisoners at their “permanent home of record” address introduce the risk of not meeting statutorily mandated dates to deliver census data. It is unclear how many weeks or months would be required for large correctional facilities to arrange for Census Bureau field enumerators to schedule interviews conducted in a safe, confidential environment.

The Census Bureau concluded that counting prisoners at a “permanent home of record” address, rather than at their place of incarceration, would result in increased cost both to the decennial census program and to the federal, state and local correctional facilities that would be required to participate in data collection efforts. The Census Bureau study raised concerns that this change would result in decreased accuracy for a possibly large proportion of millions of individuals confined on census day. The completeness of the census count would be compromised for prisoners who cannot provide a valid address. The Bureau has no method of determining how many individuals would fall into that category. Further, a fundamental shift for the enumeration of correctional facilities would likely have a negative effect on other group quarters enumerations.

Following completion of the study, Congress did not further pursue counting prisoners at their “permanent home of record.”

2010 Census Redistricting Data Program

Figure 2 explains the five-phase process by which the Census Bureau plans to gather and distribute redistricting data by the April 1 deadline.

Figure 2. 2010 Census Redistricting Data Program

(Public Law 94-171)

This program has five phases:

Phase 1: State Legislative District Project (SLDP): 2005-2006

KEY CENSUS DATE: February 2005 Federal Register Notice Announcing the 2010 Census Redistricting Data Program
Commencement of Phase 1: The State Legislative District Project (SLDP)

CENSUS DIRECTOR INVITES STATE OFFICIALS TO JOIN PHASE 1 OF THE 2010 CENSUS REDISTRICTING DATA PROGRAM

Purpose: Afford participating states the opportunity to provide the Census Bureau with their legislative district plans, codes and names. These new areas will be included in the Public Law 94-171 data sets and the American Community Survey data releases starting with the five-year releases. All 50 states participated in the delivery of their legislative plans.

In addition, each state had the opportunity to host a roll-out of the 2010 Census plans during Phase 1. These meetings were intended to provide information regarding various programs and timelines for the 2010 Census, allowing states to plan appropriately with this information coming out early in the decade.

Timeline: February 2005-January 2007

Phase 2 Voting District/Block Boundary Suggestion Project (VTD/BBSP): 2007-2009

KEY CENSUS DATE: April 2007 *Federal Register* Notice announcing the 2010 Census Redistricting Data Program
Commencement of Phase 2: The Voting District/Block Boundary Suggestion Project (BBSP)

Purpose: Afford participating states the opportunity to provide the Census Bureau with their Voting District (VTD) boundaries and updates to congressional and legislative districts for inclusion in the Public Law 94-171 data sets. States also will submit block boundary suggestions for inclusion in the 2010 Census block tabulations during this phase of the Redistricting Data Program. A verification phase is included for all components (VTD/SLD/congressional) of this phase. Under contract, the Census Bureau produced a software tool, the MAF/TIGER partnership software (MTPS), that states could use to update voting districts and block boundary suggestions. Both Phase 1 and 2 are voluntary.

Timeline: March 2007-May 2009

Using the MTPS, states will have several months to define their voting districts (i.e., wards, election precincts) and suggest block boundaries. Staff in the Census Bureau's 12 regional offices will review the shape files submitted by states and incorporate the information into the Census Bureau's geographic database that will be used to take the census.

VTD/BBSP Verification: States will work closely with the regional office geographic staff to ensure that the Census Bureau properly includes the geographic updates in the MAF/TIGER database.

KEY CENSUS DATE: APRIL 1, 2010—Census Day

Phase 3 Delivering the Data: 2011

KEY CENSUS DATE: April 1, 2011. By law the Census Bureau must deliver population totals for small areas to the governor and legislative leadership in each state no later than April 1, 2011.

Purpose: Under Public Law No. 94-171, the Census Bureau is required to provide each governor and the majority and minority leaders of each house of the state legislature with 2010 Census population totals for small area geography, such as counties, American Indian areas, school districts, cities, towns, county subdivisions, census tracts, block groups and blocks. States that participated in Phase 2 of the Redistricting Data Program will receive data summaries for local voting districts (e.g., election precincts). State legislative districts collected nationwide during Phase 1 also will be included in the Public Law 94-171 data files. These 2010 Census Public Law 94-171 Redistricting Data will include population totals by race, Hispanic origin, and voting age and housing units by occupied and vacancy status.

These public law data will be accompanied by census maps (in PDF format) showing blocks, census tracts, counties, towns, cities (as of their January 1, 2010 corporate limits), county subdivisions, state legislative districts, and voting districts for participating states. Comparable geographic TIGER/Line® Shape files also will be provided to these designated state officials under Public Law 94-171.

Timeline: February 2011-March 31, 2011

* The Census Bureau will, to the extent possible, process and deliver the Public Law Redistricting Data and maps in a sequence that reflects the known state constitutional and court-established deadlines for completing redistricting in 2011 legislative sessions.

Direct questions to:

2010 Census Redistricting Data Office

Phone: (301) 763-4039

Fax: (301) 763-4348

E-mail: rdo@census.gov

Phase 4: Collection of the Post-2010 Census Redistricting Data Plans: 2012-2013

Purpose: The Census Bureau will collect state legislative district and congressional plans from the states for insertion into the Census Bureau's MAF/TIGER database. The Census Bureau will provide geographic and data products for the 113th Congress as well as ongoing data through the American Community Survey. The Census Bureau also will retabulate the 100 percent data for the newly drawn congressional and state legislative districts.

Timeline: Summer 2012

Phase 5: Evaluation and Recommendation for the 2020 Census: 2012-2014

Purpose: To work with the states in reviewing the efforts made during the 2010 Census Redistricting Data Program.

States will conduct a review documenting the successes and failures of the Census Bureau to meet the needs of the states as required by Public Law 94-171. A final publication will summarize the view from the states and their recommendations for the 2020 Census.

Timeline: January 2014-September 2014

Source: U.S. Census Bureau, 2009.

Short-Form Only Census

Unlike Census 2000, the 2010 Census will be a short-form only census. Census 2000 included a short form to collect basic information used for reapportionment and redistricting, and a long form sent to approximately one in six households that was designed to collect detailed information. The detailed information will be used to distribute fiscal resources under a wide array of federal, state, local and tribal programs.

Decoupling the short form and long form has allowed the Census Bureau to focus all its 2010 efforts on the constitutional requirement to produce an accurate count of the resident population. The decennial census short form includes seven topics: name, age, gender, race, ethnicity, relationship and tenure (whether a home is owned or rented). Since 2005, the long-form data have been collected annually on the American Community Survey (ACS). This innovation provides more current, detailed information than has ever been available before. Responses to both the 2010 census and the ACS are mandatory.

Building the Census Address List

The 2010 Census questionnaire delivery will be conducted by mail-out/mail-back procedures in most areas. The initial step in building the census mailing list of residential addresses is to combine addresses from the U.S. Postal Service's delivery sequence file with the addresses on the Census Bureau's 2000 Census Master Address File (MAF).

The Local Update of Census Addresses (LUCA) further supplemented the address list development. Established in response to requirements of [Public Law 103-430](#), LUCA provided local and tribal governments the opportunity to review and update individual address information or block-by-block address counts and associated geographic information in the MAF/TIGER database. These updates are verified during the address canvassing operation.

The address canvassing operation is the next major step in building the address list. Census Bureau address listers are required to canvass assigned census blocks looking for every place where people lived, stayed, or could have lived or stayed. Listers compare the living quarters on the ground to what is displayed on a small hand-held computer (HHC). Used for the first time during the 2010 Census, the HHC displayed an address record for each known living quarter in the MAF. On both the address list and maps, listers confirm existing addresses, add missing addresses and delete non-existent addresses. They also identify the housing type and ensure that all addresses are assigned to the correct geographic location. Listers also collect global positioning system (GPS) coordinates (when available) and manual coordinates using the HHC.

Census Residence Concepts

Figure 3 explains how the Census Bureau decides where each person should be counted.

Figure 3. Census Residence Concepts

After the decennial census is conducted, the Census Bureau produces a count of the number of people in each state for the purpose of apportionment. The concept of usual residence, interpreted as where a person “lives and sleeps most of the time,” determines where people should be counted as of Census Day—April 1, 2010. Below are some common situations illustrating where people should be counted in the census.

Example 1—Person in Health Care Facility: Person lives in this household, but is in a general or veterans’ affairs hospital on Census Day, including a newborn baby not yet brought home. **COUNT PERSON AT:** This household, unless they are in a psychiatric ward, skilled nursing facility, or residential treatment facility for juveniles. If so, this person should be counted at the hospital or facility.

Example 2—Person in the Military: Person is a member of the U.S. Armed Forces and on Census Day is living on a military installation in the United States, or is living on a military vessel that is assigned to a homeport in the United States. **COUNT PERSON AT:** The residence where he or she lives and sleeps most of the time. Those who live in the barracks should be counted there. Those who are assigned to a vessel should be counted at their onshore residence where they live and sleep most of the time, otherwise, they should be counted at the vessel’s home port.

Example 3—Person at College: College student living away from home. **COUNT PERSON AT:** Where they live and sleep most of the time—typically their place of residence at school.

Example 4—Person Overseas: U.S. military, civilian employee of the federal government working abroad, or their dependent living with them. **COUNT PERSON AT:** Their “state of record” as reported in the administrative records of the U.S. Department of Defense, U.S. Department of State, and so forth.

Example 5—Person in Prison or Jail: Person in prison, jail, a federal detention center, or other correctional facility. **COUNT PERSON AT:** The facility.

Example 6—Person Experiencing Homelessness: Person without shelter. **COUNT PERSON AT:** Block where they are found on Census Day.

Source: U.S. Census Bureau, 2009.

Delivering the Census Forms

In March 2010, advance letters will be mailed or delivered to most housing units, alerting households of the pending 2010 Census questionnaire delivery. The 2010 Census questionnaire and then a reminder postcard will follow the advance letters. Respondents will be urged in publicity and by instructions on the questionnaire to mail the form back by Census Day, April 1. In April 2010, the Census Bureau will deliver replacement questionnaires in mail-out/mail-back areas with expected low response rates. In addition, the Census Bureau will

target delivery of replacement questionnaires to non-respondents in areas with expected moderate response rates. The Census Bureau will not deliver replacement questionnaires for areas with expected high response rates. This strategy, new for Census 2010, has proven to maximize mail response rates.

A key innovation for the 2010 Census will be mailing bilingual Spanish/English questionnaires to housing units in selected census tracts where a high percentage of households require language assistance. Questionnaires also will be available in five languages—Chinese (simplified), Korean, Russian, Spanish and Vietnamese.

Data Collection and Processing Centers

Between fall 2007 and spring 2008, the Census Bureau opened 12 regional census centers as temporary sites near the 12 permanent regional offices to provide additional space to manage the large 2010 Census work load. The Census Bureau also opened the Puerto Rico Area Office in Puerto Rico. These centers and area offices support the address list development activities and the reviews by tribal and local governments.

Three sites will be used as data capture centers—Essex, Md.; Phoenix, Ariz.; and Jeffersonville, Ind. The third center is located in the Census Bureau’s permanent processing facility in Jeffersonville. The completed census forms will be received and scanned at these data capture centers. The centers will house imaging equipment, data keying devices and other systems for converting responses to census questions into computer-readable form.

In fall 2009, the Census Bureau will open more than 450 temporary local census offices to manage and control the many operations to collect data from households that do not mail back the census forms.

Multiracial Data

Section 2 of the Voting Rights Act of 1965, as amended, prohibits a state from enacting a redistricting plan that “results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color”⁶³ or because a person is “a member of a language minority group.”⁶⁴ A “language minority group” is defined as “American Indian, Asian American, Alaskan Natives or of Spanish heritage.”⁶⁵

To facilitate enforcement of the Voting Rights Act, the Census Bureau asks each person counted to identify their race and whether they are of Hispanic or Latino origin. For the 2010 Census, the racial categories are White, Black, American Indian, Asian, Native Hawaiians and other Pacific Islanders, and Some Other Race. People of Hispanic or Latino origin might be of any race. People are given the opportunity to select more than one race.

The Census Bureau reports racial data in 63 categories, covering those who report being in up to all six racial groups. Doubling that number for Hispanic or Latino origin and doubling it again for those under and over age 18 means there are 263 potential categories of population count for each block!

⁶³ 42 U.S.C. § 1973(a) (2006).

⁶⁴ 42 U.S.C. § 1973b(f)(2) (2006).

⁶⁵ 42 U.S.C. § 1973l(c)(3) (2006).

To reduce the categories of racial data to a manageable number, the Office of Management and Budget on March 9, 2000, issued [OMB Bulletin No. 00-02](#), “Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement.” The bulletin suggests that agencies track:

1. The five single-race categories;
2. The four most commonly reported combinations of two races: American Indian or Alaska Native and White; Asian and White; Black or African American and White; and American Indian or Alaska Native and Black or African American;
3. Any other combinations of two or more races that represent more than 1 percent of the population in a jurisdiction; and
4. The balance reporting more than one race.

The bulletin also suggests rules for allocating multiple race responses when one racial minority brings a claim. The rules generally require that the complaining minority be allocated all those who have indicated they are any part of that racial minority.

To provide further guidance to states and local governments that must submit their redistricting plans for preclearance before they can take effect, the U.S. Department of Justice on Jan. 18, 2001, issued a notice called “Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c.” [66 Fed. Reg. 5412](#). The guidance says that, in most of the usual cases, the department will analyze only eight categories of race data:

1. Non-Hispanic White
2. Non-Hispanic Black plus Non-Hispanic Black and White
3. Non-Hispanic Asian plus Non-Hispanic Asian and White
4. Non-Hispanic American Indian plus Non-Hispanic American Indian and White
5. Non-Hispanic Pacific Islander plus Non-Hispanic Pacific Islander and White
6. Non-Hispanic Some Other Race plus Non-Hispanic Some Other Race and White
7. Non-Hispanic Other multiple-race (where more than one minority race is listed)
8. Hispanic

The total of these racial groups will add to 100 percent.

In the 2000 census, out of 281 million people, 6.8 million reported they were of two or more races; 93 percent of those reported only two races.

3. EQUAL POPULATION

Introduction

The U.S. Supreme Court's 1962 decision in *Baker v. Carr*⁶⁶ was a sharp departure from that Court's long-standing policy of judicial nonintervention in redistricting cases.⁶⁷ Many redistricting cases that reached the Supreme Court in the next several years were challenges to situations in which differences in population among legislative districts, or in the number of people represented by members of a single legislative body, were so great that—viewed from the perspective of 1990—they are not only obviously impermissible but also ludicrous. These situations had nearly all disappeared either before or during the post-1970 round of redistricting. This chapter discusses the constitutional requirement of equal population among state legislative and congressional districts as it has developed in federal cases decided since *Baker v. Carr*.

One Person, One Vote—Background

Although the history-making decision in *Baker v. Carr* held that state legislative (and, by implication, congressional) districting cases are justiciable, and expressed confidence that courts would prove able to “fashion relief” where constitutional violations might be found,⁶⁸ the Supreme Court did not provide specific standards or criteria for judicial review of state districting or for judicial remedies.

Development by the Supreme Court of the substantive case law standards that govern state legislative and congressional districting began the following year with *Gray v. Sanders*,⁶⁹ in which the Court held that unit voting systems are unconstitutional *per se*. That decision included the now familiar assertion by Justice Douglas that

⁶⁶ 369 U.S. 186 (1962).

⁶⁷ *E.g.*, *Colegrove v. Green*, 328 U.S. 549 (1946) (ruling that courts should not interfere in congressional redistricting disputes). However, in 1958, a three-judge federal district court in effect threatened to intervene should the Minnesota Legislature fail to redistrict itself in accordance with the state's constitution. *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958). The Legislature responded (although the new districts were held inequitable after *Baker v. Carr*) and the case was dismissed as moot on the plaintiff's motion. 177 F. Supp. 803 (1959). For an interesting discussion of pertinent U.S. Supreme Court voting rights case law preceding *Baker v. Carr*, as well as an informative summary of the development of redistricting standards since that case was decided, see Padilla and Gross, “Judicial Power and Reapportionment,” 15 *Idaho L. Rev.* 263 (1979).

⁶⁸ 369 U.S. 186, 197-198.

⁶⁹ 372 U.S. 368 (1963).

“[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”⁷⁰

Measuring Population Equality Among Districts

How is the degree of population equality (or inequality) among legislative or congressional districts measured? A clear understanding of the measures available and those used by the courts—and by the drafters of redistricting plans—is essential. The courts have not always been consistent or precise in their terms, and this has led to considerable misunderstanding and confusion. For example, courts have sometimes used terms with definite statistical meaning in a general, nonstatistical manner. A definition of terms, therefore, may be helpful at this point.

Ideal population. A logical starting point is the “ideal” district population. In a single-member district plan, the “ideal” district population is equal to the total state population divided by the total number of districts. (For example, if a state's population is 4 million and there are 40 legislative districts, the “ideal” district population is 100,000.) For purposes of this discussion, it will be assumed that a single-member districting plan is being considered. In districting plans that use multimember districts, the “ideal” population is more properly expressed as the “ideal” population per representative and is obtained by dividing the total state population by the total number of representatives. The number of representatives rather than the number of districts would thus be used in performing statistical calculations for districting plans that employ multimember districts.

There is, then, the need to express the degree to which: 1) an individual district's population varies, or differs, from the “ideal;” and 2) all districts collectively vary, or differ, in population from the “ideal.”

Deviation. The degree by which a single district's population varies from the “ideal” may be stated in terms of “absolute deviation” or “relative deviation.” The “absolute deviation” is equal to the difference between its population and the “ideal” population, expressed as a plus (+) or minus (-) number, meaning that the district's population exceeds or falls short of the “ideal” by that number of people. (For example, if the “ideal” population is 100,000 and a given district has a population of 102,000, its “absolute deviation” is +2,000.) “Relative deviation,” the more commonly used measure, is attained by dividing the district's absolute deviation by the “ideal” population. The resulting quotient indicates the proportion by which the district's population exceeds or falls short of the “ideal” population and usually is expressed as a percentage of the “ideal” population. (In the preceding example, the “relative deviation” is +2 percent.)

Several methods of measuring the extent to which populations of all the districts in a plan vary, or differ collectively from the “ideal,” are available.

Mean deviation. A frequently used measure is the “mean deviation,” expressed in absolute or relative terms. The “absolute mean deviation” of a set of districts from the “ideal” is equal to the sum of the absolute deviations of all the districts (disregarding “+” or “-” signs) divided by the total number of districts. The “relative mean deviation” is equal to the sum of the individual district relative deviations (disregarding “+” or “-” signs) divided by the total number of districts.

Overall range. Perhaps the most commonly used measure of population equality, or inequality, of all districts in a plan is “overall range,” which again can be expressed in absolute or relative terms. The “range” is a statement

⁷⁰ *Id.* at 381.

of the population deviations of the most populous district and the least populous district, expressed in either absolute or relative terms. (For example, if the ideal district population is 100,000, the largest district in the plan has a population of 102,000, and the smallest district has a population of 99,000, then the range is +2,000 and -1,000, or +2 percent and -1 percent.)

The “overall range” is the difference in population between the largest and the smallest districts, expressed either as a percentage or as the number of people. (In the preceding example, the “overall range” is 3 percent or 3,000 people.) Although the courts normally measure a plan using the statistician’s “overall range,” they almost always call it something else, such as “maximum deviation.”⁷¹

None of the foregoing measures provides a full picture of the degree of population equality, or inequality, and perhaps several measures should be used in evaluating any set of districts. (For example, the overall range may be a large one because of the large deviation of only one district, but all the remaining districts may be clustered closely around the “ideal.” The use of “mean deviation” would reveal this.) For purposes of comparison and clarity, this book uses the measures of relative overall range and relative mean deviation expressed simply as overall range and mean deviation. Table 2 shows the various measures in mathematical form.⁷²

⁷¹ *E.g.*, *Abrams v. Johnson*, 521 U.S. 74, 99, 1939 (1997) (“overall population deviation”); *Board of Estimate v. Morris*, 489 U.S. 688, 700 (“maximum percentage deviation”); 489 U.S. at 691, 701 (“total deviation”) (1989); *Brown v. Thomson*, 462 U.S. 835, 838 (1983) (“maximum percentage deviation”); *Karcher v. Daggett*, 462 U.S. 725, 729, 766 (“maximum population difference”), 731-732, 741, 765-790 (“maximum deviation”) (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977) (“maximum deviation”); *Chapman v. Meier*, 420 U.S. 1, 23 (1975) (“deviation,” “variation,” “total population variance”); *White v. Weiser*, 412 U.S. 783, 785-790 (1973) (“total population difference,” “total percentage deviation,” “total absolute deviation”); *White v. Regester*, 412 U.S. 755, 761, 764 (“total variation”), 762 (“total deviation”), 763 (“population differential”) (1973); *Gaffney v. Cummings*, 412 U.S. 735, 742, 750-751 (1973) (“maximum variation”); *Mahan v. Howell*, 410 U.S. 315, 319-320 (1973) (“maximum percentage variation,” “maximum percentage deviation”); *Kirkpatrick v. Preisler*, 394 U.S. 526, 529 (1969) (“population difference”).

⁷² How “population” is defined for equal population purposes is an issue that seemed to be developing in the 1990s but did not rise to the forefront in the 2000s. In *Chen v. City of Houston*, the Supreme Court denied certiorari to a case arising from the 5th Circuit in which a violation of the one person, one vote principle was alleged because defining population as total population overrepresented the voting power of districts with a high level of noncitizen residents. 532 U.S. 1046 (2001). The Court of Appeals rejected this argument, ruling that the definition of population was an “eminently political question [that] has been left to the political process.” No. 98-20440, 206 F.3d 502, 528 (5th Cir. 2000). Justice Thomas issued a dissenting opinion in which he identified a developing circuit split on the issue and opined that a determination by the Court of the constitutionality of using citizen voting age population would be timely due to the immediacy of the next redistricting cycle. 532 U.S. at 1047.

Table 2. Statistical Terminology for Districting

IDEAL DISTRICT POPULATION	=	State Population/ Number of Districts
INDIVIDUAL DISTRICTS		
ABSOLUTE DEVIATION	=	District Population - Ideal Population
RELATIVE DEVIATION	=	Absolute Deviation/ Ideal Population
ALL DISTRICTS		
MEAN DEVIATION*	=	Sum of All Deviations/ Number of Districts
RANGE*	=	Largest Positive Deviation and Largest Negative Deviation
OVERALL RANGE*	=	Largest Positive Deviation + Largest Negative Deviation (Ignoring “+” or “-“ signs)
*Can Be “Absolute” or “Relative”		

Source: NCSL, 2009.

Two Different Standards for Congressional and Legislative Districts

The equal population requirements for congressional districts and legislative districts do not rest on the same stone in the constitutional foundation of the Republic. The equal population standard for congressional districts, first enunciated by the Supreme Court in *Wesberry v. Sanders*,⁷³ arises from Article I, Section 2, of the Constitution, “Representatives . . . shall be apportioned among the several states . . . according to their respective numbers. . . .” This standard has been strictly interpreted by the Court in *Kirkpatrick v. Preisler*,⁷⁴ *White v. Weiser*⁷⁵ and *Karcher v. Daggett*.⁷⁶ By contrast, the Supreme Court held in *Reynolds v. Sims*⁷⁷ that it is the Equal Protection

⁷³ 376 U.S. 1 (1964).

⁷⁴ 394 U.S. 526 (1969).

⁷⁵ 412 U.S. 783 (1973).

⁷⁶ 462 U.S. 725 (1983).

⁷⁷ 377 U.S. 533 (1964).

Clause of the 14th Amendment⁷⁸ that requires states to construct legislative districts that are substantially equal in population. The Supreme Court has required strict mathematical equality for congressional districts, but has not required the same degree of equality for state legislative districts.

The Standard for Drawing Congressional Districts—Strict Equality

In *Wesberry v. Sanders* (1964), the Supreme Court held that the population of congressional districts in the same state must be as nearly equal in population as practicable.⁷⁹

In April 1969, the Supreme Court decided *Kirkpatrick v. Preisler*,⁸⁰ a case involving congressional districts drawn by the Missouri General Assembly. The 10 districts had an overall range of approximately 6 percent. Writing for a five-member majority, Justice Brennan found that the plan failed to satisfy the “as nearly as practicable” standard of population equality the Court had earlier enunciated in *Wesberry v. Sanders*. The *Kirkpatrick* opinion specifically rejected the suggestion that there is a point at which population differences among districts becomes *de minimis* and held that, insofar as a state fails to achieve mathematical equality among districts, it must either show that the variances are unavoidable or specifically justify the variances.⁸¹ The opinion went on to reject several purported justifications advanced by Missouri.

The justifications rejected included a desire to avoid fragmenting either political subdivisions or areas with distinct economic and social interests, considerations of practical politics, and even an asserted preference for geographically compact districts. Also, the majority opinion held that Missouri had failed to show any systematic relationship between its congressional district population disparities and either of two other factors offered as justifications—varying proportions of eligible voters to total population and projected future population shifts among districts.⁸² (The Court did not flatly rule out the latter consideration, but it said such projections must be well-documented and uniformly applied.)

In *White v. Weiser*, a 1973 case involving Texas congressional districts,⁸³ the U.S. Supreme Court ruled that, although the overall range among Texas' 24 congressional districts was smaller than that invalidated in *Kirkpatrick v. Preisler* in 1969, the Texas districts were not as mathematically equal as reasonably possible and were therefore unacceptable. The Court specifically rejected an argument that the variances resulted from the Texas Legislature's attempt to avoid fragmenting political subdivisions.⁸⁴

⁷⁸ “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.”

⁷⁹ 376 U.S. 1 (1964).

⁸⁰ 394 U.S. 526 (1969).

⁸¹ *Id.* at 530-531.

⁸² 394 U.S. at 533-536.

⁸³ 412 U.S. 783 (1973).

⁸⁴ *Id.* at 790-791.

Ten years later, in *Karcher v. Daggett*,⁸⁵ the U.S. Supreme Court reaffirmed its position in *Kirkpatrick v. Preisler* that there is no level of population inequality among congressional districts that is too small to worry about, as long as those challenging the plan can show that the inequality could have been avoided. As Justice Brennan wrote for the 5-4 majority: “We thus reaffirm that there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, Sec. 2, without justification.”⁸⁶

The congressional redistricting plan drawn by the New Jersey Legislature had an overall range of 3,674 people, or .6984 percent.⁸⁷ The plaintiffs showed that at least one other plan before the Legislature had a “maximum population difference” (overall range) of only 2,375 people or .4514 percent,⁸⁸ thus carrying their burden of proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population. The Court also noted that the population differences could have been reduced by the simple device of transferring entire political subdivisions of known population between contiguous districts.⁸⁹

Once the plaintiffs had shown that the population differences could have been reduced, the state had the burden of proving that each significant variation from the ideal was necessary to achieve “some legitimate state objective.”⁹⁰

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.⁹¹

The New Jersey Legislature attempted to justify the population deviations as necessary to preserve the voting strength of racial minority groups. But the evidence was directed at only one of the 14 districts, so the Court

⁸⁵ 462 U.S. 725 (1983).

⁸⁶ *Id.* at 734.

⁸⁷ *Id.* at 728.

⁸⁸ *Id.* at 728-729.

⁸⁹ *Id.* at 739.

⁹⁰ *Id.* at 740.

⁹¹ 462 U.S. at 740-741.

found that New Jersey had failed to justify the deviations in the other districts and affirmed the lower court's rejection of the plan.⁹²

In 1997, *Abrams v. Johnson*⁹³ involved a challenge to a congressional plan drawn by a federal court on the basis of violation of the guarantee of one person, one vote. The challenged plan was drawn on remand from *Miller v. Johnson*.⁹⁴ In *Miller v. Johnson*, the Supreme Court affirmed that Georgia's 11th District was unconstitutional

⁹² *Id.* at 742-744. Lower courts have relied on the holding and tests under *Karcher* to determine if congressional district plans achieve population equality. See *State ex rel. Stephan v. Graves*, 796 F. Supp. 468 (D. Kan. 1992) (ruling that a congressional district plan with a “maximum population deviation” (overall range) of .94 percent was unconstitutional regardless of the fact that the plan maintained whole counties in each congressional district; the court instead adopted a plan with an overall range of 0.01 percent, which was one of three plans before the court with “population deviations” (overall ranges) of less than .34 percent). See also *Larios v. Cox*, 300 F. Supp. 2d 1320, 1354-55 (N.D. Ga. 2004) (ruling that a congressional plan with a total deviation of 72 people was constitutional due to a legitimate state interest in avoiding precinct splits along something other than easily recognizable boundaries despite testimony that an alternate plan that addressed traditional districting principles with less deviation was possible), *aff'd* 542 U.S. 947 (2004) (mem.) (Stevens & Breyer, JJ. concurring) (Scalia, J., dissenting); *Graham v. Thornburgh*, No. 02-4087-JAR, 207 F. Supp. 2d 1280 (D. Kan. 2002) (ruling that a congressional plan with a maximum deviation of 33 people was constitutional despite existence of alternative plans with lower deviations due to the adopted plan's relatively small deviation, the fact that the deviation was a result of balancing legitimate state goals, and the adopted plan caused the least shift of population from the 1992 plan); *Vieth v. Pennsylvania*, No. 1:CV-01-2439, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (ruling that a congressional plan with an overall range of 19 people was unconstitutional based on the finding that the justification offered by the state (avoiding split precincts) could be more closely achieved by alternative plans with minimum possible population deviations and that the justification was not the actual cause of deviation), *appeal dismissed as moot sub nom. Schweiker v. Vieth*, 537 U.S. 801 (2002) (mem.); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Calif. 1994) (finding a plan with an overall range of .49 percent, see *Wilson v. Eu*, 823 P.2d 545, 607-09 (Cal. 1990), was justified by legitimate state objectives), *aff'd in part, appeal dismissed in part*, 515 U.S. 1170 (1995) (mem.); *Stone v. Hechler*, 782 F. Supp. 1116 (W.D. W.Va. 1992) (holding that a congressional plan with an overall range of .09 percent was constitutional even though 17 other plans had lower overall ranges, the court found that the deviation was necessary to further legitimate state goals of preserving the cores of prior districts and making districts compact and that the adopted plan was more successful in achieving those goals than were the other plans); *Anne Arundel County Republican Cent. Comm. v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991) (ruling that a congressional plan with a “variance” (overall range) of 10 people was constitutional based on the state's justifications that the plan kept major regions intact, created a minority voting district, and recognized incumbent representation with its attendant seniority in the House), *aff'd* 504 U.S. 938 (1992) (mem.), *reh'g denied* 505 U.S. 1231 (1992); and *Turner v. Arkansas*, 784 F. Supp. 585 (E.D. Ark. 1991) (accepting a plan with a “variance” of 0.78 percent even though several plans with lower “variances” were introduced; the court found that the plan achieved a legitimate state objective because none of the other plans met the dual objectives of population equality plus meeting other constitutional criteria), *aff'd* 504 U.S. 952 (1992) (mem.). Cf. *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (adopting a congressional plan with an overall range of one person, not only on the basis that the “deviation” was smaller than the other plan offered (17 people) but also because the adopted plan better met other constitutional criteria such as fairness to minorities and fair distribution of party seats across party lines; even though the court recognized that cases such as *Karcher* consider even minute deviations legally significant, it stated that “rather than reduce congressional redistricting to a ‘hair splitting game’ we shall focus greater attention on other constitutional criteria that may reveal” a distinction between the two plans more significant than the mathematical distinction. *Id.* at 645 (citing *Carstens v. Lamm*, 543 F. Supp. 68, 85 (D. Colo. 1982)).

⁹³ 521 U.S. 74 (1997).

⁹⁴ 515 U.S. 900 (1995).

because race was a predominant factor in drawing the district.⁹⁵ A subsequent amended complaint was filed with the district court considering the case on remand challenging the Second District on the same grounds. The court declared that district also to be unconstitutional. The court gave the Georgia legislature an opportunity to redraw the plan, but a special session of the Georgia legislature adjourned without adopting a new plan when the House of Representatives and the Senate could not agree on the number of majority-minority districts to be adopted.⁹⁶ The court then drew the plan at issue in this case.

The plan drawn by the district court had an “overall population deviation” (overall range) of 0.35 percent and an “average deviation” of 0.11 percent.⁹⁷ No other plan submitted or considered by the court that was otherwise judged to be a constitutional plan had a lower overall range.⁹⁸ In a 5-4 decision, Justice Kennedy delivered the opinion affirming the decision of the district court. (The dissent focused on grounds other than one person, one vote.)

The Supreme Court affirmed the principle established in *Karcher* that “absolute population equality [is] the paramount objective”⁹⁹ in congressional plans and the holdings in *Chapman v. Meir*¹⁰⁰ and *Connor v. Finch*¹⁰¹ that “[w]ith a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.”¹⁰² The Supreme Court found that the district court did comply with the applicable standards for variance from absolute population equality and effectively enunciated the specific policies and features that justified the variances.¹⁰³

In addition to affirming the status quo regarding one person, one vote standards in congressional redistricting, the court made two other important findings. The first was that, even if the plan had failed on the basis of the one person, one vote challenge, “the solution would not be adoption of the constitutionally infirm, because race-based, plans of appellants Rather, we would require some very minor changes in the court’s plan—a few shiftings of precincts—to even out districts with the greatest deviations.”¹⁰⁴ The second important finding is the acknowledgment by the court:

⁹⁵ *Id.* at 917-20.

⁹⁶ 521 U.S. 74, 82.

⁹⁷ *Id.* at 99.

⁹⁸ *Id.*

⁹⁹ 521 U.S. at 98 (citing *Karcher v. Daggett*, 462 U.S. 725, 732 (1983)).

¹⁰⁰ 420 U.S. 1 (1975).

¹⁰¹ 431 U.S. 407 (1977).

¹⁰² 521 U.S. 74, 98 (citing *Chapman*, 420 U.S. at 26 and *Connor*, 431 U.S. at 419 -420).

¹⁰³ *Id.* at 99-100.

¹⁰⁴ *Id.* at 100

That exercise, however, and appellant's objections to the court plan's slight population deviations, are increasingly futile. We are now more than six years from the last census, on which appellant's data is based. The difference between the court plan's average deviation (0.11%) and the Illustrative Plan's (0.07%) is 0.04%, which represents 328 people out of a perfect district population of 588,928. The population of Georgia has not stood still. Georgia is one of the fastest growing States, and continues to undergo population shifts and changes In light of these changes, the tinkering appellants propose would not reflect Georgia's true population distribution in any event. The *Karcher* Court, in explaining the absolute equality standard acknowledged that 'census data are not perfect' and that 'population counts for particular localities are outdated long before they are completed.' 462 U.S., at 732. *Karcher* was written only two years from the previous census, however, and we are now more than six years from one. The magnitude of population shifts since the census is far greater here than was likely to be so in *Karcher*. These equitable considerations disfavor requiring yet another reapportionment to correct the deviation.¹⁰⁵

The Standard for Drawing Legislative Plans

*Reynolds v. Sims*¹⁰⁶ is the cornerstone in the development of the federal judiciary's population variance standards for state legislative districting. The case is notable both for the ruling that both houses of a bicameral state legislature must be districted on a population basis and for comments about what population-based districting requires. The opinion by Chief Justice Warren includes the often-quoted comment that "mathematical nicety is not a constitutional requisite,"¹⁰⁷ but nevertheless states that "the overriding objective must be substantial equality of population among the various districts."¹⁰⁸ The Court declined at that time to express any view as to what degree of population equality would or would not be held constitutional, observing that "what is marginally permissible in one State may be unsatisfactory in another depending upon the particular circumstances of the case."¹⁰⁹

An especially significant comment—as matters later developed—differentiated between congressional and legislative districting. The Warren opinion said:

[S]ome distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a state than congressional seats, it may be feasible to use political

¹⁰⁵ 521 U.S. at 100-101. On remand (*Bush v. Vera*, 517 U.S. 952 (1996), affirming judgment of district court that Texas congressional Districts constituted racial gerrymander), the district court in *Vera v. Bush*, 980 F. Supp. 251 (S. D. Tex. 1997), following *Abrams*, declined to address population deviation issues in a court-ordered plan, stating that "[b]ecause any correction for population deviation is unlikely to reflect the current populations of the districts in this court's 1996 interim plan, we decline to adjust for any population deviation between districts." *Id.* at 253.

¹⁰⁶ 377 U.S. 533 (1964).

¹⁰⁷ *Id.* at 569.

¹⁰⁸ *Id.* at 579.

¹⁰⁹ *Id.* at 578.

subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State.¹¹⁰

Mahan v. Howell—Congressional and Legislative Districting Differentiated

Although the Supreme Court recognized a distinction between congressional and legislative districting, it did not specify what differences in equality of population this might permit.

This uncertainty prevailed for nearly nine years, a period during which the 1970 census was completed and the states undertook—and, in many cases, completed—legislative redistricting based on that census. Then, in February 1973, the U.S. Supreme Court announced its decision in *Mahan v. Howell*,¹¹¹ a rather complicated challenge to Virginia's legislative districting plan. *Mahan* involved issues of the constitutionality of multimember districts and the treatment of certain naval personnel “home-ported” in Norfolk, Va., as well as a challenge to the overall range of the plan enacted by the Virginia General Assembly. A federal district court, concluding that the “maximum deviation” (overall range) among house districts was 16.4 percent, declared the plan unconstitutional by reason of that population disparity.

The Supreme Court majority opinion recounted some of the facts stated and conclusions reached in *Reynolds*, including those factors the Court had suggested might justify limited departure from strict population equality in legislative, as opposed to congressional, districting. The opinion, by Justice Rehnquist, stated:

Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, Sec. 2 [of the United States Constitution], broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting The dichotomy between the two lines of cases has consistently been maintained.¹¹²

The majority took note of the Virginia General Assembly's state constitutional authority to enact local legislation dealing with particular political subdivisions. They found that this legislative function was a significant and a substantial aspect of the Virginia legislature's powers and practices and thus justified an attempt to preserve political subdivision boundaries in drawing House of Delegates' districts. The majority concluded that, while the resulting overall range among house districts “may well approach tolerable limits, we do not believe it exceeds them.”¹¹³ Chief Justice Burger and Justices Stewart, White and Blackmun joined the majority opinion; Justice Powell took no part.

¹¹⁰ *Id.*

¹¹¹ 410 U.S. 315 (1973).

¹¹² *Id.* at 322. The evolution of districting technology has not significantly affected this principle. See, e.g., *In Re: Constitutionality of House Joint Resolution 1987*, No. SC02-194, 817 So. 2d 819, 826 (Fla. 2002) (rejecting challengers' assertion that the court should hold states to a stricter standard of population equality because of advances in technology stating that the “Supreme Court has made it clear that the goal of achieving population equality among districts is not paramount.” quoting *Brown v. Thomson*, 462 U.S. 835, 842 (1983)).

¹¹³ *Id.* at 325-329.

Dissenting Justices Brennan, Douglas and Marshall sought, at some length, to refute the contention that a distinction between standards for legislative and congressional districting had been maintained by the Court.¹¹⁴ They suggested that the “total deviation” (overall range) in the Virginia House approached 25 percent, a figure they said placed the plan in the same range as several others invalidated by the Supreme Court in the period between 1967 and 1971.¹¹⁵ (The differing conclusions as to the overall range of the Virginia plan stem from alternative ways of treating the effect of floterial districts included in the plan.)¹¹⁶

The 10-Percent Standard

The distinction between the standard of population equality demanded in congressional districting and that required in state legislative districting again was recognized, and the legislative districting standard somewhat clarified, in June 1973 by the U.S. Supreme Court decisions in *Gaffney v. Cummings*,¹¹⁷ a Connecticut case, and *White v. Regester*,¹¹⁸ a Texas case. Each case arose from a state-drawn legislative districting plan struck down by a federal district court.

Gaffney v. Cummings involved a plan prepared by a bipartisan commission appointed pursuant to Connecticut law. The plan’s “total maximum deviation” (overall range) was 1.8 percent in the Senate and 7.8 percent in the House,¹¹⁹ and one of its objectives was described as “political fairness;” i.e., the political makeup of each house should roughly reflect the proportion of the statewide total vote received by candidates of each major party.¹²⁰ *White v. Regester* concerned the distribution of Texas House seats in a plan, drawn by the state Legislative Redistricting Board, which had a “total variation” (overall range) of 9.9 percent.¹²¹ It was challenged both on that ground and on the complaint that certain multimember districts invidiously discriminated against particular racial or ethnic groups. (The latter complaint was found valid by the district court and upheld by the Supreme Court, that aspect of the case is discussed in [chapter 8](#).)

The majority opinion in each of these cases was written by Justice White for himself, Chief Justice Burger, and Justices Stewart, Blackmun and Rehnquist, the same group that had formed the majority in *Mahan v. Howell*, as well as Justice Powell, who had taken no part in *Mahan*. In the *Gaffney* opinion, after again asserting that the

¹¹⁴ 410 U.S. at 340-343.

¹¹⁵ *Id.* at 336.

¹¹⁶ A “floterial” district encompasses within its boundaries two or more other districts, each of which elects a member or members to a legislative or other public body. It is ordinarily used when none of the encompassed districts is, by itself, entitled to another seat, but their combined populations do entitle the area as a whole to additional representation.

¹¹⁷ 412 U.S. 735 (1973).

¹¹⁸ 412 U.S. 755 (1973).

¹¹⁹ 412 U.S. 735, 737.

¹²⁰ *Id.* at 752.

¹²¹ 412 U.S. 755, 761.

Supreme Court had always maintained a distinction between congressional and state legislative districting cases, Justice White said:

Although requiring that the population variations among legislative districts in *Mahan* be justified by substantial state considerations, we did not hold that in state legislative cases any deviations from perfect population equality in the districts, however small, make out prima facie equal protection violations and require that the contested reapportionments be struck down absent adequate state justification.¹²²

The *Gaffney* opinion continued by holding that no prima facie violation of the Equal Protection Clause had been shown and that the “political fairness” objective of *Gaffney* did not invalidate the plan.¹²³ Similarly, in the *White* opinion, the Supreme Court majority declared: “Insofar as the District Court’s judgment rested on the conclusion that the population differential [i.e., overall range] of 9.9 percent ... made out a prima facie equal protection violation under the 14th Amendment, absent special justification, the court was in error.”¹²⁴ The majority opinion observed: “Very likely, larger differences between districts would not be tolerable without justification ‘based on legitimate considerations incident to the effectuation of a rational state policy.’”¹²⁵

Justices Brennan, Douglas and Marshall, dissenting in both *Gaffney* and *White* with a single opinion, asserted that the majority opinions in the two cases had, in effect, established a 10 percent *de minimis* rule for state legislative districting.¹²⁶ Dicta in later Supreme Court decisions in *Chapman v. Meier*,¹²⁷ *Connor v. Finch*,¹²⁸ and *Brown v. Thomson*¹²⁹ have confirmed that a prima facie constitutional violation is not established by an overall range below 10 percent.

*Chapman v. Meier*¹³⁰ involved a redistricting of the North Dakota Senate devised by a federal court, under which the “total variance” (overall range) among districts was slightly more than 20 percent. Justice Blackmun, writing for the unanimous Court, recalled that state-drawn redistricting plans having less than a 10 percent “deviation” (overall range), and where there was no showing of invidious discrimination, were found valid in *Gaffney* and *White*, and that a “total population variance” (overall range) of 16.4 percent was subject to court scrutiny but was found justified in *Mahan* because it served to implement a rational state policy. He held that none of the reasons advanced—absence of a particular racial or political group whose voting power was minimized or canceled, sparse

¹²² 412 U.S. 735, 743.

¹²³ *Id.* at 751-752.

¹²⁴ 412 U.S. 755, 763.

¹²⁵ *Id.* at 764.

¹²⁶ *Id.* at 776-777.

¹²⁷ 420 U.S. 1 (1975).

¹²⁸ 431 U.S. 407 (1977).

¹²⁹ 462 U.S. 835 (1983).

¹³⁰ 420 U.S. 1 (1975).

population of the state generally, and desire both to preserve political subdivision boundaries and to continue an asserted tradition of dividing the state along political subdivision lines and along the Missouri River—was sufficient to justify the “variance” (overall range) of more than 20 percent.¹³¹

In *Connor v. Finch*,¹³² a case from Mississippi decided in May 1977, the Supreme Court's majority opinion, by Justice Stewart, stated that the “maximum deviation” (overall range) of the Mississippi redistricting plan at issue was computed by the federal district court (which drew the plan) to be 16.5 percent for the Senate and 19.3 percent for the House. The opinion noted that these figures “substantially exceed the ‘under-10 percent’ deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments,” and concluded that the district court failed to cite any unique feature of the Mississippi political structure that would justify a “deviation” (overall range) of such magnitude.¹³³ The plan was therefore invalidated. (The only dissenter was Justice Powell, who believed the plan should have been remanded to the district court for such limited changes as were necessary to bring it into conformity with Supreme Court guidelines.)¹³⁴

The only legislative reapportionment case involving population equality arising from the 1980 census and decided by the U.S. Supreme Court was *Brown v. Thomson*.¹³⁵ It concerned the Wyoming House. The Wyoming Constitution requires that each county constitute a legislative district, to be apportioned at least one senator and one representative. Wyoming had 23 counties, among which 64 representatives had been apportioned in accordance with the 1980 census. Niobrara County, the least populous, had 2,924 people, or 60 percent below the ideal of 7,337. The average deviation was 16 percent, and the “maximum deviation” (overall range) was 89 percent.¹³⁶

Justice Powell, in the majority opinion joined by Justices Burger, Rehnquist, O'Connor and Stevens, put to rest any doubt that the Court intends to use a 10-percent standard to judge legislative apportionment plans by saying that the Court's decisions had established, as a general matter, that a legislative apportionment plan with a “maximum population deviation” (overall range) under 10 percent is insufficient to make out a prima facie case of invidious discrimination under the 14th Amendment so as to require justification by the state.¹³⁷

A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State The ultimate inquiry, therefore, is whether the legislature's plan “may reasonably be said to advance [a] rational state policy” and, if so,

¹³¹ *Id.* at 21-26.

¹³² 431 U.S. 407 (1977).

¹³³ *Id.* at 418, 420.

¹³⁴ *Id.* at 430-433.

¹³⁵ 462 U.S. 835 (1983).

¹³⁶ *Id.* at 837-43.

¹³⁷ *Id.* at 842.

“whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.”¹³⁸

Justice Powell stated that consideration must be given to the character as well as the degree of deviations when analyzing a state redistricting plan: “The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause.”¹³⁹

Justice Powell concluded that Wyoming's constitutional policy—followed since statehood—of using counties as representative districts and ensuring that each county had at least one representative, was supported by substantial and legitimate state concerns, and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were no greater than necessary to preserve counties as representative districts, and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas.¹⁴⁰

The Supreme Court has maintained the status quo regarding population equality in legislative redistricting cases. In *Voinovich v. Quilter*,¹⁴¹ the Court in a unanimous opinion delivered by Justice O'Connor reversed a federal district court opinion holding that “total deviations in excess of 10% cannot be justified by a policy of preserving the boundaries of political subdivisions.”¹⁴²

Justice O'Connor validated the 10-percent *de minimis* standard for state legislative districts established in *Gaffney* and *White*, quoting *Brown* that:

[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination, and therefore must be justified by the State.¹⁴³

¹³⁸ *Id.* at 842-843 (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)).

¹³⁹ *Id.* at 845-846.

¹⁴⁰ 462 U.S. at 843-846. *But see* how empty of precedential value the case may be, note 195 *infra* and accompanying text.

¹⁴¹ 507 U.S. 146 (1993).

¹⁴² *Id.* at 162.

¹⁴³ *Id.* at 161 (quoting *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983) (internal quotation marks and citations omitted)). The 10-percent standard has been consistently applied in the past two decades by lower courts. *See Rodriguez v. Pataki*, No. 02 Civ. 0618, 308 F. Supp. 2d 346, 363 (S.D.N.Y. 2004) (“Thus, a redistricting plan with a maximum deviation below ten percent is prima facie constitutional . . .” quoting *Marylanders*, 849 F. Supp at 1031), *aff'd* 543 U.S. 997 (2004) (mem.); *Larios v. Cox*, 300 F. Supp. 2d at 1340 (“as a general matter, ‘an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations’ that are insufficient to make out a prima facie case of discrimination” (citation omitted)); *Montiel v. Davis*, No. Civ.A. 01-0447-BH-S, 215 F. Supp. 2d 1279, 1285 (S.D. Ala.

Once the plan's deviation exceeds this threshold, a prima facie case of discrimination has been established and the court must then determine whether the plan advances a rational state policy and whether the deviation exceeds constitutional limits in accordance with *Mahan* and *Brown*.

Proving Discrimination Within the 10-Percent Range

States should not assume that any legislative districting plan having less than a 10-percent overall range is safe from successful challenge. Even if the Court is prepared to allow the states some leeway from redistricting perfection, now that the basic law of population equality is well established, it is unlikely that the justices would be unduly hesitant to strike down a plan having an overall range of less than 10 percent if a challenger were to succeed in raising a suspicion that the plan was not a good faith effort overall or that there was something suspect about the districts involved.¹⁴⁴ However, the decisions in *Gaffney*, *White* and *Brown* indicate that the challenger of such a plan has the initial burden of showing that the plan violates the Equal Protection Clause.¹⁴⁵ The Supreme Court said in the *White* case that it could not “glean an equal protection violation from the single fact

2002) (“It is well settled that ‘[a legislative] apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.’” quoting *Brown*, 462 U.S. at 842-43); *Holloway v. Hechler*, 817 F. Supp. 617, 623 (S.D. W.Va. 1992) (holding that “the 9.97 percentage figure does not prima facie establish [the plan] to be unconstitutional under . . . the Fourteenth Amendment”), *aff'd* 507 U.S. 956 (1993) (mem.); *Fund for Accurate and Informed Representation Inc. (FAIR) v. Weprin*, 796 F. Supp. 662, 668-69 (N.D. N.Y. 1992) (stating that plaintiffs’ concession that the plan at issue had a maximum deviation of 9.43 percent was “fatal” to their “one person, one vote claim because, absent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a prima facie case of discrimination”).

¹⁴⁴ In *Marylanders for Fair Representation Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994), the district court stated its belief that “a plan with a maximum deviation below 10 percent could still be successfully challenged, with appropriate proof . . . of an unconstitutional or irrational purpose.” The court rejected the argument that the 10-percent rule forecloses challenges to a plan and stated that there should be a remedy available for those whose votes are diluted by a lower-than-10-percent plan that is adopted for unconstitutional or irrational state policy purposes. *Id.* at 1033-1034. The plaintiffs in this case, however, were unable to prove that the plan at issue, with a “maximum deviation” (overall range) of 9.84 percent, was for an illegitimate state purpose or objective. See also *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, 2006 U.S. Dist. LEXIS 29689, *19 (N.D.Ga. May 16, 2006) (stating that “population deviations of less than ten percent ‘are presumptively constitutional, and the burden lies on the plaintiffs to rebut the presumption’” quoting *Larios*, No. 1:03-CV-693-CAP, 300 F. Supp. 2d at 1341, and ruling that even though the plaintiffs’ assertions that a plan with a lower-than-10-percent deviation was not consistent with state’s legitimate interests and alternative plans with less deviation better accomplished those interests had merit, the assertions did not overcome the presumption of constitutionality); *Rodriguez v. Pataki*, No. 02 Civ. 0618, 308 F. Supp. 2d at 365 (stating that a plan with a maximum deviation below 10 percent, in this case 9.78 percent, can be unconstitutional if challengers demonstrate that an “asserted unconstitutional or irrational state policy is the actual reason for the deviation” quoting *Marylanders*, 849 F. Supp. at 1032, but rejecting plaintiffs’ assertion that an improper regionally discriminatory motive existed); *Montiel v. Davis*, No. Civ.A. 01-0447-BH-S, 215 F. Supp. 2d at 1285 (stating that “if the maximum deviation is less than 10 percent, the population disparity is considered *de minimis* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness” and ruling that plans with overall population deviations of 9.78 percent (House) and 9.93 percent (Senate) were constitutional because plaintiffs failed to prove the deviation resulted solely from the promotion of an unconstitutional or irrational state policy); *Bonneville County v. Yursa*, 2005 Opinion No. 138, 142 Idaho 464, 129 P.3d 1213, 1217, 1219 (2005) (acknowledging that a presumptively constitutional plan can be found unconstitutional if the challenger can demonstrate “that the deviation results from some unconstitutional or irrational state purpose” but ruling that the regional deviation in the plan was not significant enough to “effectively dilute the right to vote” and no intent to regionally discriminate had been demonstrated).

¹⁴⁵ 412 U.S. 735, 740-741; 412 U.S. 755, 763-764; 462 U.S. 835, 842-843.

that two legislative districts in Texas differ from one another by as much as 9.9 percent”¹⁴⁶ It indicated in *Gaffney* that a showing by the plaintiff that an alternative plan with a lower “variation” (overall range) could be devised is not in itself sufficient to require a federal court to invalidate a plan adopted by a state legislature.¹⁴⁷

In *Larios v. Cox*,¹⁴⁸ a district court struck down two state legislative plans enacted by the Georgia General Assembly in 2001 and 2002, ruling that the plans violated the one person, one vote principle. Although the district court acknowledged that districting “is intended to have substantial political consequences”¹⁴⁹ and also that “the plaintiffs could not establish a claim of unconstitutional partisan gerrymandering,” the court still implied that partisan advantage alone would not be a legitimate state interest under a one person, one vote analysis. However, the court did not address the issue because it found that the state’s political goals were “bound up inextricably with the interests of regionalism and incumbent protection.”¹⁵⁰ The plan for each house had an overall range of 9.98 percent. Testimony was given by legislators and redistricting staff that they believed there was a safe harbor of “+/- 5%” and that population deviations below that level did not have to be supported by any legitimate state interest.¹⁵¹ In addition, the court found that testimony demonstrated that the protection of rural Georgia and inner-city Atlanta and the protection of Democratic incumbents, instead of “traditional redistricting criteria,” were the objectives of the plan creators.¹⁵² The court also noted that the average deviation was above 3 percent in both plans and that the legislators had rejected a number of proposals with smaller deviations.¹⁵³ The court found that regional protectionism, rather than the protection of political subdivisions such as counties, was not a justification for minor deviations in apportionment, noting that, unlike regions, political subdivisions provide many governmental services and that state legislatures often enact local legislation.¹⁵⁴ The court also rejected protection of incumbents as a legitimate consideration if the policy is “not applied in a consistent and neutral way.”¹⁵⁵ The district court found the incumbent protection “overexpansive,” stating that “[t]he Supreme Court has said only that an interest in avoiding contests between incumbents may justify deviations from exact population equality, not that general protection of incumbents may also justify deviations.”¹⁵⁶

¹⁴⁶ 412 U.S. 755, 764.

¹⁴⁷ 412 U.S. 735, 750-751.

¹⁴⁸ No. 1:03-CV-693-CAP, 300 F. Supp. 2d 1320, *aff'd* 542 U.S.947 (2004).

¹⁴⁹ *Id.* at 1351, quoting *Gaffney*, 412 U.S. 735, 753.

¹⁵⁰ *Id.* at 1351-52.

¹⁵¹ *Id.* at 1325.

¹⁵² *Id.* at 1325, 1331-34.

¹⁵³ 300 F. Supp. 2d 1320, 1352, *aff'd* 542 U.S.947 (2004).

¹⁵⁴ *Id.* at 1344-47.

¹⁵⁵ *Id.* at 1347-48.

¹⁵⁶ *Id.* at 1348.

The Supreme Court affirmed the district court decision. The majority did not issue an opinion, but Justices Stevens and Breyer issued a concurring opinion and Justice Scalia issued a dissenting opinion discussing the role of political considerations in the context of a one person, one vote challenge.

In his concurring opinion, Justice Stevens noted approvingly the majority's rejection of the appellant's argument that "a safe harbor for population deviations of less than 10 percent [exists], within which districting decisions could be made for any reason whatsoever."¹⁵⁷ Justice Stevens then revisited the Court's *Vieth*¹⁵⁸ decision concerning partisan gerrymandering, opining that after *Vieth* "the equal-population principle remains the only clear limitation on improper districting practices"¹⁵⁹ and that districting based solely on partisan interests is impermissible.¹⁶⁰ Justice Scalia stated in his dissent that he would have set the case for argument because the Court's cases have not addressed the question of whether a districting plan with a total deviation of less than 10 percent can be invalidated based on "circumstantial evidence of partisan political motivation."¹⁶¹ He opined that to recognize equal-population challenges to plans with overall deviations under 10 percent based on "impermissible political bias"¹⁶² would "more likely encourage politically motivated litigation than . . . vindicate political rights."¹⁶³

A relatively high mean deviation, even within the context of an overall range of less than 10 percent, may make it easier for a challenger to meet the burden of establishing an equal protection violation. In *Gaffney*, the majority opinion pointed out that, although the "total maximum deviations" (overall ranges) were 7.8 percent in the House and 1.8 percent in the Senate,¹⁶⁴ the respective mean deviations were only 1.9 percent and .45 percent.¹⁶⁵ Similarly, the *White* opinion contrasts the 9.9 percent "total variance" of the Texas House districting plan with its mean deviation of 1.8 percent.¹⁶⁶

¹⁵⁷ 542 U.S. 947, 949.

¹⁵⁸ *Vieth v. Jubelirer*, 541 U.S. 267 (2004). This case is discussed in [chapter 6](#).

¹⁵⁹ 542 U.S. at 949.

¹⁶⁰ *Id.* at 951.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 952.

¹⁶⁴ 412 U.S. 735, 737.

¹⁶⁵ *Id.* at 750.

¹⁶⁶ 412 U.S. 755, 764.

It should be noted that there is nothing in the U.S. Constitution or case law to prevent state courts from imposing stricter standards of population equality, under state constitutions, than the federal courts demand. State legislatures also can impose stricter population standards of equality in their redistricting law.¹⁶⁷

“Rational State Policies” That Justify Exceeding the 10-percent Standard

If a state enacts or adopts a plan with an overall population range exceeding 10 percent in either house and the plan is challenged in federal court, the state will have the burden of showing both that the overall range is necessary to implement a “rational state policy”¹⁶⁸ and that it does not dilute or take away the voting strength of any particular group of citizens. The obvious question, then, is: What are the criteria of a “rational state policy” that are constitutionally relevant to legislative districting?

Affording representation to political subdivisions. The majority opinion in *Reynolds v. Sims* stated: “So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible”¹⁶⁹ in legislative districting. That opinion continued: “Considerations of area alone provide an insufficient justification for deviations from the equal-population principle.”¹⁷⁰ It also observed:

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a state may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.¹⁷¹

In *Mahan v. Howell* the majority reaffirmed the foregoing position and stated:

We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational.

¹⁶⁷ Iowa has required that no senatorial district's population can exceed that of any other by more than 5 percent; no representative district's population may exceed that of any other by more than 5 percent; no congressional district's population can exceed that of any other by more than 1 percent; average deviations from the ideal population for House and Senate districts cannot exceed 1 percent; and in a court challenge the General Assembly has the burden of proof of justifying any variance in excess of 1 percent of the ideal population for any district. Iowa Code § 42.4.

¹⁶⁸ *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 580.

¹⁷¹ *Id.* at 580-581.

And if that be so, the decision of the General Assembly to provide representation to subdivisions qua subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection Clause of the Fourteenth Amendment.¹⁷²

The majority opinion went on to hold that Virginia's "plan for apportionment of the House of Delegates may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions."¹⁷³

In *Brown v. Thomson*,¹⁷⁴ the Supreme Court showed that it was willing to go a long way to support a state's constitutional policy of using counties as legislative districts and ensuring that each county had at least one representative, even when that meant upholding a plan with a "maximum deviation" (overall range) of 89 percent. Writing for the majority, Justice Powell found that the policy, followed since statehood, was supported by substantial and legitimate state concerns and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were not greater than necessary to preserve counties as representative districts and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas.¹⁷⁵

In 1994, the district court in *Quilter v. Voinovich*¹⁷⁶ relied on *Mahan v. Howell* and *Brown v. Thomson* in ruling that Ohio's legislative district plan with a "total deviation" (overall range) of 13.81 percent for House districts and 10.54 percent for Senate districts did not violate the one person, one vote guarantee because the deviation was justified by the rational state policy of preserving county lines. The court stated, in distinguishing *Quilter* from other cases where a rational state policy argument was rejected, that Ohio had a clearly stated constitutional policy, the plan advanced that policy, and the deviations resulting from the plan were not constitutionally excessive.¹⁷⁷ The court also pointed out that the plan was not advanced arbitrarily as evidenced by the fact that the plan did, in fact, preserve whole counties within the applicable population limits.¹⁷⁸

¹⁷² 410 U.S. 315, 325-326 (1973).

¹⁷³ *Id.* at 328.

¹⁷⁴ 462 U.S. 835 (1983).

¹⁷⁵ *Id.* at 843-846. Cf. note 195, *infra*, discussing the decision of *Gorin v. Karpin*, 775 F. Supp. 1430 (D. Wyo. 1991), which found Wyoming's legislative plan to be unconstitutional.

¹⁷⁶ 857 F. Supp. 579 (N.D. Ohio 1994). This decision resulted from the Supreme Court's decision in *Voinovich v. Quilter*, 507 U.S. 146 (1993) to remand an earlier unpublished district court decision holding that "deviations" of more than 10 percent could not be justified by a policy of preserving political boundaries. See *supra* note 141 and accompanying text.

¹⁷⁷ 857 F. Supp. at 584, 586 and 587. See also *Deem v. Manchin*, No. 3:01cv75, 188 F. Supp 2d 651 (N.D. W.Va. 2002) (ruling that 10.92 percent overall range was justified by five rational and legitimate policy goals in text of legislation even if the goals were applied inconsistently due to balancing of competing goals), *aff'd sub nom. Unger v. Manchin*, 536 U.S. 935 (2002) (mem.); *Marylanders for Fair Representation Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (finding a House of Delegates' plan with a "maximum deviation" (overall range) of 10.67 percent constitutional based on proof that the plan preserved state boundaries and preserved core districts without exceeding constitutional limits).

¹⁷⁸ 857 F. Supp. at 585.

Affording representation to political subdivisions was, as of 2008, the only “rational state policy” that had actually been accepted by the Supreme Court as justification for a legislative districting plan that had an overall range greater than 10 percent. The record since 1973 suggests that the Supreme Court is not easily persuaded to accept even this justification. It declined to do so in *Chapman v. Meier*, *Connor v. Finch* and *Langsdon v. Millsaps*.¹⁷⁹

In its unanimous decision in *Chapman* the Court found: “It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines.”¹⁸⁰ The opinion also noted that it would have been possible to follow such a policy in North Dakota and still achieve a significantly lower overall range.¹⁸¹ Similarly, in a concurring opinion in *Connor*, Justice Blackmun wrote:

I do not understand the [Supreme] Court to disapprove the District Court’s decision to use county lines as districting boundaries wherever possible, even though this policy may cause a greater variation in district population than would otherwise be appropriate for a court-ordered plan. The final plan adopted [by the District Court, and subsequently appealed] appears to produce even greater population disparities than necessary to effectuate the county boundary policy.¹⁸²

In *Langsdon v. Millsaps*, Tennessee’s apportionment plan for its House of Representatives had a “maximum deviation” (overall range) of 13.9 percent and divided 30 counties.¹⁸³ The state argued that the “variance” of 13.9 percent was necessary in order to comply with the state constitutional prohibition on splitting counties, but the plaintiffs presented a plan with a “total population variance” (overall range) of 9.847 percent that split only 27 counties.¹⁸⁴ The district court held, and the Supreme Court affirmed, that, although the “constitutional provision against splitting counties is a rational state policy to be considered in apportionment legislation,” in this case it was “patently unreasonable to justify a 14% variance on the basis of not splitting counties” because, as plaintiffs had shown, fewer counties may be split while decreasing the variance below the goal of 10 percent.¹⁸⁵

*Mahan v. Howell*¹⁸⁶ and *Brown v. Thomson*¹⁸⁷ are the only cases in which the Court has found that affording representation to political subdivisions is a “rational state policy” that justifies exceeding the 10 percent overall range. And in *Brown v. Thomson*, Wyoming’s policy of affording representation to political subdivisions may have been less important to the result than was the peculiar posture in which the case was presented to the Court. The

¹⁷⁹ 836 F. Supp. 447 (W.D. Tenn. 1993), *aff’d* 510 U.S. 1160 (1994) (mem.).

¹⁸⁰ 420 U.S. 1, 25 (1975).

¹⁸¹ *Id.*

¹⁸² 431 U.S. 407, 426 (1977).

¹⁸³ 836 F. Supp 447, 448.

¹⁸⁴ *Id.* at 448, 450.

¹⁸⁵ *Id.* at 451-52.

¹⁸⁶ 410 U.S. 315 (1973).

¹⁸⁷ 462 U.S. 835 (1983).

appellants chose not to challenge the 89 percent overall range of the plan, but rather to challenge only the effect of giving Niobrara County its own representative.¹⁸⁸ The Legislature had provided that, if this representation for Niobrara County were held unconstitutional, it would be combined with a neighboring county in a single representative district; the House then would consist of 63 representatives.¹⁸⁹ In that event, the overall range would be reduced to 66 percent and the average deviation to 13 percent.¹⁹⁰ Rather than find the whole plan unconstitutional and require the state to be redistricted without respecting county boundaries (as it had done in *Whitcomb v. Chavis*¹⁹¹ for the Indiana General Assembly), the Court chose to confine itself to the marginal effect of giving Niobrara County a representative and found that it was *de minimis*: “These statistics make clear that the grant of a representative to Niobrara County is not a significant cause of the population deviations that exist in Wyoming.”¹⁹²

Justice O'Connor, joined by Justice Stevens, concurred in the result but emphasized that it was only because the challenge was so narrowly drawn that she had voted to reject it:

I have the gravest doubts that a statewide legislative plan with an 89 percent maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries. I join the Court's opinion on the understanding that nothing in it suggests that this Court would uphold such a scheme.¹⁹³

Justice Brennan, writing for himself and Justices Marshall, Blackmun and White, dissented from the Court's holding, stressing:

[H]ow extraordinarily narrow [the Court's holding] is, and how empty of likely precedential value [I]t is unlikely that any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature [P]laintiffs henceforth will know better than to exercise moderation or restraint in mounting constitutional attacks on state apportionment statutes, lest they forfeit their small claim by omitting to assert a big one.¹⁹⁴

¹⁸⁸ *Id.* at 846.

¹⁸⁹ *Id.* at 840.

¹⁹⁰ *Id.* at 847.

¹⁹¹ 403 U.S. 124 (1971).

¹⁹² 462 U.S. at 847.

¹⁹³ *Id.* at 850.

¹⁹⁴ *Id.* at 850-851.

The Court reaffirmed this narrow view of its holding in *Brown* by later citing it as authority for the statement that “no case of ours has indicated that a deviation of some 78% could ever be justified.”¹⁹⁵

Overall ranges in excess of 10 percent appear most likely to be upheld in cases of apportionment. In apportionment, members are apportioned among political subdivisions rather than a district being drawn for each member. However, such schemes have been upheld only when the number of members greatly exceeds the number of political subdivisions among which they are apportioned. In *Reynolds v. Sims*, the Alabama Legislature apportioned 106 seats among 67 counties, with each county being assured one seat. This resulted in an overall range of 16:1. In overturning the apportionment scheme, the Court stated:

[A] State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible.¹⁹⁶

In *Abate v. Mundt*, 18 members of county government were apportioned among five cities, resulting in an overall range of 11.9 percent. The Court noted that:

[A] desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality [T]he facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes.¹⁹⁷

¹⁹⁵ *Bd. of Estimate v. Morris*, 489 U.S. 688, 702 (1989). This statement was reiterated in *Gorin v. Karpan*, 775 F. Supp. 1430 (D. Wyo. 1991), a district court case in which, unlike *Brown*, the overall range of Wyoming's state legislative plan was being challenged. In *Gorin* the challenged plan for the House had a “maximum deviation” (overall range) of approximately 83 percent and the “maximum population deviation” for the Senate was approximately 58 percent. *Id.* at 1439. The defendant tried to justify the deviations using the same argument presented in *Brown*—preservation of county boundaries. *Id.* at 1442. While noting that such preservation was, in fact, a legitimate state policy, the Court stated that the policy was carried to such an “unconstitutional extreme” that it “emasculated the ‘one person, one vote’ principle.” *Id.* at 1444. The strength of the policy argument had also been diminished by the fact that other plans were offered that, for the most part, maintained county boundaries while reducing population inequality. *Id.*

¹⁹⁶ 377 U.S. 533, 581 (1964).

¹⁹⁷ 403 U.S. 182, 185 (1971).

In *Brown v. Thomson*, the Wyoming Legislature was apportioning 64 representatives among 23 counties. The Court noted with approval *Schaefer v. Thomson*,¹⁹⁸ where a three-judge district court held that the apportionment of the Wyoming Senate of 25 senators among 23 counties, with the two largest counties each having two senators, so far departed from the principle of population equality that it was unconstitutional.¹⁹⁹ But the Court went on to state: “The Wyoming House of Representatives presents a different case because the number of representatives is substantially larger than the number of counties.”²⁰⁰

In *Bd. of Estimate v. Morris*,²⁰¹ the charter of the city of New York had created a Board of Estimate composed of eight ex officio members, each of whom was an elected official. The mayor, comptroller and city council president were elected citywide and had two votes each. The five borough presidents were elected by their boroughs and had one vote each. The overall range of population among the five boroughs was 132 percent. The overall range of population per vote on the board, including the three at-large members with two votes each, was 78 percent. The Supreme Court held that the city had failed to carry its burden of justifying “such a substantial departure from the one-person, one-vote ideal.”²⁰²

Thus, the use of apportionment among political subdivisions may afford an acceptable scheme where the number of seats apportioned is substantially larger than the number of political subdivisions among which they are apportioned. In 1993, the apportionment of 435 seats in the federal House of Representatives among the 50 states resulted in an overall range of 76.2 percent.²⁰³ After the 2000 census, the overall range was 63.3 percent.²⁰⁴

Other state policies. The Supreme Court has, at least in dicta in *Karcher v. Daggett*, said that other state policies besides affording representation to political subdivisions can be used to justify a variance from equal population.

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the

¹⁹⁸ 240 F. Supp. 247 (D. Wyo. 1964).

¹⁹⁹ 462 U.S. 835, 837 (1983).

²⁰⁰ *Id.* at 845, n. 7.

²⁰¹ 489 U.S. 688 (1989).

²⁰² *Id.* at 703.

²⁰³ Wyoming had the smallest population district, 453,588, and Montana had the largest, 799,065. U.S. Census Bureau, *1990 Census of Population and Housing*, Summary Tape Files 1/3, Congressional Districts of the 103rd Congress on CD-ROM (Washington, D.C.: U.S. Census Bureau, 1993).

²⁰⁴ After the 2000 census, Wyoming again had the smallest population district, 495,304, and Montana the largest, 905,316. U.S. Census Bureau, *Congressional Apportionment: Census 2000 Brief* (Washington, D.C.: U.S. Census Bureau, July 2001), available at www.census.gov/prod/2001pubs/c2kbr01-7.pdf.

availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.²⁰⁵

Since *Karcher v. Daggett* was a congressional redistricting case, where strict equality of population is required, these additional “rational state policies” would presumably apply with even greater force in a legislative redistricting case.

Legislative Plans Drawn by a Court

An interesting feature of *Chapman v. Meier* and *Connor v. Finch* is the Supreme Court's indication that, where it becomes necessary for a federal court to draw a state legislative districting plan, the 10-percent standard does not apply:

A court-ordered plan . . . must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.

. . .

[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan . . . with minimal population variance cannot be adopted.²⁰⁶

Although the 10-percent standard does not apply, “[t]his is not to say . . . that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting.”²⁰⁷

Conclusion

The U.S. Supreme Court has determined that the Apportionment Clause of Article I, Section 2, of the U.S. Constitution requires that the population of all the congressional districts in a state be as nearly equal in population as practicable.²⁰⁸ There are no *de minimis* variations, which could practicably be avoided, without justification.²⁰⁹ Justification might include making districts compact, respecting municipal boundaries, preserving

²⁰⁵ 462 U.S. 725, 740-741 (1983).

²⁰⁶ *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); partially quoted in *Conner v. Finch*, 431 U.S. 407, 417-418 (1977).

²⁰⁷ 420 U.S. 1, 27, n. 19 (citations omitted).

²⁰⁸ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²⁰⁹ *Karcher v. Daggett*, 462 U.S. 725, 734 (1983).

the cores of prior districts, or avoiding contests between incumbent representatives.²¹⁰ However, the state must show with some specificity that a particular objective required the specific deviations in its plan.²¹¹

The Court has held that, under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, both houses of a state legislature must have districts that are substantially equal in population.²¹² However, the Court has distinguished between congressional plans and legislative plans, saying that a legislative apportionment plan is not *prima facie* invalid because of population inequality as long as its overall range is less than 10 percent.²¹³ Even if the overall range is more than 10 percent, a state may be able to justify the inequality of population by showing that it was necessary to provide representation to political subdivisions, as political subdivisions,²¹⁴ or to avoid splitting political subdivisions.²¹⁵ However, this may be possible only where the number of representatives is apportioned among a substantially smaller number of political subdivisions.²¹⁶

Table 3 shows the degree of population equality attained by redistricting plans based on the 2000 census.

²¹⁰ *Id.* at 740-741.

²¹¹ *Id.* See also *Abrams v. Johnson*, 521 U.S. 74, 99-101 (1997).

²¹² *Reynolds v. Sims*, 377 U.S. 533 (1964).

²¹³ *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

²¹⁴ *Mahan v. Howell*, 410 U.S. 315 (1973); *Brown v. Thomson*, 462 U.S. 835 (1983).

²¹⁵ *Voinovich v. Quilter*, 507 U.S. 146 (1993).

²¹⁶ *Cf.*, *Brown v. Thomson*, 462 U.S. 835 (1983) (64 representatives apportioned among 23 counties, approved) and *Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964) (25 senators apportioned among 23 counties, rejected).

Table 3. Population Equality of 2000s Districts

	State House		State Senate		Congressional		
	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	People Overall Range
Alabama	42,353	9.93%	127,060	9.73%	636,300	0.00%	0
Alaska	15,673	9.96%	31,346	9.32%	N/A	N/A	N/A
Arizona	171,021	3.79%	171,021	3.79%	641,329	0.00%	0
Arkansas	26,734	9.87%	76,383	9.81%	668,350	0.10%	5698
California	423,395	0.00%	846,792	0.00%	639,087	0.00%	1
Colorado	66,173	4.88%	122,863	4.95%	614,465	0.00%	2
Connecticut	22,553	9.20%	94,599	8.03%	681,113	0.00%	0
Delaware	19,112	9.98%	37,314	9.96%	N/A	N/A	N/A
Florida	133,186	2.79%	399,559	0.03%	639,295	0.00%	1
Georgia	45,480	1.95%	146,187	1.93%	629,727	0.00%	2
Hawaii	22,046	20.10%	44,973	38.90%	605,769	0.31%	1,899
Idaho	36,970	9.71%	36,970	9.71%	646,977	0.60%	3,595
Illinois	105,248	0.00%	210,496	0.00%	653,647	0.00%	0
Indiana	60,805	1.92%	121,610	3.80%	675,609	0.02%	102
Iowa	29,263	1.89%	58,526	1.46%	585,265	0.02%	134
Kansas	21,378	9.95%	66,806	9.27%	672,105	0.00%	33
Kentucky	40,418	10.00%	106,362	9.53%	673,628	0.00%	4
Louisiana	42,561	9.88%	114,589	9.95%	638,425	0.04%	240
Maine	8,443	9.33%	36,426	3.57%	637,462	0.00%	23
Maryland	37,564	9.89%	112,692	9.96%	662,060	0.00%	2
Massachusetts	39,682	9.68%	158,727	9.33%	634,910	0.39%	2476
Michigan	90,350	9.92%	261,538	9.92%	662,563	0.00%	1
Minnesota	36,713	1.56%	73,425	1.35%	614,935	0.00%	1
Mississippi	23,317	9.98%	54,705	9.30%	711,165	0.00%	10
Missouri	34,326	6.08%	164,565	6.81%	621,690	0.00%	1
Montana	9,022	9.85%	18,044	9.81%	N/A	N/A	N/A
Nebraska	N/A	N/A	34,924	10.00%	570,421	0.00%	0

	State House		State Senate		Congressional		
	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	People Overall Range
Nevada	47,578	1.97%	95,155	9.91%	666,086	0.00%	6
New Hampshire	3,089	9.26%	51,491	4.96%	617,893	0.10%	636
New Jersey	210,359	1.83%	210,359	1.83%	647,257	0.00%	2
New Mexico	25,986	9.70%	43,311	9.60%	606,349	0.03%	166
New York	126,510	9.43%	306,072	9.78%	654,361	0.00%	1
North Carolina	67,078	9.98%	160,986	9.96%	619,178	0.00%	1
North Dakota	13,664	10.00%	13,664	10.00%	N/A	N/A	N/A
Ohio	114,678	12.46%	344,035	8.81%	630,730	0.00%	0
Oklahoma	34,165	2.05%	71,889	4.71%	690,131	0.00%	1
Oregon	57,023	1.90%	114,047	1.77%	684,280	0.00%	1
Pennsylvania	60,498	5.54%	245,621	3.98%	646,371	0.00%	2
Rhode Island	13,978	9.88%	27,587	9.83%	524,160	0.00%	6
South Carolina	32,355	4.99%	87,218	9.87%	668,669	0.00%	1
South Dakota	21,567	9.71%	21,567	9.69%	N/A	N/A	N/A
Tennessee	57,468	9.99%	172,403	9.98%	632,143	0.00%	5
Texas	139,012	9.74%	672,639	9.71%	651,619	0.00%	15
Utah	29,776	8.00%	77,006	7.02%	744,390	0.00%	1
Vermont	4,059	18.99%	20,294	14.73%	N/A	N/A	N/A
Virginia	70,785	3.90%	176,963	4.00%	643,501	0.00%	38
Washington	120,288	0.30%	120,288	0.30%	654,902	0.00%	7
West Virginia	18,083	9.98%	106,374	10.92%	602,781	0.22%	1,313
Wisconsin	54,179	1.60%	162,536	0.98%	670,459	0.00%	5
Wyoming	8,230	9.81%	16,451	9.51%	N/A	N/A	N/A

Note: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming received only one seat in the U.S. House of Representatives, so their congressional plans did not have an overall range.

Source: NCSL, 2009.

Table 4. Units of Geography Used to Draw 2000s Plans

	House	Senate	Congressional
Alabama	Census blocks	Census blocks	Counties, census blocks
Alaska	Census blocks (split)	Census blocks (split)	N/A
Arizona	Census blocks	Census blocks	Census blocks
Arkansas	Census blocks	Census blocks	Counties
California	Census blocks	Census blocks	Census blocks
Colorado	Census blocks	Census blocks	Census blocks
Connecticut	Census blocks	Census blocks	Census blocks
Delaware	Census blocks (split)	Census blocks (split)	N/A
Florida	Counties; census tracts, block groups, blocks	Counties; census tracts, block groups, blocks	Counties; census tracts, block groups, blocks
Georgia	Census blocks	Census blocks	Census blocks
Hawaii	Census blocks	Census blocks	Census blocks
Idaho	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
Illinois	Census blocks	Census blocks	Census blocks (split)
Indiana	VTDs, census blocks (split)	VTDs, census blocks (split)	VTDs, census blocks (split)
Iowa	Townships, precincts	House districts	Counties
Kansas	VTDs, census blocks (split)	VTDs, census blocks (split)	VTDs, census blocks (split)
Kentucky	Census blocks (split)	Census blocks (split)	Census blocks (split)
Louisiana	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
Maine	Census blocks	Census blocks	Census blocks
Maryland	Precincts, census blocks	Precincts, census blocks	Precincts, census blocks
Massachusetts	Precincts	Precincts	Precincts
Michigan	Census blocks	Census blocks	Census blocks
Minnesota	Census blocks	Census blocks	Census blocks
Mississippi	Precincts, census blocks	Precincts, census blocks	Precincts, census blocks
Missouri	Census blocks	Census blocks	VTDs, census blocks
Montana	Census blocks	Census blocks	N/A
Nebraska	N/A	Precincts, census blocks	Precincts, census blocks
Nevada	Census blocks	Census blocks	Census blocks

	House	Senate	Congressional
New Hampshire	Towns, wards, census blocks (split)	Towns	Towns
New Jersey	Census blocks	Census blocks	Census blocks
New Mexico	Precincts	Precincts	Precincts
New York	Census blocks	Census blocks	Census blocks
North Carolina	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
North Dakota	Census blocks (split)	Census blocks (split)	N/A
Ohio	Political subdivisions	Political subdivisions	Census blocks
Oklahoma	Census blocks	Census blocks	Census blocks
Oregon	Census blocks	Census blocks	Census blocks
Pennsylvania	Census blocks (split)	VTDs, MCDs	VTDs, census blocks (split)
Rhode Island	Census blocks	Census blocks	Census blocks
South Carolina	Census blocks	VTDs, census blocks	Census blocks
South Dakota	Senate districts, VTDs	VTDs, census blocks	N/A
Tennessee	Census blocks	Census blocks	Census blocks
Texas	Census blocks	Census blocks	Census blocks
Utah	Census blocks	Census blocks	Census blocks
Vermont	Towns, census blocks (split)	Towns, census blocks (split)	N/A
Virginia	Precincts, census blocks	Precincts, census blocks	Precincts, census blocks
Washington	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
West Virginia	VTDs, census blocks	VTDs, census blocks	Counties
Wisconsin	Wards, census blocks (split)	Wards, census blocks (split)	Wards, census blocks (split)
Wyoming	Census blocks (split)	Census blocks (split)	N/A

Note: VTD = Voting Tabulation District (precinct, ward, electoral district, etc.)

Source: NCSL, 2009.

4. RACIAL AND LANGUAGE MINORITIES

Introduction

More than a century ago, the U.S. Supreme Court described the right to vote as fundamental because it is “preservative of all rights.”²¹⁷ Almost 100 years later, Justice Black wrote, “[o]ther rights even the most basic are illusory if the right to vote is undermined.”²¹⁸ Unfortunately, for a large number of American citizens the right to vote remained illusory until, almost a century after the ratification of the 15th Amendment,²¹⁹ Congress passed the Voting Rights Act of 1965.²²⁰ The act primarily protected the right to vote as guaranteed by the 15th Amendment. It was also designed to enforce the 14th Amendment and Article 1, Section 4, of the Constitution.²²¹

The Voting Rights Act is one of the most successful civil rights statutes ever passed by Congress. The act accomplished what the 15th Amendment to the U.S. Constitution and numerous federal statutes had failed to accomplish—it provided minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination.

The act contains two principal sections, Section 2 and Section 5. Section 2 was originally a restatement of the 15th Amendment and applies to all jurisdictions. It prohibits any state or political subdivision from imposing a “voting qualification or prerequisite to voting or standard, practice or procedure ... in a manner which results in the denial or abridgement of the right to vote on account of race or color.”²²²

²¹⁷ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

²¹⁸ *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

²¹⁹ “The right of citizens of the United States shall not be denied or abridged by the United States, or by any state on account of race, color or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

²²⁰ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

²²¹ Williamson, “The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions,” 62 *Wash. U.L.Q.* 1 (1984).

²²² 42 U.S.C. § 1973(a) (2006).

Section 5, on the other hand, applies only to certain jurisdictions covered under the act. A jurisdiction covered under Section 5 is required to preclear any changes in its electoral laws, practices or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.²²³

The two sections work independently of each other. A change that has been precleared under Section 5 still can be challenged under Section 2.

The act has been amended four times since 1965.

1. The 1970 amendments instituted a nationwide, five-year ban on the use of tests and devices as prerequisites to voting.²²⁴
2. In 1975, the ban on tests was made permanent and the coverage of the act was broadened to include members of language minority groups.²²⁵
3. In 1982, in response to judicial opinions discussed below, amendments made it clear that an intent to discriminate was not required for a claim under Section 2 of the act.²²⁶
4. In 2006, amendments again responded to judicial opinions, making it clear that broad intent to discriminate was grounds for denial of preclearance under Section 5, and that Section 5 was intended to preserve minority voters' ability to elect candidates of their choice, not merely to influence elections.²²⁷

In each of those four years, Section 5 was set to expire, but Congress extended it, most recently until 2032.²²⁸

²²³ 42 U.S.C. § 1973c (2006).

²²⁴ Act of June 22, 1970, Pub. L. No. 91-285, secs. 2-5, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1973b (2006))

²²⁵ Act of Aug. 6, 1975, Pub. L. No. 94-73, Title II, secs. 203, 206, 207, 89 Stat. 400, 401-02 (codified as amended at 42 U.S.C. §§ 1973(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;” 1973b(f)(2), “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group;” 1973d; 1973k; 1973l(c)(3), “The term ‘language minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage”).

²²⁶ Act of June 29, 1982, Pub. L. No. 97-205, sec. 3; 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a) (2006)).

²²⁷ Act of July 27, 2006, Pub. L. No. 109-246, sec. 5, 120 Stat. 577, 581 (to be codified as amended at 42 U.S.C. § 1973c).

²²⁸ Act of July 27, 2006, Pub. L. No. 109-246, sec. 4, 120 Stat. 581 (to be codified as amended at 42 U.S.C. § 1973b).

In the 1990s, the Department of Justice encouraged states subject to Section 5 preclearance to draw redistricting plans that created new districts where members of a racial or language minority group (primarily African Americans or Hispanics) were a majority of the population. These new “majority-minority” districts were intended to protect the states from liability under Section 2 for failing to draw districts that the minority group had a fair chance to win. As states drew the plans, they discovered that the Justice Department had little concern that majority-minority districts be compact. In some cases, the department refused to preclear a plan unless the state “maximized” the number of majority-minority districts by drawing them wherever pockets of minority population could be strung together. As the plans were redrawn to obtain preclearance, some of the districts took on bizarre shapes that caused them to be labeled “racial gerrymanders.”²²⁹

The racial gerrymanders were attacked in federal court for denying White voters their right to equal protection of the laws under the 14th Amendment.²³⁰ The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy in Georgia,²³¹ and held that a racial gerrymander must be subjected to “strict scrutiny” to determine whether it was “narrowly tailored” to achieve a “compelling state interest” in complying with Section 2.²³² Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed “traditional districting principles.”²³³

As the Supreme Court refined its rulings on racial gerrymandering, it made clear that a challenge to a district as a racial gerrymander will not succeed unless it shows that race was the predominant factor in its creation. A racial-gerrymander challenge will fail if race was a factor, but the predominant purpose was to advance the cause of a party, as in the creation of a safe Democratic district by including Black voters because they more reliably support Democratic candidates.²³⁴

This chapter provides an explanation of how the law of race and redistricting developed. It sets forth the legal standards that will govern plan drafters as they attempt to accommodate the conflicting demands of minority groups, the Justice Department, and the U.S. Supreme Court after the 2010 census.

²²⁹ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

²³⁰ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996); and *Lawyer v. Department of Justice*, 521 U.S. 567 (1997).

²³¹ *Miller v. Johnson*, 515 U.S. 900, 924-25 (1995).

²³² *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

²³³ *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996).

²³⁴ *Cromartie v. Hunt*, 34 F. Supp.2d 1029 (E.D.N.C. 1998), *rev'd sub nom. Hunt v. Cromartie*, 526 U.S. 541 (1999).

Section 2 of the Voting Rights Act—General Protection of Voters’ Rights

Applicability

Section 2 of the Voting Rights Act prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any U.S. citizen’s right to vote on account of race, color or status as a member of a language minority group.²³⁵ The 1982 amendments codified a “totality of circumstances” standard to be used for determining whether a challenged practice results in an abridgment of the right to vote. Currently, a violation of Section 2 is established if:

[B]ased 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 racial, color, or language minority class] ... 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 ... 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.²³⁶

Generally, Section 2 cases have involved claims that the political process was not equally open to certain minorities because of the use of multimember districts, packing minorities into a single district, or fracturing minorities into several districts.

Multimember districts. The voting strength of a minority group can be lessened by placing it in a larger multimember or at-large district where the majority can elect a number of its preferred candidates and the minority group cannot elect any of its preferred candidates. The validity of multimember districts has been challenged in numerous vote dilution cases, both before and after the 1982 amendments. Courts continue to hold that multimember districts are not *per se* unconstitutional.²³⁷ However, an at-large and multimember election system may violate Section 2 if it results in a denial of equal opportunity to participate in the electoral process.²³⁸ In examining the “totality of the circumstances,” courts may look to districting lines for independent indicators of discriminatory intent.²³⁹

Packing. “Packing” occurs when a minority group is concentrated into one or more districts so that the group constitutes an overwhelming majority in those districts, thus minimizing the number of districts in which the minority could elect candidates of its choice.²⁴⁰ Packing often is accomplished by drawing district lines to follow

²³⁵ 42 U.S.C. § 1973 (a) (2006).

²³⁶ 42 U.S.C. § 1973 (b) (2006).

²³⁷ See note 261, *infra*.

²³⁸ *United States v. Marengo County Comm’n*, 731 F.2d 1546, 1565 (11th Cir.1984).

²³⁹ *Id.* at 1574.

²⁴⁰ *Voinovich v. Quilter*, 507 U.S. 146, 153-54, (1993).

racially segregated housing patterns. In *Rybicki v. State Board of Elections (Rybicki II)*,²⁴¹ the court held that, over time, any rigid adherence to well-defined lines of racial division can result in packing and vote dilution. Although the court did not find that it was wrong *per se* to consider racial housing patterns when drawing district lines, the court encouraged districting that moved away from Black-White boundaries, finding that apparent tracing of racial divisions presented a suspect circumstance.²⁴²

Fracturing. “Fracturing” occurs when a group of minority voters is broken off from a concentration of minority voters and added to a large majority district. This submerges the minority voters in the majority district. In what became the seminal case, the district court in *Gingles v. Edmisten*²⁴³ considered a claim by Black citizens that a North Carolina redistricting plan fractured or submerged the strength of minority voters. Plaintiffs claimed that the North Carolina plan made use of multimember districts to submerge the Black vote in areas with substantial White voting majorities. The plan also used single-member districts to fracture concentrations of Black voters into separate voting minorities. The court held that, in light of the lingering effects of official discrimination and the substantial racial polarization in voting, the creation of multimember districts resulted in the submergence of Black voters. This submergence inhibited the ability of minority voters to participate in the political process.²⁴⁴ The court also held that the plan’s single-member districts unlawfully diluted Black voting strength by fracturing concentrations of Black voters.²⁴⁵

Judicial Interpretation of Section 2 of the Voting Rights Act and the 1982 Amendments

An overview. In the 1980 case of *City of Mobile v. Bolden*,²⁴⁶ the Supreme Court rejected earlier cases that measured the effects of particular voting practices and ruled that plaintiffs must prove an intent to discriminate in order to prove a vote dilution claim. This decision substantially increased the burden that plaintiffs had to meet. Congress disapproved of the *Bolden* decision and in 1982 amended Section 2 of the Voting Rights Act to codify the factors analyzed in the pre-*Bolden* court decisions. Thus, the focus shifted from discriminatory intent to the discriminatory effects or “results.”

The Supreme Court first considered the amended Voting Rights Act in *Thornburg v. Gingles*.²⁴⁷ In *Gingles*, the Court announced three preconditions that a plaintiff first must establish to prove a Section 2 claim—the size and geographic compactness of the minority population, its political cohesion, and whether the majority usually voted as a bloc to defeat the minority group’s preferred candidate. Then the courts would look at the “totality of the

²⁴¹ 574 F. Supp. 1147 (N.D. Ill. 1983).

²⁴² *Id.* at 1155.

²⁴³ 590 F. Supp. 345 (E.D.N.C. 1984), *aff’d in part, rev’d in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).

²⁴⁴ 590 F. Supp. at 374.

²⁴⁵ *Id.* at 374-375.

²⁴⁶ 446 U.S. 55 (1980).

²⁴⁷ 478 U.S. 30 (1986).

circumstances” to determine if the practice results in a dilution of electoral power. In numerous cases since 1986, the Supreme Court has attempted to clarify the *Gingles* factors.

***Bolden* and the 1982 amendments.** In *City of Mobile v. Bolden*,²⁴⁸ Black residents had charged that Mobile’s practice of electing commissioners at large diluted minority voting strength, thus violating the 14th and 15th amendments and Section 2 of the Voting Rights Act. The plurality opinion stated that “racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.”²⁴⁹ The Court concluded that the plaintiffs had failed to prove a violation of Section 2 of the Voting Rights Act in that Congress did not intend Section 2 to have any effect different from that of the 15th Amendment itself.²⁵⁰

Congressional response to *Bolden* was swift. The House Judiciary Committee originated the move to amend Section 2 of the Voting Rights Act. The House Judiciary Committee report found the intent standard inappropriate and indicated that the proper judicial focus should be on election outcomes, not on discriminatory intent.²⁵¹ The House Judiciary Committee set forth a results standard that would ban any voting procedure that would “result” in a denial or abridgment of the right to vote on account of race or color.²⁵² The House of Representatives stated that the results test was to parallel the “effects” test of the remedial Section 5.²⁵³ To avoid the establishment of a race-based entitlement to representation, the House added a disclaimer against proportionality.²⁵⁴ The Senate Judiciary Committee recommended a revised version of the bill, which eventually was adopted. It retained the results focus of the House proposal but codified the “totality of circumstances” language from *White v. Regester*,²⁵⁵ a 1973 case involving multimember state legislative districts in Texas, as the standard:

§ 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *City of Mobile v. Bolden*. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.²⁵⁶

²⁴⁸ 446 U.S. 55 (1980).

²⁴⁹ *Id.* at 62.

²⁵⁰ *Id.* at 60-61.

²⁵¹ H.R. Rep. No. 227, 97th Cong., 1st Sess. (1981) at 29-31.

²⁵² *Id.* at 48.

²⁵³ *Id.* at 29.

²⁵⁴ *Id.* at 48.

²⁵⁵ 412 U.S. 755 (1973).

²⁵⁶ S. Rep. No. 417, 97th Cong., 2nd Sess. 2 (1982).

In reporting its findings, the Senate Judiciary Committee found that the Court in *Bolden* had broken with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory intent. The committee concluded that “[t]his intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial injury [sic] from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.”²⁵⁷

The Senate Judiciary Committee added further guidance by including as a part of the Section 2 legislative history a nonexclusive list of factors for courts to consider. These factors, basically an enumeration of those articulated in the 1973 case of *Zimmer v. McKeithen*,²⁵⁸ include:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals; and
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.²⁵⁹

²⁵⁷ *Id.* at 16.

²⁵⁸ 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd per curiam sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

²⁵⁹ S. Rep. No. 417, 97th Cong. 2nd Sess. 29 (1982).

Thornburg v. Gingles. Between 1982 and 1986, numerous lower court decisions upheld the constitutionality of the amendments.²⁶⁰ Many cases dealt with the use of multimember districts where the courts held that multimember districts were not *per se* a violation of Section 2.²⁶¹

The Supreme Court first interpreted the 1982 amendments to Section 2 in *Thornburg v. Gingles*.²⁶² In that case, the plaintiffs challenged the 1982 North Carolina redistricting plans for one multimember state senate district, one single-member state senate district, and five multimember state house districts. Pursuant to Section 5 of the act, the plans had been precleared by the Department of Justice. The plaintiffs claimed that the plans impaired the ability of Blacks to elect representatives of their choice in violation of the 14th and 15th amendments as well as Section 2 of the Voting Rights Act.

Justice Brennan, writing for the majority in *Gingles*, gave an exhaustive analysis of the legislative history of Section 2. Brennan rejected, with no dissent, the earlier test of intent to discriminate and affirmed that a court, in deciding whether a violation of Section 2 has occurred, is to determine if “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”²⁶³

To answer this question, Justice Brennan indicated that a court “must assess the impact of the contested structure or practice on minority electoral opportunities ‘on the basis of objective factors.’”²⁶⁴ The factors to be considered in determining the “totality of circumstances” surrounding an alleged Section 2 violation were similar to those mentioned in *McKeithan* and in the 1982 Senate legislative history:

1. The extent of the history of official discrimination touching on the minority group participation in the democratic process;
2. Racially polarized voting;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, antisingle-shot provisions, or other voting practices that enhance the opportunity for discrimination;
4. Denial of access to the candidate slating process for members of the class;
5. The extent to which the members of the minority group bear the effects of discrimination in areas such as education, employment and health that hinder effective participation;

²⁶⁰ *United States v. Marengo County Comm’n*, 731 F.2d 1546 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); *Rybicki v. State Bd. of Elections (Rybicki I)*, 574 F. Supp. 1082 (N.D. Ill. 1982); 574 F. Supp. 1147 (N.D. Ill. 1983) (*Rybicki II*).

²⁶¹ *United States v. Marengo County Comm’n*, 731 F.2d 1546 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Ketchum v. Byrne*, 740 F.2d 1398(7th Cir. 1984).

²⁶² 478 U.S. 30 (1986).

²⁶³ *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986), quoting S. Rep. No. 417, 97th Cong. 2nd Sess. 28 (1982).

²⁶⁴ *Id.* at 44, quoting S. Rep. No. 417, 97th Cong. 2nd Sess. 27 (1982).

6. Whether political campaigns have been characterized by racial appeals;
7. The extent to which members of the protected class have been elected;
8. Whether there is a significant lack of responsiveness by elected officials to the particular needs of the group; and
9. Whether the policy underlying the use of the voting qualification, standard, practice or procedure is tenuous.²⁶⁵

In a footnote to the plurality opinion, Justice Brennan indicated that two of the objective factors used to evaluate vote dilution claims—racial polarization and the electoral success of Black candidates—are essential to minority vote dilution claims.²⁶⁶

In addition to a review of “objective” factors, the *Gingles* Court developed a new three-part test that a minority group must meet in order to establish a vote dilution claim under Section 2. The test requires that a minority group prove that:

1. It is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. It is politically cohesive; and
3. In the absence of special circumstances, bloc voting by the White majority usually defeats the minority’s preferred candidate.²⁶⁷

The *Gingles* Court held that all but one of the challenged 1982 multimember districts were characterized by racially polarized voting; a history of official discrimination in voting matters, education, housing, employment and health services; and campaign appeals to racial prejudice. Those factors, in concert with the use of multimember districts, impaired the ability of geographically insular and politically cohesive groups of Black voters to participate equally in the political process and to elect candidates of their choice.²⁶⁸

With respect to one of the multimember districts, a majority of the Supreme Court voted to reverse the lower court, holding that, as a matter of law, the lower court had ignored the continued success of Black voters in the district. This success resulted in proportional representation inconsistent with the allegation that the ability of Black voters in that district was unequal to that of White voters in electing representatives of their choice.²⁶⁹ Justice Stevens, speaking for justices Marshall and Blackmun, dissented from the majority in this matter and discounted the continued electoral success of minority-favored candidates in the district since 1972. Instead, he

²⁶⁵ 478 U.S. at 36-37.

²⁶⁶ *Id.* at 48, n. 15.

²⁶⁷ *Id.* at 50-51.

²⁶⁸ 478 U.S. at 80.

²⁶⁹ *Id.* at 77.

would have accepted other district court findings regarding this district and other state legislative districts for the years involved, deferring to the knowledge of the judges of the lower court who are “well-acquainted with the political realities of the State.”²⁷⁰

Post-*Gingles* judicial interpretations. Since the seminal case of *Thornburg v. Gingles* in 1986, the interpretation of Section 2 has evolved in later Supreme Court cases.

Application to Single-Member Districts. What is the Proper Population?—Grove v. Emison. In the 1990s, the U.S. Supreme Court expounded on the *Gingles* tests. In *Grove v. Emison*,²⁷¹ the Supreme Court specifically ruled that the *Gingles* preconditions for a vote dilution claim apply to single-member districts as well as to multimember or at-large districts.²⁷² The Court had previously held that multimember districts and at-large districts pose greater threats to minority-voter participation than single-member districts.²⁷³ The Court found that it would be peculiar to hold challenges to the more dangerous multimember districts to a higher threshold than challenges to single-member districts.²⁷⁴ The reasons for the *Gingles* preconditions also applied to single-member districts. “Unless these points are established, there neither has been a wrong nor can be a remedy.”²⁷⁵ The *Grove* Court found that there was no evidence of the second or third *Gingles* conditions, i.e., minority cohesion or majority bloc voting. Thus, having failed to meet the *Gingles* preconditions, the Supreme Court found that there was no need to create a majority-minority district.

A State’s Right to Draw Majority-Minority Districts Not Required by Section 2—Voinovich v. Quilter. In *Voinovich v. Quilter*,²⁷⁶ decided a week after *Grove*, the Supreme Court again found that a federal court had overstepped its boundary. Pursuant to the Ohio Constitution, a reapportionment board proposed a plan for the state. The plan included eight majority-minority districts. Suit was filed in federal court alleging that the plan illegally packed Black voters into a few districts where they constituted a super majority. Plaintiffs alleged that some Black voters should have been dispersed to create “influence” districts in which they would not constitute a majority, but could, with White crossover votes, elect candidates of their choice.

The district court rejected the plaintiffs’ claims that Section 2 of the Voting Rights Act requires that such “influence” districts be created whenever possible. However, the district court went on to find that Section 2 prohibits the “wholesale creation of majority-minority districts” unless necessary to remedy a violation of Section 2. The district court therefore ordered that the reapportionment board redraw the plan or demonstrate that it was remedying a Section 2 violation. The board revised the plan to create only five majority-minority districts and created a record that it believed justified their creation. The district court concluded that the board had not

²⁷⁰ *Id.* at 107.

²⁷¹ 507 U.S. 25 (1993).

²⁷² For the procedural history of *Grove*, see [chapter 7](#).

²⁷³ *Gingles*, 478 U.S. at 47.

²⁷⁴ 507 U.S. 25, 40.

²⁷⁵ *Id.*

²⁷⁶ 507 U.S. 146 (1993).

proven a violation of Section 2 and ordered that the primary elections be rescheduled. The U.S. Supreme Court stayed this order and heard the appeal.

The Supreme Court disagreed with the ruling of the district court that Section 2 prohibits the creation by the state of majority-minority districts absent a violation of Section 2. A state is free to draw districts however it wants, so long as it does not violate the U.S. Constitution or the Voting Rights Act. Although a federal court cannot order the creation of majority-minority districts absent a violation of federal law, a state is free to do so. Further, by requiring the state to prove a violation of Section 2 to justify its plan, the Supreme Court found that the district court had committed error by shifting the burden of proof for a Section 2 violation from the plaintiffs to the state.

In deciding the issue before the Court, the Supreme Court first noted that it had not ruled on whether influence dilution claims are viable under Section 2. The Court again found that it was not necessary to decide that issue in this case. The Court held that, assuming such claims are valid, they must meet the *Gingles* preconditions. Because the district court specifically found that Ohio does not suffer from racially polarized voting, the plaintiffs could not prove a violation of Section 2 of the Voting Rights Act.

Maximumization Not Required; Proportionality Not a Safe Harbor—Johnson v. DeGrandy. A year after the *Grove* and *Voinovich* decisions, the Supreme Court again struck down changes required by a district court. In *Johnson v. DeGrandy*,²⁷⁷ plaintiffs objected to the legislative redistricting plan in Florida because it was possible to draw additional districts in Dade County that would have Hispanic majorities. The state argued that, because the number of majority-minority districts was proportionate to the number of minorities in the population, there could be no vote dilution. The district court found that all three *Gingles* preconditions had been established and that a violation of Section 2 must be found because additional Hispanic majority-minority House districts could be drawn without diluting Black voters' strength. The Court ordered a remedial plan with two additional majority-minority districts.

The Supreme Court first declined to decide whether the plaintiffs had established the first prong of the *Gingles* test—whether Hispanics were sufficiently numerous and geographically compact to be a majority in additional single-member districts. The state argued that, because a large percentage of the Hispanic population in the region were not citizens, several districts in the plaintiffs' proposed plan would not have sufficient Hispanic citizens of voting age to elect candidates of their choice without crossover votes from other ethnic groups. Thus, although Hispanics may constitute a majority of the population—and even a majority of the voting age population—they may not constitute a majority of the voting age population eligible to vote.

Rather than deciding this issue, the Supreme Court focused on the “totality of the circumstances” as articulated in *Gingles*. The district court had seemed to hold that, if the three prongs of *Gingles* are proven, and the totality of the circumstances shows that there is a history of discrimination against members of a minority group, Section 2 requires that the maximum number of majority-minority districts be created. The Supreme Court disagreed. It specifically rejected a rule that would require a state to maximize majority-minority districts: “Failure to maximize cannot be the measure of Section 2.”²⁷⁸

²⁷⁷ 512 U.S. 997 (1994).

²⁷⁸ 512 U.S. at 1017.

The Supreme Court also rejected an absolute rule that would bar Section 2 claims if the number of majority-minority districts is proportionate to the minority group's share of the relevant voting age population. The Court found that offering states a "safe harbor" might lead to other misuses, such as creating a majority-minority district in an area in which racial bloc voting was not present so that one would not have to be drawn in an area that needed one. Rather, the Court considered the totality of the circumstances. Examining the totality of the circumstances, the Court found that, since Hispanics and Blacks could elect representatives of their choice in proportion to their share of the voting age population and since there was no other evidence of either minority group having less opportunity than other members of the electorate to participate in the political process, there was no violation of Section 2.

Minority-Group Compactness. Role of Section 2 in Influence Districts. LULAC v. Perry. In *League of United Latin American Citizens (LULAC) v. Perry*,²⁷⁹ the Supreme Court considered a mid-decade congressional redistricting in Texas. It ruled that for a state legislature to redraw in mid-decade a plan drawn by a federal court, even if the legislature's primary purpose was partisan advancement, did not violate the Equal Protection Clause as a partisan gerrymander. However, the Supreme Court held that it was a violation of Section 2 for the state legislature to dismantle an effective Hispanic district by reducing the district from one in which the Hispanic percentage was more than 50 percent of citizen voting age population (CVAP) to one that had more than 50 percent Hispanic voting age population but less than 50 percent VAP if only citizens were counted. The Supreme Court said the dismantling of the district was not justified by the creation of a majority CVAP Hispanic district elsewhere in Texas made up of two Hispanic communities widely separated by geography. The purpose of changing the district was to protect a Hispanic incumbent who was threatened by increasing opposition by Hispanic voters. The Supreme Court found that the substitute district failed the first *Gingles* precondition, that of a minority community large and geographically compact enough to form a majority in the district. The Supreme Court framed its compactness analysis this way: Although for a racial gerrymandering claim the focus should be on compactness in the district's shape, for the first *Gingles* prong in a Section 2 claim the focus should be on the compactness of the minority group. In a challenge to another district, the Supreme Court denied a Section 2 challenge to the dismantling of a 25.7 percent Black minority in an "influence district," because it said Section 2 protects the opportunity of minorities to elect representatives of their choice, not merely to influence elections.

In *Bartlett v. Strickland*,²⁸⁰ the Supreme Court finally delineated the meaning of "majority" in the first *Gingles* prong. The case was an appeal from a decision of the North Carolina Supreme Court, which had held that a pair of state House districts that divided a county were drawn in violation of the state constitution's prohibition on unnecessary splitting of counties in legislative district plans. The state defended by saying the legislature believed splitting the county was necessary to comply with Section 2 of the Voting Rights Act by drawing an effective minority district. The district in question was 42.37 percent Black in total population and 39.09 percent Black in voting age population. The State Supreme Court said that, to justify a departure from the state constitution's Whole County Provision²⁸¹ to comply with Section 2, the legislature would have to draw a district in which the minority group was a numerical majority—more than 50 percent—of the voting age citizen population. In the plurality opinion of the Court in the 5-4 decision, Justice Kennedy rejected the state's assertion that the first *Gingles* prong can be satisfied by what the state called an "effective minority district" in which the minority is less than 50 percent of voting age population. Reviewing the terminology of minority districts, the Court said the

²⁷⁹ No. 05-204, 548 U.S. 399 (2006).

²⁸⁰ No. 07-689 (U.S. Mar. 9, 2009).

²⁸¹ N.C. Const., art. II, §§ 3(3), 5(3).

spectrum runs from “majority-minority district,” in which the minority group has a numerical, working majority of voting age population, to “influence district,” in which the minority can influence the outcome of an election even if its preferred candidate cannot be elected. The *Strickland* court said Section 2 had been held in *Voinovich* to require majority-minority districts and held in *LULAC* not to require influence districts. In between those on the spectrum, the Court said, lay “crossover” districts, in which the minority group is not a numerical majority of the voting age population, but is potentially large enough to elect its preferred candidate by persuading enough majority voters to cross over to support the minority’s preferred candidate. The Court said a crossover district is sometimes misleadingly called a “coalitional” district, a term the Court said should be reserved for districts in which more than one minority group, working in coalition, can form a majority. The *Strickland* court cited the need for a bright-line rule for Section 2 to avoid the consequences of “extending racial considerations even further into the districting process.” It compared its limitation to that of the Court in *Johnson v. DeGrandy* in rejecting a requirement for maximization of minority districts. The *Strickland* court cautioned that its ruling concerned the *Gingles* precondition for considering an “effects” violation of Section 2, and insisted that its decision did not add a precondition to consideration of a discriminatory “purpose” violation. The dissents in *Strickland* were strongly worded, particularly the terse one from Justice Ginsburg, essentially inviting Congress to overrule the Court’s interpretation of Section 2. The *Strickland* court did not discuss the state Supreme Court’s inclusion of U.S. citizenship in the majority-minority formula.

Racial Gerrymandering—Shaw v. Reno and related cases. Although not brought as a Section 2 case, the decision in *Shaw v. Reno*²⁸² (*Shaw I*) affected later Section 2 cases. In *Shaw I*, the Supreme Court held that, under the 14th Amendment, “redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race” must meet the strict scrutiny standard of other legislation that makes distinctions based on race.²⁸³ The Supreme Court remanded to the district court a challenge to a North Carolina congressional district for a determination of whether it was narrowly tailored to further a compelling governmental interest. Later, in *Miller v. Johnson* (1995),²⁸⁴ the Supreme Court held that a Georgia congressional district need not have a bizarre shape to be considered a racial gerrymander. If race was the predominant, overriding factor, the district would be subject to strict scrutiny. In order to survive strict scrutiny, the district must be narrowly tailored to serve a compelling state interest.

Two decisions of the Supreme Court later in the 1990s assumed, without deciding, that complying with Section 2 is a compelling state interest. First, in *Shaw v. Hunt*,²⁸⁵ the Supreme Court again considered congressional districts in North Carolina. The state attempted to justify its redistricting plan in part by the need to avoid liability under Section 2. The district court upheld the plan under strict scrutiny, because it was narrowly tailored to serve the state’s interest in complying with Sections 2 and 5 of the Voting Rights Act. The Supreme Court reversed. It held that, in order to survive strict scrutiny, the state’s action must “remedy the anticipated violation or achieve compliance to be narrowly tailored.”²⁸⁶ A district that is not “reasonably compact” cannot remedy a perceived Section 2 violation because it fails to satisfy the first threshold requirement of the *Gingles* standard.

²⁸² 509 U.S. 630 (1993).

²⁸³ *Id.* at 644 (1993).

²⁸⁴ 515 U.S. 900 (1995).

²⁸⁵ 517 U.S. 899 (1996).

²⁸⁶ *Id.* at 915-16.

Thus, the bizarre shape of the district in North Carolina could not be justified by the need to avoid liability under Section 2.

Later, in *Bush v. Vera*,²⁸⁷ the Supreme Court upheld a decision by the district court in Texas that three congressional districts were not narrowly tailored to avoid Section 2 liability. The Court found that the bizarre shapes of the districts “defeat any claim that the districts were narrowly tailored to serve the state’s interest in avoiding liability under Section 2, because Section 2 does not require a state to create, on predominately racial grounds, a district that is not ‘reasonably compact.’”²⁸⁸ Thus, the courts struck down Texas’ attempt to create three new majority-minority districts.

Finally, in *Easley v. Cromartie*,²⁸⁹ the Supreme Court upheld a redrawn version of the minority district rejected in *Shaw v. Hunt*. It said a racial gerrymandering claim cannot succeed, even if race was a factor in drawing the district, if the predominant purpose was to advance the cause of a party, as in the creation of a safe Democratic district by including Black voters because they more reliably support Democratic candidates.

Shaw, *Miller*, *Vera* and *Cromartie* are discussed in more detail later in this chapter under “*Racial Gerrymandering*.”

The Use of Statistical Evidence to Prove Racial Polarization

Under *Gingles*’ three-part test, proof of legally significant racially polarized voting is an indispensable element of a Section 2 vote dilution claim. Racially polarized voting (also referred to as racial bloc voting) exists when the race of a candidate affects the way in which a voter votes.²⁹⁰ Since it is generally unknown how members of each race vote for particular candidates, parties to a Section 2 claim and the court are forced to rely on various statistical techniques to estimate how minority voters and majority voters voted in a challenged electoral district. Testimony by witnesses who are familiar with local politics and voting behavior generally is presented in conjunction with statistical evidence to corroborate or contradict statistical findings.²⁹¹

The most commonly employed statistical techniques for measuring racially polarized voting are homogeneous precinct (or extreme case) analysis and bivariate regression analysis.²⁹² These two statistical measurements were endorsed, but not mandated, by the Supreme Court in *Gingles*.²⁹³

²⁸⁷ 517 U.S. 952 (1996).

²⁸⁸ 517 U.S. at 979.

²⁸⁹ 532 U.S. 234 (2001).

²⁹⁰ 478 U.S. 30, 52 (1986).

²⁹¹ See, e.g., *Jackson v. Edgefield Co., South Carolina Sch. Dist.*, 650 F. Supp. 1176, 1198 (D. S.C. 1986).

²⁹² 478 U.S. at 52-53 n. 20; See also Engstrom and McDonald, “Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting,” 17 *Urban Lawyer* 369, 371 (1986).

²⁹³ 478 U.S. at 53 n. 20.

Homogeneous precinct analysis. A “homogeneous precinct” is defined as a precinct that has at least a 90 percent minority group population or at least a 90 percent majority population.²⁹⁴ Homogeneous precinct analysis isolates racially segregated precincts, determines how members of the predominant race in each of these precincts voted, and uses the results to estimate the voting behavior of other members of that race throughout the challenged electoral district. Although popular in vote dilution cases as an easily comprehensible statistical technique, homogeneous precinct analysis is rarely used alone to estimate racially polarized voting.²⁹⁵ Among the disadvantages cited for exclusive reliance on homogeneous precinct analysis are its dependence on small, potentially underrepresentative precinct samples and its assumption that majority and minority voters who live in racially mixed (i.e., nonhomogeneous) precincts will vote the same way as members of their race in the homogeneous precincts voted.²⁹⁶

Bivariate regression analysis. Bivariate regression analysis often is used to complement the results of a homogeneous precinct analysis.²⁹⁷ Bivariate regression analysis examines the relationship between the racial composition of a precinct and the percentage of votes a candidate receives from that precinct. The resulting correlation derived from the aggregated precinct data is used to estimate the voting behavior of individual voters throughout the challenged electoral district. Bivariate regression analysis relies on both homogeneous and racially mixed precincts for its data. Unlike homogeneous precinct analysis, bivariate regression analysis takes into account the potential of minority voters in racially mixed precincts to vote differently from minority voters in homogeneous precincts.²⁹⁸

The *Gingles* Court avoided establishing any mathematical formula for determining when racial polarization exists. According to the Court, the amount of White bloc voting necessary to defeat the minority bloc vote plus White crossover votes will vary from district to district, depending on factors such as the percentage of registered voters in the district who are minorities, the size of the district, the number of seats open and the candidates running in a multimember district, the presence of majority vote requirements, designated posts, and prohibitions against bullet voting.²⁹⁹

The Court made clear that each challenged district must be individually evaluated for racially polarized voting, and that it is improper to rely on aggregated statistical information from all challenged districts to show racial

²⁹⁴ See, e.g., *Romero v. City of Pomona*, 665 F. Supp. 853, 866 (C.D. Cal. 1987); cf., *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1028 (C.D. Ill. 1987) (65 percent Black precincts are homogeneous).

²⁹⁵ See, e.g., *Gingles*, 590 F. Supp. 345, 367-368 n. 29. See also Engstrom, *supra*, at 372.

²⁹⁶ Jacobs and O'Rourke, “Racial Polarization,” 3 *Journal of Law & Politics* 295, 323 (Fall 1986); Engstrom, *supra*, at 372.

²⁹⁷ Bivariate regression analysis also is referred to as ecological regression, linear regression, correlation and regression, and various other names.

²⁹⁸ Engstrom and McDonald, “Definitions, Measurements, and Statistics: Weeding Wildgen’s Thicket,” 20 *Urban Lawyer* 175, 184-185 (1988).

²⁹⁹ 478 U.S. at 56 n. 24 and accompanying text. Subsequent attempts in lower courts to mathematically quantify the existence of racially polarized voting also have been rejected. See, e.g., *McNeil v. Springfield*, 658 F. Supp. 1015, 1029 (C.D. Ill. 1987) (rejecting expert opinion that racial polarization exists only where 90 percent or more of a population votes consistently for candidates of a particular race).

polarization in any particular district.³⁰⁰ The Court also noted that showing a pattern of bloc voting over a period of time is more probative of legally significant racial polarization than are the results of a single election.³⁰¹ The number of elections that must be studied varies, depending primarily upon how many elections in the challenged district fielded minority candidates.³⁰² Studies of elections involving almost exclusively White candidates, even where those studies show that a majority of Blacks usually vote for winning candidates, have been rejected in favor of studies of elections involving head-to-head candidacies between minorities and Whites.³⁰³

Minority District Terminology

In determining whether voters can establish a violation of Section 2 of the Voting Rights Act or whether an electoral change or procedure is entitled to preclearance under Section 5 of the act, the courts have employed several different terms. Among the most-frequently used are “majority-minority districts,” “effective minority districts,” “crossover districts,” “coalitional districts,” and “influence districts.” The U.S. Supreme Court discussed the application of Section 2 to those districts in *Bartlett v. Strickland*,³⁰⁴ summarized on [page 62](#).

Majority-Minority Districts

A majority-minority district in the voting rights context is a district in which the majority of the population is either African American, Hispanic, Asian or Native American. In *Bartlett v. Strickland*, the U.S. Supreme Court said Section 2 does not require the drawing of a majority-minority district in which the minority group is less than 50 percent of the district’s voting age population.

³⁰⁰ *Id.* at 59 n. 28.

³⁰¹ *Id.* at 57.

³⁰² *Id.* 57 n. 25. The lower court in *Gingles* relied on statistical evidence from 53 primary and general elections covering the 1978, 1980 and 1982 elections, in which Black candidates ran for seats in the challenged House and Senate districts.

³⁰³ *McNeil*, 658 F. Supp. 1015, 1029; *Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987); *League of United Latin American Citizens (LULAC) v. Midland Indep. School Dist.*, 648 F. Supp. 596, 607 (W.D. Tex. 1986), *aff’d*, 829 F.2d 546 (5th Cir. 1987). *But see Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998).

³⁰⁴ [No. 07-689](#) (U.S. Mar. 9, 2009).

Table 5. Majority-Minority Districts in Each State
(Total Population)

State	State House				State Senate				Congressional			
	Black or African American		Hispanic		Black or African American		Hispanic		Black or African American		Hispanic	
	1990s	2000s	1990s	2000 s	1990s	2000s	1990s	2000s	1990s	2000s	1990s	2000s
Alabama	26	27			8	8				1		
Alaska												
Arizona			3	4			3	4				2
Arkansas	13	13				4						
California			10	17			4	8				10
Colorado				4				1				
Connecticut	8	4	4	3	1	1						
Delaware	2	3			1	1						
Florida	13	13	9	11	2	3	3	3	0	3		3
Georgia	41	41			12	13				2		
Hawaii												
Idaho												
Illinois	18	18	4	8	8	8	2	4		3		1
Indiana	7	5			3	3						
Iowa												
Kansas	4	3			1	1						
Kentucky	3	3			1	1						
Louisiana	25	27			9	10				1		
Maine												
Maryland	29	34			9	10			2	2		
Massachusetts	4	3		21								
Michigan	13	12			5	5				2		
Minnesota		1										
Mississippi	38	39			12	12			1	1		
Missouri	14	16			4	4						
Montana												
Nebraska					1	1						
Nevada	1			2	1		1					
New Hampshire												
New Jersey	3	1	1	1	3	1	1	1		1		
New Mexico			23	30			14	17				
New York	17	15	11	14	7	8	4	6		3		1
North Carolina	14	15			4	3				1		
North Dakota												
Ohio	8	5			1	2				1		
Oklahoma	3	3			2	2						
Oregon												
Pennsylvania	15	15	1	1	4	4				1		
Rhode Island				3								
South Carolina	26	31			10	11				1		
South Dakota												
Tennessee	11	13			3	3				1		

	State House				State Senate				Congressional			
	Black or African American		Hispanic		Black or African American		Hispanic		Black or African American		Hispanic	
State	1990s	2000s	1990s	2000s	1990s	2000s	1990s	2000s	1990s	2000s	1990s	2000s
Texas	10	7	29	35	1		7	7				7
Utah												
Vermont												
Virginia	12	12			5	5				1		
Washington												
West Virginia												
Wisconsin	5	5		1	2	2						
Wyoming												
Total	383	384	95	136	121	126	38	52	3	25	0	24

Notes:

1. Although courts use voting age population to identify a majority-minority district, NCSL was unable to locate voting age data for the 1990s districts. To keep the data comparable, this table shows total population for both decades.
2. District boundaries for the 2000s are those used in the 2006 election and provided by the states to the Census Bureau.
3. The Maryland House of Delegates in the 2000s has 13 legislative districts with a majority Black population. Ten districts elect three delegates each, one district elects two delegates, and two districts elect one delegate. This table lists the number of Maryland delegates elected from a majority-minority district, not the number of districts.

Sources: Totals for the 1990s are from *The Almanac of State Legislatures*, 1994; totals for the 2000s are from NCSL, 2009.

Effective Minority Districts

An effective minority district is one that contains sufficient population to provide the minority community with an opportunity to elect a candidate of its choice. In early voting rights litigation, a rule of thumb developed (in light of statistical analysis) that a district needed to contain a minority population of 65 percent in order to provide minority voters an opportunity to elect candidates of their choice.³⁰⁵ In more recent cases, courts generally have recognized that the minority percentage that is necessary to provide minorities an opportunity to elect their candidate of choice varies by jurisdiction and minority group.³⁰⁶

³⁰⁵ See *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Ketchum v. Byrne*, 740 F.2d 1398, 1416 (7th Cir. 1984).

³⁰⁶ See *Garza v. County of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss. 1984), aff'd sub nom. *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984); *Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D. Pa. Aug. 13, 1992).

A district in which minority voters have elected their preferred candidates is considered an effective minority district, even if the district contains less than a majority of the minority population. Jurisdictions are not required to create majority-minority districts in areas where minority voters have been successful in electing their preferred candidates. “Only if apportionment ... has the effect of denying a protected class the opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.”³⁰⁷ If minority voters were able to elect candidates of their choice from a district, minority plaintiffs would be unable to establish legally significant racial bloc voting that usually defeats the minority’s preferred candidate.³⁰⁸

On the other hand, a majority-minority district is not necessarily an effective minority district.³⁰⁹ In *Bartlett v. Strickland*,³¹⁰ the Supreme Court ruled that Section 2 can require the drawing of an effective minority district only if the minority group is more than 50 percent of the district’s voting age population.

Crossover Districts

The Court in *Bartlett v. Strickland* described a “crossover district” as a species of “effective minority district.” A crossover district is one in which the minority group is not a numerical majority of the voting age population, but is potentially large enough to elect its preferred candidate by persuading enough majority voters to cross over to support the minority’s preferred candidate. The Court said this should not be confused with another species of effective minority district, the “coalitional district.”

Coalitional Districts

The Court in *Bartlett v. Strickland* described a “coalitional district” as another species of “effective minority district.” A “coalitional district” is one in which more than one minority group, working in coalition, can form a majority to elect their preferred candidates.

Influence Districts

An influence district is a district in which the minority community, although not sufficiently large to elect a candidate of its choice, is able to influence the outcome of an election and elect a candidate who will be responsive to the interests and concerns of the minority community. Although, as noted below, several courts have discussed the value of influence districts, the U.S. Supreme Court in *League of United Latin American Citizens (LULAC) v. Perry*³¹¹ ruled that Section 2 did not protect an influence district in that case. The Court in *Bartlett v. Strickland*

³⁰⁷ *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993).

³⁰⁸ *Gingles*, 478 U.S. at 50-51.

³⁰⁹ *Jeffers v. Clinton*, No. 89-004, 1990 U.S. Dist. LEXIS 2507 (E.D. Ark. Feb. 9, 1990) (remedial districts containing majority African American population rejected in favor of districts proposed by plaintiffs containing slightly higher African American population).

³¹⁰ No. 07-689 (U.S. Mar. 9, 2009).

³¹¹ No. 05-204, 548 U.S. 399 (2006).

cited *LULAC* as authority that influence districts are not protected by Section 2. The Court in *Georgia v. Ashcroft*³¹² recognized influence districts as an acceptable way to satisfy the Section 5 retrogression standard, but in response, Congress amended Section 5 to state that the ability to elect candidates of their choice was what Section 5 was intended to protect.

In *Armour v. Ohio*,³¹³ the Court found that the minority community of Youngstown, Ohio, although too small to constitute a majority in a state House district, had been illegally fragmented. The Court ordered the creation of a district containing an African American population of approximately 35 percent. According to the Court:

Defendants go to great lengths to demonstrate that based upon racial voting patterns plaintiffs will not be able to elect a black candidate without a majority of black voters in the redrawn district. However, defendants misapprehend the requirements of the Voting Rights Act. The issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a candidate of their choice. We believe that they can. In a reconfigured district, plaintiffs will constitute nearly one-third of the voting age population and about half of the usual Democratic vote. Therefore, the Democratic Party and its candidates will be forced to be sensitive to the minority population by virtue of that population's size [W]e find that plaintiffs could elect a candidate of their choice, although not necessarily of their race, in a reconfigured district.³¹⁴

The courts that have recognized the validity of an influence claim have focused on whether the minority community has sufficient numbers to elect a candidate who will be responsive to their interests and concerns.

A Note on the Difficulty of Determining Minority Percentages of Different Populations

Measuring minority voting strength is complicated by the absence of reliable data on the race or ethnicity of voters and the diversity of state laws on voter registration and voting in primaries. The complexity is illustrated by the difference between two states that have been in the thick of recent redistricting litigation, North Carolina and Texas. In North Carolina, voters are asked when registering what is their party affiliation, their race, and their ethnicity (the two ethnic choices being Hispanic and Non-Hispanic). Voters in Texas are asked none of those questions, so none of that information is known about registered voters except by indirect means. Data is collected by Texas precinct of the number of registered voters who have recognized Hispanic surnames. In North Carolina registered Democrats may cast primary votes only in the Democratic primary, and Republicans only in the Republican primary. Voters who choose not to designate a party on their voter registration application may vote in the primary of any party that chooses to allow them in, and since 1996 both major parties have done so. So North Carolina has a semi-closed primary system. Texas, where voters do not register by party, perforce has an open primary system. Data on party identification in Texas is sometimes measured by the size of the vote in each party's primary.

In addition, consideration of the citizen voting age population is frustrated by the lack of any but sample data from the Census about U.S. citizenship. Citizenship is a question that has been asked only of Census respondents

³¹² 539 U.S. 461 (2003).

³¹³ 775 F. Supp. 1044 (N.D. Ohio 1991).

³¹⁴ *Id.* at 1060.

who received the long form in 2000 and those who will receive the American Community Survey in the 2010 cycle. The Census Bureau does not consider that data to be reliable below the tract level.

Racial Gerrymandering

Introduction

“[R]acial gerrymander—the deliberate and arbitrary distortion of district boundaries ... for [racial] purposes.”³¹⁵ Racial gerrymandering exists where race for its own sake and not other redistricting principles is the legislature’s dominant and controlling rationale in drawing its district lines and the legislature subordinates traditional race-neutral districting principles to racial considerations.

The racial gerrymander is not a new phenomenon. It was first used to circumvent application of the 15th Amendment and perpetuate racial discrimination in the South after the Civil War. As early as the 1870s, minorities in Mississippi were packed into a single district to limit their representation in Congress. In 1960, the boundary of the city of Tuskegee, Ala., was redefined “from a square to an uncouth twenty-eight-sided figure” to exclude only Blacks from the city.³¹⁶

During the redistricting rounds following the 1990 decennial census, racial gerrymandering made an about-face. It was used to increase minority representation, not limit it. Several states—including Georgia, Louisiana and North Carolina—believed they had an obligation to maximize the number of minority districts, especially after the Voting Rights Section of the Department of Justice refused to preclear initial plans from those states on the ground that alternative proposals had been presented that included additional minority districts. State legislators responded to these rejections by adopting new plans that created additional minority districts. The Justice Department precleared the new plans.

In several states, suits were filed in federal district court challenging the constitutionality of the new redistricting plans on the ground that they violated the Equal Protection Clause of the 14th Amendment. The first of the suits to reach the Supreme Court was *Shaw v. Reno*,³¹⁷ challenging the North Carolina congressional plan. Justice O’Connor, in the opening sentence of the Court opinion, wrote: “This case involves two of the most complex and sensitive issues this Court has faced in recent years: the meaning of the constitutional ‘right’ to vote and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups.”³¹⁸

The Supreme Court, painfully aware of the history of racial discrimination, had recognized in earlier cases the necessity of considering the effects of a redistricting scheme on a minority group in order to protect the members of the group from plans that would have a discriminatory purpose or have the effect of reducing minority voting strength—protections guaranteed by the 14th Amendment. In order to balance these competing constitutional guarantees, the Court had held that “the Fourteenth Amendment requires state legislation that expressly

³¹⁵ *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 640 (1993) (internal quotation marks omitted).

³¹⁶ *Shaw I*, 509 U.S. at 640 (internal quotation marks omitted).

³¹⁷ 509 U.S. 630 (1993).

³¹⁸ 509 U.S. at 633.

distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.”³¹⁹ This “race-based districting” demands close judicial scrutiny.

The Supreme Court rendered opinions in several cases involving racial gerrymandering challenges to state redistricting efforts in the wake of the 1990 census, including *Shaw v. Reno*,³²⁰ *United States v. Hays*,³²¹ *Miller v. Johnson*,³²² *Bush v. Vera*,³²³ *Shaw v. Hunt (Shaw II)*,³²⁴ *Lawyer v. Dept. of Justice*,³²⁵ *Hunt v. Cromartie*³²⁶ and *Easley v. Cromartie*.³²⁷ In its opinions in those cases, the court attempted to balance the competing constitutional guarantees that: 1) no state shall purposefully discriminate against any individual on the basis of race; and 2) members of a minority group shall be free from discrimination in the electoral process. In balancing the constitutional guarantees, the Court set forth procedures to follow in evaluating racial gerrymander challenges to redistricting plans.

A plaintiff challenging the constitutionality of a redistricting plan on racial grounds must have standing and must prove that the plan was racially gerrymandered. Once the plaintiff proves that a district was racially gerrymandered, the Court, applying strict scrutiny, must determine whether the state had a compelling governmental interest in creating the majority-minority district and whether the district was narrowly tailored to achieve that interest.

Standing

The Supreme Court has addressed the issue of “standing” (an individual’s right to bring an action in court) in racial gerrymandering cases. In *United States v. Hays*,³²⁸ the Supreme Court spelled out the elements necessary for standing.

It is by now well settled that “the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and

³¹⁹ *Id.* at 643.

³²⁰ *Id.* at 630.

³²¹ 515 U.S. 737 (1995).

³²² 515 U.S. 900 (1995).

³²³ 517 U.S. 952 (1996).

³²⁴ 517 U.S. 899 (1996).

³²⁵ 521 U.S. 567 (1997).

³²⁶ 526 U.S. 541 (1999).

³²⁷ 532 U.S. 234 (2001).

³²⁸ 515 U.S. 737 (1995).

the conduct complained of Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision” In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power

...

... Any citizen able to demonstrate that he or she, personally, has been injured by that kind of racial classification has standing to challenge the classification in federal court

... Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature’s reliance on racial criteria, and therefore has standing to challenge the legislature’s action On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms, and any inference that the plaintiff has personally been subjected to a racial classification would not be justified absent specific evidence tending to support that inference. Unless such evidence is present, that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve.³²⁹

An individual will have standing if the individual resides in a racially gerrymandered district or presents evidence that he or she, personally, has been injured by the racial classification.

Proof of Racial Gerrymander

Consideration of race. Although the Supreme Court has held several redistricting plans unconstitutional because of racial gerrymandering, the Court has made it clear that race-conscious redistricting is not always unconstitutional. “[T]his Court never has held that race-conscious state decision making is impermissible in all circumstances.”³³⁰

The Court has said that, if a minority district were created through a process that adhered to traditional districting principles such as compactness, contiguity, respect for political subdivisions, and maintaining communities of interest, or other race-neutral criteria such as incumbent protection, the plan would not be found to purposefully distinguish between voters on the basis of race and would not be held unconstitutional.³³¹

A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses. Moreover, redistricting differs from other kinds of state decision making in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible discrimination.³³²

³²⁹ *Id.* at 742-45 (footnotes, citation and internal quotation marks omitted).

³³⁰ *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

³³¹ *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

³³² 509 U.S. at 646.

As the Court said in *Miller v. Johnson*:

The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process '[D]iscriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects" The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a state can "defeat a claim that a district has been gerrymandered on racial lines."³³³

Race the dominant motive. In *Bush v. Vera*, the Court stated that, "[f]or strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race."³³⁴ "[R]ace must be 'the predominant factor motivating the legislature's [redistricting] decision."³³⁵

Three principal categories of evidence are used to determine whether legitimate districting principles were subordinated to race: 1) district shape and demographics, 2) testimony and correspondence directly stating the legislative motives for drawing the plan, and 3) the nature of the redistricting data used by the legislature.

Bizarre shape. The shapes of the minority districts have played an important part in the Supreme Court's decisions. "[R]eapportionment is one area in which appearances do matter."³³⁶ A significant part of the evidence the Court relied on to find racial gerrymandering in *Shaw II*, *Miller* and *Bush* was the irregular shape of the constructed districts, along with demographic data. The Court held that "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' ... demands the same close scrutiny that we give other state laws that classify citizens by race."³³⁷ "The plaintiff's burden is to show, either through circumstantial

³³³ *Miller v. Johnson*, 515 U.S. 900, 915-916 (1995) (internal quotation marks, footnotes and citation omitted).

³³⁴ 517 U.S. 952, 959 (1996).

³³⁵ *Id.*

³³⁶ *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

³³⁷ *Miller v. Johnson*, 515 U.S. 900, 905 (1995) (internal quotation marks and citation omitted).

evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."³³⁸

Testimony and correspondence. The second category of evidence the courts consider is direct evidence of the legislature's motive. Testimony of state officials, legislators and key staff involved in the drafting process played a significant role in the courts' findings in *Shaw II*, *Bush* and *Miller*. In addition, testimony received by the legislature in public hearings and alternative plans presented during the redistricting process will be evaluated to determine legislative motive. Last, the courts will consider the state's preclearance submission under Section 5 of the Voting Rights Act and other documents and testimony concerning the submission—including letters to and from the Department of Justice—to determine the state's motives behind the plan.

Use of racial data. The third category of evidence considered by the court is the type and detail of data used by the state. The court has recognized the power redistricters have "to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed."³³⁹ When racial data is available at the most detailed block level, and other data such as party registration, past voting statistics, and other socioeconomic data is only available at the much higher precinct ("Voting Tally District") or tract level, a red flag is raised.

The use of sophisticated technology and detailed information in the drawing of majority minority districts is no more objectionable than it is in the drawing of majority majority districts. But ... the direct evidence of racial considerations, coupled with the fact that the computer program used was significantly more sophisticated with respect to race than with respect to other demographic data, provides substantial evidence that it was race that led to the neglect of traditional districting criteria ...³⁴⁰

Consideration of race in order to achieve a partisan objective. In *Easeley v. Cromartie*,³⁴¹ its final decision concerning the 1990s round of congressional redistricting for North Carolina, the Supreme Court expanded on its rule that, where racial and partisan motives intertwine, race must not predominate. The Court said the lower court ruled erroneously that race predominated where the legislature put Black voters into a district to make it more Democratic. Voter registration data by party was available, as was voter registration by race. The Supreme Court said the lower court should have taken into account evidence that Black Democrats were more reliable in voting for Democratic candidates than White Democrats. It could be concluded that the predominant motivation for drawing the district was to make a more reliable Democratic district by increasing its percentage of the more reliable Democratic voters, i.e., the Black ones.³⁴²

In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party

³³⁸ 515 U.S. at 916.

³³⁹ *Bush v. Vera*, 517 U.S. 952, 961 (1996).

³⁴⁰ 517 U.S. at 962-63.

³⁴¹ 532 U.S. 234 (2001).

³⁴² *Id.*

attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.³⁴³

Strict Scrutiny

Compelling state interest. Once the court determines that traditional redistricting principles were subordinated to race and that race was the predominant factor used in redistricting, the court, applying strict scrutiny, must determine whether the state has a compelling interest in creating a majority-minority district using race as a predominant factor.

Just what is a compelling state interest that justifies classifying citizens on the basis of race in redistricting legislation? A common thread that runs through the racial gerrymandering cases is the assertion that a state has a compelling governmental interest in eradicating the effects of past discrimination and in complying with the requirements of sections 2 and 5 of the Voting Rights Act.

Remedying past discrimination. In order for its interest in remedying past or present discrimination to be a compelling state interest, a state must satisfy two conditions: First, the state “must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.”³⁴⁴ “Second, the institution that makes the racial distinction must have had a ‘strong basis in evidence’ to conclude that remedial action was necessary, ‘before it embarks on an affirmative-action program.’”³⁴⁵

Complying with Section 2 of the Voting Rights Act. A claimed violation of Section 2 of the Voting Rights Act could provide the compelling governmental interest the state needs to create a race-based district. “To prevail on such a claim, a plaintiff must prove that the minority group is ‘sufficiently large and geographically compact to constitute a majority in a single-member district;’ that the minority group ‘is politically cohesive;’ and that ‘the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority’s preferred candidate.’”³⁴⁶

A majority-minority district created to comply with Section 2 of the Voting Rights Act would not necessarily be a racially gerrymandered district. The minority group must be geographically compact in order for Section 2 requirements to apply. If a compact district were drawn with the minority group a majority of the voting age population in the district, the district would not be a racial gerrymander.

Complying with Section 5 of the Voting Rights Act. The third assertion of a compelling state interest is compliance with Section 5 of the Voting Rights Act. The Supreme Court, after lengthy consideration of the role the Department of Justice played in these cases, made it clear that the test for Section 5, as decided in *Beer v. United*

³⁴³ *Id.* at 258.

³⁴⁴ *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) (internal quotation marks and citation omitted).

³⁴⁵ *Id.* at 910.

³⁴⁶ *Id.* at 914, citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

States,³⁴⁷ was nonretrogression, not maximization of minority districts as urged by the Department of Justice. “We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.”³⁴⁸ “There is no indication Congress intended such a far-reaching application of Section 5, so we reject the Justice Department’s interpretation of the statute and avoid the constitutional problems that interpretation raises.”³⁴⁹

Narrowly tailored. When a state asserts it has a compelling governmental interest in creating a race-based district, the court will apply “strict scrutiny” to determine whether the plan is narrowly tailored to achieve the compelling governmental interest. A state “must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve [that] compelling interest.”³⁵⁰

When a compelling state interest exists, “the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored.” On the other hand, any state action based on race must not go too far. As the Court said in *Shaw I*, “A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.”³⁵¹

Traditional Districting Principles

As the preceding discussion shows, race cannot be the primary consideration in forming districts “without regard for traditional districting principles.”³⁵² “[R]ace for its own sake and not other districting principles [cannot be] the legislature’s dominant and controlling rationale in drawing its district lines.”³⁵³ The state cannot rely on race “in substantial disregard of customary and traditional districting principles. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind.”³⁵⁴ “[W]e begin with general findings and evidence regarding the redistricting plan’s respect for traditional districting principles ...”³⁵⁵ What “traditional districting principles” are and why they are important are explained in [chapter 5](#).

³⁴⁷ 425 U.S. 130 (1976).

³⁴⁸ *Miller v. Johnson*, 515 U.S. 900, 922 (1995).

³⁴⁹ *Id.* at 927.

³⁵⁰ *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal quotation marks and citation omitted).

³⁵¹ *Shaw v. Reno*, 509 U.S. 630, 655(1993).

³⁵² *Id.* at 642 (1993).

³⁵³ *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

³⁵⁴ *Id.* at 928 (O’Connor, J., concurring).

³⁵⁵ *Bush v. Vera*, 517 U.S. 952, 959 (1996).

Section 5 of The Voting Rights Act: Preclearance Requirements

Historical Background

When the Voting Rights Act was adopted in 1965, Section 5³⁵⁶ was considered one of the primary enforcement mechanisms to ensure that minority voters would have an opportunity to register to vote and fully participate in the electoral process free of discrimination. The intent of Section 5 was to prevent states that had a history of racially discriminatory electoral practices from developing new and innovative means to continue to effectively disenfranchise Black voters.

Despite numerous laws passed by Congress between 1957 and 1964 and “despite the earnest efforts of the Department of Justice and of many federal judges, these ... laws [did] little to cure the problem of voting discrimination.”³⁵⁷ As noted by the Court in *South Carolina v. Katzenbach*, election officials and states either defied or evaded court orders, “switched to discriminatory devices not covered by the federal decrees or ... enacted difficult new tests designed to prolong the existing disparity between White and Negro registration.”³⁵⁸

Before passage of Section 5, the federal government, through the Civil Rights Division of the Department of Justice, undertook the arduous and time-consuming task of filing individual suits against each discriminatory voting law. This approach proved unsuccessful in increasing Black voter registration.³⁵⁹ Section 5, which gives extraordinary power to the federal government, was the means “designed by Congress to banish the blight of racial discrimination in voting, which had infected the electoral process in parts of our country for nearly a century.”³⁶⁰

Although Section 5 is a temporary provision of the Voting Rights Act, Congress has extended its coverage each time expiration has been imminent.³⁶¹ Most recently, in 2006 Congress extended Section 5 so that it would cover all redistricting cycles through 2031.³⁶² At that time, Section 5 will automatically expire unless Congress again extends its coverage.³⁶³

³⁵⁶ Pub. L. No. 89-110, sec. 5, 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973c (2006)).

³⁵⁷ *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

³⁵⁸ *Id.* at 314.

³⁵⁹ Before passage of Section 5, only 29 percent of Blacks were registered to vote in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia, compared to 73.4 percent of Whites. In Mississippi, only 6.7 percent of Blacks were registered. By 1967, two years after passage of the Voting Rights Act, more than 52 percent of Blacks were registered to vote in these states. Bernard Grofman, Lisa Handley and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York: Cambridge University Press, 1992) 23.

³⁶⁰ *Katzenbach*, 383 U.S. at 308.

³⁶¹ See Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982); Pub. L. No. 109-246, 120 Stat. 577 (2006).

³⁶² See Pub. L. No. 109-246, sec. 4, 120 Stat. 577, 580 (2006) (to be codified as amended at 42 U.S.C. § 1973b(a)(8)).

³⁶³ *Id.*

Statutory Preclearance Requirements

Section 5 of the Voting Rights Act requires covered jurisdictions to submit changes in “any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting” to either the U.S. Department of Justice or the U.S. District Court for the District of Columbia for preclearance before the change can be implemented.³⁶⁴ Section 4(b) of the original act created the first criteria for determining whether a jurisdiction was subject to Section 5. According to that provision, a jurisdiction was “covered,” and therefore subject to the preclearance requirements, if:

1. The jurisdiction maintained on Nov. 1, 1964, a test or device as a precondition for registering or voting; and
2. Either (a) less than 50 percent of the voting age population was registered to vote on Nov. 1, 1964, or (b) less than 50 percent of the voting age population voted in the November 1964 presidential election.³⁶⁵

Some states were covered in their entirety. In other states only certain counties were covered.³⁶⁶

In 1970, Congress extended the preclearance requirements for an additional five years.³⁶⁷ The 1970 amendments also expanded the coverage test. The new test covered jurisdictions that were covered under the old test plus jurisdictions that:

1. Maintained on Nov. 1, 1968, any test or device, and
2. In which (a) less than 50 percent of the voting age population was registered to vote on Nov. 1, 1968, or (b) less than 50 percent of the voting age population had voted in the November 1968 presidential election.³⁶⁸

In 1975, Congress extended the preclearance requirements for an additional seven years (through the 1980 redistricting cycle).³⁶⁹ The 1975 amendments added to the list of prohibited tests and devices the conduct of registration and elections in only the English language if more than 5 percent of the voting age population in the

³⁶⁴ 42 U.S.C. § 1973c (2006).

³⁶⁵ Pub. L. No. 89-110, sec. 4(b), 79 Stat. 437, 438 (1965) (codified as amended at 42 U.S.C. § 1973b(b) (2006)). The original jurisdictions subject to preclearance were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and parts of North Carolina. See *infra* Table 6.

³⁶⁶ Pub. L. No. 89-110, sec. 5, 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973c (2006)) (providing that Section 5 applies to “a State or political subdivision”). This coverage formula was devised by Congress to target southern states that had a history of racial discrimination in the election process. See Grofman, et al., *supra*, 16-17.

³⁶⁷ Pub. L. No. 91-285, sec. 3, 84 Stat. 314, 315 (1970) (codified as amended at 42 U.S.C. § 1973b(a)(1) (2006)).

³⁶⁸ *Id.* at sec. 4 (42 U.S.C. § 1973b(b)). As a result of the 1970 amendments, three counties in New York City—New York, Kings and the Bronx—and parts of New Hampshire became subject to Section 5. See *infra* Table 6.

³⁶⁹ Pub. L. No. 94-73, sec. 101, 89 Stat. 400 (1975).

jurisdiction belonged to a single language minority group (including Alaskan natives, Native Americans, Asian Americans and people of Spanish heritage).³⁷⁰ The 1975 amendments also required the use of bilingual election materials and assistance if 5 percent of the jurisdiction's voting age citizens were of a single language minority and the illiteracy rate of that language minority group was greater than the national average.³⁷¹ Finally, the coverage test was extended to include jurisdictions that:

1. Maintained on Nov. 1, 1972, any test or device, and
2. In which (a) less than 50 percent of the citizens of voting age were registered to vote on Nov. 1, 1972, or (b) less than 50 percent of the citizens of voting age had voted in the November 1972 presidential election.³⁷²

The 1982³⁷³ and 2006³⁷⁴ amendments each extended the preclearance requirement for an additional 25 years, but otherwise did not make any substantive changes to the coverage test of Section 5.

In all, 16 states or parts of states now are covered by Section 5 preclearance requirements, as shown in [Table 6](#).

Table 6. Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended

The [Appendix to 28 C.F.R. Part 51](#) lists the jurisdictions subject to Section 5 preclearance. It provides:

The preclearance requirement of Section 5 of the Voting Rights Act, as amended, applies in the following jurisdictions. The applicable date is the date that was used to determine coverage and the date after which changes affecting voting are subject to the preclearance requirement. Some jurisdictions, for example, Yuba County, California, are included more than once because they have been determined on more than one occasion to be covered under Section 4(b).

Jurisdiction	Applicable Date	Federal Register	Date
Alabama	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Alaska	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Arizona	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
California:			

³⁷⁰ *Id.* at sec. 203, 89 Stat. 401-02 (codified as amended at 42 U.S.C. § 1973b(f)(3) (2006)).

³⁷¹ *Id.* at 89 Stat. 402 (42 U.S.C. § 1973b (f)(4) (2006)).

³⁷² *Id.* at sec. 202, 89 Stat. 401 (42 U.S.C. § 1973b(b)). As a result of the 1975 amendments, Alaska, Arizona, New Mexico, Texas and parts of California, Florida, Michigan and South Dakota were covered under the act. *See infra* [Table 6](#).

³⁷³ Pub. L. No. 97-205, sec. 2(b), 96 Stat. 131, 133 (1982) (codified as amended at 42 U.S.C. § 1973(a)(8) (2006)).

³⁷⁴ Pub. L. No. 109-246, sec. 4, 120 Stat. 577, 580 (2006) (to be codified as amended at 42 U.S.C. § 1973b(a)(8)).

Jurisdiction	Applicable Date	Federal Register	Date
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Merced County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Monterey County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Yuba County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Yuba County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976
Florida:			
Collier County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976
Hardee County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Hendry County	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976
Hillsborough County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Monroe County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Georgia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Louisiana	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Michigan:			
Allegan County:			
Clyde Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976
Saginaw County:			
Buena Vista Township	Nov. 1, 1972	41 FR 34329	Aug. 13, 1976
Mississippi	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
New Hampshire:			
Cheshire County:			
Rindge Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Coos County:			
Millsfield Township	Nov. 1, 1968	39 FR 16912	May 10, 1974
Pinkhams Grant	Nov. 1, 1968	39 FR 16912	May 10, 1974
Stewartstown Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Stratford Town	Nov. 1, 1968	39 FR 16912	May 10, 1974

Jurisdiction	Applicable Date	Federal Register	Date
Grafton County:			
Benton Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Hillsborough County:			
Antrim Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Merrimack County:			
Boscawen Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Rockingham County:			
Newington Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
Sullivan County:			
Unity Town	Nov. 1, 1968	39 FR 16912	May 10, 1974
New York:			
Bronx County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Bronx County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Kings County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Kings County	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
New York County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
North Carolina:			
Anson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Beaufort County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Bertie County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Bladen County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Camden County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966
Caswell County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Chowan County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Cleveland County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Craven County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Cumberland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965

Jurisdiction	Applicable Date	Federal Register	Date
Edgecombe County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Franklin County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Gaston County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Gates County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Granville County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Greene County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Guilford County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Halifax County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Harnett County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Hertford County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Hoke County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Jackson County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Lee County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Lenoir County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Martin County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966
Nash County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Northampton County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Onslow County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Pasquotank County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Perquimans County	Nov. 1, 1964	31 FR 3317	Mar. 2, 1966
Person County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Pitt County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Robeson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Rockingham County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Scotland County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Union County	Nov. 1, 1964	31 FR 5081	Mar. 29, 1966
Vance County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965

Jurisdiction	Applicable Date	Federal Register	Date
Washington County	Nov. 1, 1964	31 FR 19	Jan. 4, 1966
Wayne County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
Wilson County	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
South Carolina	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
South Dakota:			
Shannon County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976
Todd County	Nov. 1, 1972	41 FR 784	Jan. 5, 1976
Texas	Nov. 1, 1972	40 FR 43746	Sept. 23, 1975
Virginia	Nov. 1, 1964	30 FR 9897	Aug. 7, 1965
The following political subdivisions in States subject to statewide coverage are also covered individually:			
Arizona:			
Apache County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Apache County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Cochise County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Coconino County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Coconino County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Mohave County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Navajo County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Navajo County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Pima County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Pinal County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Pinal County	Nov. 1, 1972	40 FR 49422	Oct. 22, 1975
Santa Cruz County	Nov. 1, 1968	36 FR 5809	Mar. 27, 1971
Yuma County	Nov. 1, 1964	31 FR 982	Jan. 25, 1966

Note:

Three political subdivisions in Virginia (Fairfax City, Frederick County and Shenandoah County) have “bailed out” from coverage pursuant to Section 4 of the Voting Rights Act. The United States consented to the declaratory judgment in each of those cases. Some jurisdictions, for example, Yuba County, California, are

included more than once because they have been determined on more than one occasion to be covered under section 4(b).

Source: 28 C.F.R. Part 51, app. (2007).

Scope of Coverage

Judicial Decisions. In *Allen v. State Board of Elections*, the U.S. Supreme Court broadly interpreted Section 5 to cover all actions necessary to make a vote effective.³⁷⁵ The Court said:

We must reject a narrow construction that appellees would give to § 5. The Voting Rights 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

The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.³⁷⁶

The Court reasoned that unless Section 5 were afforded a broad interpretation, elected officials would likely develop new ways to avoid the effect of the legislation.³⁷⁷ Thus, the Court rejected the argument that Section 5 covers only state enactments that prescribe who can register to vote without covering state rules relating to other aspects of the electoral process, such as the qualification of candidates or state decisions on which offices must be elective.³⁷⁸

Until 1992, federal courts interpreted *Allen* to mean that Section 5 covered all “transfers of decisionmaking power that had a potential for discrimination against minority voters.”³⁷⁹ However, in *Presley v. Etowah County Comm’n*, the Supreme Court narrowed the scope of Section 5 by ruling that Section 5 does not cover transfers of decision making power involving elected officials.³⁸⁰

Presley involved two consolidated cases from Etowah and Russell counties in Alabama. In both counties the responsibilities of elected officials had changed. Etowah County, under a 1986 consent decree following the filing of a Section 2 suit, agreed to expand the size of its county commission from four to six and eliminate the at-large electoral system in favor of six single-member districts.³⁸¹ As a result of the consent decree, the county elected

³⁷⁵ 393 U.S. 544, 565-66 (1969).

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 565-68.

³⁷⁸ *Id.* at 563-71.

³⁷⁹ 502 U.S. 491, 511 (1992) (Stevens, J., dissenting).

³⁸⁰ *Id.* at 510.

³⁸¹ *Id.* at 495-96.

its first African American to the county commission.³⁸² In 1987, the four holdover commission members, over the opposition of the two newly elected commissioners, adopted a common fund resolution.³⁸³ The common fund resolution provided that individual commissioners would no longer individually control the allocation of funds in their district.³⁸⁴ Instead, the funds were placed in a common fund and the commission as a whole would determine how to allocate the funds.³⁸⁵ The commission failed to submit the common fund resolution for preclearance.³⁸⁶

In Russell County, a county commissioner was indicted in 1979 on charges of corruption in county road operations.³⁸⁷ Following the indictment, the Russell County Commission passed a resolution—the “unit system”—delegating control over road maintenance to the county engineer, an official appointed by the entire board.³⁸⁸ In 1985, Russell County increased the size of its county commission and replaced the at-large election system with elections on a district-by-district basis, resulting in the county’s first two African American commissioners.³⁸⁹ Although the change in the commission’s size and method of election were submitted for preclearance, the unit system was not.³⁹⁰

In *Presley*, the plaintiffs alleged that the common fund resolution and unit system should have been submitted for preclearance and asked the Court to enjoin the resolutions until they received preclearance.³⁹¹

The Court, in an opinion by Justice Kennedy, rejected the plaintiffs’ argument that the common fund resolution and unit system were subject to preclearance.³⁹² Without overruling *Allen*, the Court held that only changes with a direct relation to voting and the election process are subject to preclearance. According to the Court:

Covered changes must bear a direct relation to voting itself The changes in Etowah and Russell Counties affected only the allocation of power among governmental officials. They had no impact on the substantive question whether a particular office would be elective or the procedural question how an election would be conducted. Neither change involves a new

³⁸² *Id.* at 496.

³⁸³ *Id.* at 497.

³⁸⁴ 502 U.S. at 497.

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 497-98.

³⁸⁷ *Id.* at 498.

³⁸⁸ *Id.*

³⁸⁹ 502 U.S. at 499.

³⁹⁰ *Id.*

³⁹¹ *Id.* at 500.

³⁹² *Id.* at 510.

“voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting.”³⁹³

In *Riley v. Kennedy*,³⁹⁴ the Supreme Court further clarified the scope of Section 5 by specifying what constitutes a change “with respect to voting.”³⁹⁵ Before 1985, the governor of Alabama filled mid-term vacancies for county commissions by appointment.³⁹⁶ In 1985, however, the state Legislature passed a “local law” providing for special elections for mid-term vacancies in Mobile County.³⁹⁷ The new election procedure received Section 5 clearance.³⁹⁸ After the first special election occurred, the Alabama Supreme Court invalidated the 1985 local law as contrary to the Alabama Constitution.³⁹⁹ In 2005, the next time a mid-term vacancy occurred, the governor attempted to fill the seat by appointment.⁴⁰⁰ The plaintiffs challenged the appointment, arguing that the state was again required to gain Section 5 preclearance to return to the practice of gubernatorial appointment of vacant county commission seats.⁴⁰¹

The U.S. Supreme Court rejected the plaintiffs’ argument. The Court noted that a law which is “a ‘temporary misapplication of state law’ ... is not in ‘force or effect,’ even if actually implemented by state election officials.”⁴⁰² Because the Alabama Supreme Court invalidated the special-election procedure after the first special election, the 1985 local law was never in force or effect, and the return to gubernatorial appointments therefore did not constitute a change in election procedures.⁴⁰³ Because covered states only need submit changes to election procedures for Section 5 preclearance, Alabama was not required to again seek preclearance.⁴⁰⁴

Administrative Guidance. The Supreme Court decisions regarding the scope of Section 5 are binding in all judicial and administrative preclearance proceedings. In addition to those judicial decisions, the administrative regulations promulgated by the Department of Justice will likely be followed in administrative preclearance proceedings and are afforded strong persuasive effect in judicial preclearance proceedings. In *Reno v. Bossier Parish*

³⁹³ *Id.* (quoting 42 U.S.C. § 1973c (2006)).

³⁹⁴ No. 07-77, 128 S.Ct. 1970 (2008).

³⁹⁵ *Id.*, slip op. at 11, 128 S.Ct. at 1982.

³⁹⁶ *Id.*, slip op. at 4, 128 S.Ct. at 1978.

³⁹⁷ *Id.*

³⁹⁸ *Id.*, slip op. at 5, 128 S.Ct. at 1978.

³⁹⁹ No. 07-77, slip op. at 5, 128 S.Ct. at 1978–79.

⁴⁰⁰ *Id.*, slip op. at 6-7, 128 S.Ct. at 1979.

⁴⁰¹ *Id.*, slip op. at 7.

⁴⁰² *Id.*, slip op. at 15, 128 S.Ct. at 1984 (quoting *Young v. Fordice*, 520 U.S. 273, 282 (1997)).

⁴⁰³ *Id.*, slip op. at 15-16, 128 S.Ct. at 1982.

⁴⁰⁴ *Id.*, slip op. at 15-19.

Sch. Bd. (Bossier Parish I),⁴⁰⁵ the Supreme Court said that it would “normally accord the [regulations] great deference.”⁴⁰⁶

The Department of Justice regulations are helpful because they provide specific examples of voting changes that would be subject to the Section 5 preclearance requirements. According to the regulations, changes requiring preclearance include, but are not limited to:

1. Any change in qualifications or eligibility for voting;
2. Any change concerning registration, balloting and the counting of votes, and any change concerning publicity for or assistance in registration or voting;
3. Any change with respect to the use of a language other than English in any aspect of the electoral process;
4. Any change in the boundaries of voting precincts or in the location of polling places;
5. Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections);
6. Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system);
7. Any change affecting the eligibility of people to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or to remain holders of elective offices;
8. Any change in the eligibility and qualification procedures for independent candidates.
9. Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices);
10. Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum; and
11. Any change affecting the right or ability of people to participate in political campaigns that is effected by a jurisdiction subject to the requirement of Section 5.⁴⁰⁷

⁴⁰⁵ 520 U.S. 471, 483 (1997).

⁴⁰⁶ *Id.* In *Bossier Parish I*, the Supreme Court actually disregarded an administrative regulation, but only because the regulation was an unreasonable interpretation of the statute. *Id.* at 483–85.

⁴⁰⁷ 28 C.F.R. § 51.13 (2008).

Substantive Standards for Preclearance

To obtain preclearance, a jurisdiction has the burden of establishing that any voting change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color” or membership in a language minority group.⁴⁰⁸ Thus, the jurisdiction must satisfy two prongs to achieve preclearance: 1) the purpose prong, and 2) the effect prong. When reviewing an administrative request for preclearance, the Department of Justice uses the same standard that would be used by a court in a declaratory judgment action for judicial preclearance.⁴⁰⁹

Judicial Decisions

Effect Prong. In *Beer v. United States*,⁴¹⁰ the U.S. Supreme Court held that a redistricting plan satisfies the effect prong if the electoral change does not lead to retrogression in minority voting strength.⁴¹¹ The Court reasoned that “the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”⁴¹² *Retrogression* means “a decrease ... in the absolute number of representatives which a minority group has a fair chance to elect.”⁴¹³ Retrogression is measured by comparing minority voting strength under the new plan with minority voting strength under the immediately preceding plan.⁴¹⁴

Beer concerned the apportionment of city council districts in New Orleans.⁴¹⁵ When the case was decided, African Americans comprised 45 percent of the population of New Orleans.⁴¹⁶ Two of the council members were elected at large; the five remaining members were elected from single-member districts that had last been redrawn in 1961.⁴¹⁷ After the 1961 redistricting, in one district African Americans were a majority of the population but only about half of the registered voters.⁴¹⁸ In the other four districts, Whites were both a majority of the

⁴⁰⁸ 42 U.S.C. § 1973c (2006), as amended by Pub. L. No. 109-246, sec. 5, 120 Stat. 577, 580 (2006).

⁴⁰⁹ 28 C.F.R. § 51.52 (2008).

⁴¹⁰ 425 U.S. 130 (1976).

⁴¹¹ *Id.* at 141.

⁴¹² *Id.*

⁴¹³ *Ketchum v. Byrne*, 740 F.2d 1398,1402 n.2 (7th Cir. 1984).

⁴¹⁴ *Id.* at 1417.

⁴¹⁵ 425 U.S. at 133.

⁴¹⁶ *Id.* at 134.

⁴¹⁷ *Id.* at 134-35.

⁴¹⁸ *Id.* at 135.

population and a majority of registered voters.⁴¹⁹ No district had ever elected an African American.⁴²⁰ After the 1971 redistricting, African Americans were a majority of the population and majority of the registered voters in one district.⁴²¹ In a second district, African Americans were a majority of the population but not a majority of registered voters.⁴²² In the other three districts, Whites were both a majority of the population and a majority of registered voters.⁴²³

Following the Department of Justice's denial of preclearance, the city filed a declaratory judgment action.⁴²⁴ The Court noted that the 1970 council redistricting plan for New Orleans increased the number of African American majority districts from one to two and approved the redistricting plan.⁴²⁵ The Court reasoned that:

[A] legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the “effect” of diluting or abridging the right to vote on account of race within the meaning of Section 5. We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate Section 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.⁴²⁶

The retrogression standard was reaffirmed and its application broadened by the Supreme Court in *City of Lockhart v. United States*.⁴²⁷ In *Lockhart*, the Court precleared an electoral change that did not improve the position of minority voters. “Although there may have been no improvement in [minority] voting strength, there has been no retrogression either.”⁴²⁸ The Court applied the *Beer* rule that when a “new plan [does] not increase the degree of discrimination against blacks, it [is] entitled to § 5 preclearance.”⁴²⁹

Justice Thurgood Marshall, dissenting in *Lockhart*, argued that “[b]y holding that § 5 forbids only electoral changes that increase discrimination, the Court reduces § 5 to a means of maintaining the status quo.”⁴³⁰

⁴¹⁹ *Id.*

⁴²⁰ 425 U.S. at 135.

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* at 133-38

⁴²⁵ 425 U.S. at 141-42

⁴²⁶ *Id.* at 141.

⁴²⁷ 460 U.S. 125 (1983).

⁴²⁸ *Id.* at 135.

⁴²⁹ *Id.* at 134.

⁴³⁰ *Id.* at 137 (Marshall, J., dissenting).

According to Justice Marshall, the Court's view "is inconsistent with both the language and the purpose" of Section 5 because it would permit "the adoption of a discriminatory election scheme, so long as the scheme is not more discriminatory than its predecessor."⁴³¹

The Supreme Court again affirmed the retrogression standard in 1997 in *Reno v. Bossier Parish School Board (Bossier Parish I)*.⁴³² In that case, the Department of Justice argued that a redistricting plan that violates the dilutive effect test of Section 2 necessarily fails the discriminatory effect prong of Section 5 and therefore should always be denied preclearance.⁴³³ The Supreme Court disagreed, reasoning that incorporating the Section 2 test into Section 5 would replace the retrogression standard with a dilution standard.⁴³⁴ Citing "more than 20 years of precedent," the Court reaffirmed the retrogression standard for the effect prong.⁴³⁵

In the 2000 decade, there was a brief interlude in which it appeared that breaking up majority-minority districts into influence districts would be recognized as a way of satisfying the retrogression standard. The Supreme Court in *Georgia v. Ashcroft*⁴³⁶ suggested that additional influence districts would be more beneficial to minorities than majority-minority districts. Though that case dealt primarily with Section 5 rather than Section 2, Justice O'Connor in her 5-4 majority opinion revealed a leaning toward influence districts:

Thus, a court must examine whether a new plan adds or subtracts "influence districts" where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process. In assessing the comparative weight of these influence districts, it is important to consider "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.⁴³⁷

Congress, in renewing Section 5 in 2006, addressed *Georgia v. Ashcroft* and its attitude toward influence districts by stating that Section 5's purpose is "to protect the ability of such citizens to elect their preferred candidates of choice."⁴³⁸

Purpose Prong. Judicial guidance as to what constitutes discriminatory purpose has historically been scarce. In *Reno v. Bossier Parish School Board (Bossier Parish II)*, the Supreme Court ruled that discriminatory purpose only

⁴³¹ *Id.*

⁴³² 520 U.S. 471, 480 (1997).

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ 539 U.S. 461 (2003).

⁴³⁷ *Id.* at 482.

⁴³⁸ Act of July 27, 2006, Pub. L. No. 109-246, sec. 5, 120 Stat. 577, 581 (to be codified as amended at 42 U.S.C. § 1973c); see H.R. REP. NO. 109-478 at 93-94, reprinted in 2006 U.S.C.C.A.N. 618, 678-79.

encompasses intent to cause retrogression and not discriminatory intent generally.⁴³⁹ Thus, a voting change “motivated by racial animus” could achieve Section 5 preclearance so long as the change was not intended to decrease minority voting strength.⁴⁴⁰

In 2006, in an amendment known as the “Bossier fix,” Congress added two subsections to Section 5 that purport to supersede *Bossier Parrish II* and broaden the definition of discriminatory purpose.⁴⁴¹ The new provision says, “The term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.”⁴⁴² Theoretically, this definition is more expansive than the Court’s interpretation in *Bossier Parrish II*, which limited discriminatory purpose to retrogressive intent. While no court has determined whether the amendment successfully superseded *Bossier Parrish II*, it is likely that a lower showing of discriminatory intent than mere retrogressive intent will now be sufficient to deny preclearance to a jurisdiction.

Administrative Guidance. The Supreme Court decisions regarding the substantive standards for Section 5 preclearance are binding in all judicial and administrative preclearance proceedings. As noted above, the administrative regulations promulgated by the Department of Justice will likely be followed in administrative preclearance proceedings and are afforded strong persuasive effect in judicial preclearance proceedings.⁴⁴³

The Department of Justice regulations adopt the retrogression standard:

A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively.⁴⁴⁴

In addition, these regulations are especially helpful because they list several factors that should be considered when determining whether the submitted electoral change satisfies the intent and effect prongs.⁴⁴⁵ General factors to be considered include:⁴⁴⁶

⁴³⁹ 528 U.S. 320, 328–300 (2000).

⁴⁴⁰ 152 CONG. REC. S8006 (2006).

⁴⁴¹ Act of July 27, 2006, Pub. L. No. 109-246, sec. 5, 120 Stat. 577, 581 (to be codified at 42 U.S.C. § 1973c(b)–(c)).

⁴⁴² *Id.*, (to be codified at 42 U.S.C. § 1973c(c)).

⁴⁴³ See *Bossier Parrish I*, 520 U.S. at 483 (1997).

⁴⁴⁴ 28 C.F.R. § 51.54(a) (2008). Previously, a Department of Justice regulation stated that administrative preclearance would be denied if the submitted change violated Section 2 of the Voting Rights Act. However, the Department of Justice repealed that rule in May 1998 following the Supreme Court’s ruling in *Bossier Parrish I*. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 498 (Jan. 6, 1987) (codified at 28 C.F.R. § 51.55(b)(2)), *repealed by* Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended; Revision of Procedures, 63 Fed. Reg. 24108, 24109 (May 1, 1998) (codified at 28 C.F.R. § 51.55(b)).

⁴⁴⁵ 28 C.F.R. §§ 51.57–51.61 (2008). The regulations also make it clear that this list of factors is non-exhaustive. *Id.*

⁴⁴⁶ 28 C.F.R. §§ 51.57–51.58 (2008).

1. The extent to which a reasonable and legitimate justification for the change exists;
2. The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;
3. The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;
4. The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change;
5. The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction;
6. The extent to which minorities have been denied an equal opportunity to influence elections and the decision making of elected officials in the jurisdiction;
7. The extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated; and
8. The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination.

With respect to redistricting plans, the regulations suggest considering these additional factors:⁴⁴⁷

1. The extent to which malapportioned districts deny or abridge the right to vote of minority citizens;
2. The extent to which minority voting strength is reduced by the proposed redistricting;
3. The extent to which minority concentrations are fragmented among different districts;
4. The extent to which minorities are overconcentrated in one or more districts;
5. The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered;
6. The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and
7. The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.

With respect to changes in electoral systems, the regulations suggest considering these additional factors:⁴⁴⁸

⁴⁴⁷ 28 C.F.R. § 51.59 (2008).

⁴⁴⁸ 28 C.F.R. § 51.60 (2008).

1. The extent to which minority voting strength is reduced by the proposed change;
2. The extent to which minority concentrations are submerged into larger electoral units; and
3. The extent to which available alternative systems satisfying the jurisdiction's legitimate governmental interests were considered.

With respect to annexation plans, the regulations suggest considering these additional factors:⁴⁴⁹

1. The extent to which a jurisdiction's annexations reflect the purpose or have the effect of excluding minorities while including other similarly situated people;
2. The extent to which the annexations reduce a jurisdiction's minority population percentage, either at the time of the submission or, in view of the intended use, for the reasonably foreseeable future; and
3. Whether the electoral system to be used in the jurisdiction fails fairly to reflect minority voting strength as it exists in the post-annexation jurisdiction.

Procedures for Preclearance

A jurisdiction can seek either judicial or administrative preclearance of a voting change.⁴⁵⁰ If, however, the Department of Justice interposes an objection to a submitted electoral change, the jurisdiction still can seek judicial preclearance. Due to the cost and time involved in obtaining judicial preclearance, most jurisdictions seek preclearance from the Department of Justice. To facilitate the process for obtaining preclearance, the Department of Justice now allows online submissions.

Judicial preclearance. To obtain preclearance from the U.S. District Court for the District of Columbia, a jurisdiction must file a declaratory judgment action.⁴⁵¹ The Department of Justice serves as the opposing party in the declaratory judgment action. Upon filing the action, the jurisdiction has the burden of proving that the proposed electoral change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a language minority group.⁴⁵²

Administrative preclearance. *Submission.* The Department of Justice requests that any “[c]hanges affecting voting should be submitted as soon as possible after they become final.”⁴⁵³ The guidelines specify certain required

⁴⁴⁹ 28 C.F.R. § 51.61 (2008).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ 28 C.F.R. § 51.21 (2008).

contents of a submission.⁴⁵⁴ The guidelines also detail certain supplemental material that a jurisdiction should provide.⁴⁵⁵

Required contents of a submission include:

1. A copy of the proposed and existing law;
2. An explanation of the difference between the prior and proposed situations with respect to voting;
3. The name, title, address and telephone number of the person making the submission;
4. The identification of the person or body responsible for making the change and the mode of decision;
5. A statement identifying the authority under which the jurisdiction undertook the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change;
6. The date of adoption and the date the change is to take effect;
7. A statement that the change has not yet been enforced or administered or an explanation of why the statement cannot be made;
8. A statement of the reasons for the change and the anticipated effect of the change on members of racial or language minority groups;
9. Any past or present litigation involving the change;
10. A statement that the prior practice and the applicable procedure has been precleared, a statement that preclearance was not required, or an explanation of why the statement cannot be made; and
11. Other information that the attorney general determines is required for an evaluation of the purpose or effect of the change.⁴⁵⁶

For redistricting plans and annexations, the Department of Justice also requires the following information.

1. Demographic information, including the total population, voting age population, any population estimates and number of registered voters in the affected area before and after the change by race and language minority group;
2. Maps showing prior and new boundaries of voting units and precincts; location of racial and language minority groups; natural boundaries or geographic features that influenced the selection of boundaries of the prior or new units; and the location of prior and new polling places and registration sites;

⁴⁵⁴ 28 C.F.R. § 51.27 (2008).

⁴⁵⁵ 28 C.F.R. § 51.28 (2008).

⁴⁵⁶ 28 C.F.R. § 51.27 (2008).

3. With respect to annexations, the present and expected future use of the annexed land; an estimate of expected population by race and language group when the anticipated development is completed; and a statement that all prior annexations subject to preclearance have been submitted or a statement that identifies which annexations have not been submitted for preclearance;
4. Previous primary and general election returns, including name and race of each candidate; position sought by each candidate; number of votes received by each candidate by voting precinct; outcome of each contest; and the number of registered voters, by race and language group, for each precinct. Information with respect to elections held within the past 10 years will normally be sufficient;
5. Evidence of public notice and participation, including the opportunity for the public to be heard; the opportunity for interested parties to participate in the decision to adopt the proposed change; and an account of the extent to which the participation, especially by minority group members, in fact took place;
6. Evidence that the submission has been made available to the public and that the public has been informed about the availability of the submission; and
7. Minority group contacts, including name, address, telephone number, and organizational affiliation, if any.⁴⁵⁷

The Department of Justice encourages interested individuals to comment on submitted plans.⁴⁵⁸ The comments received by the Department of Justice are not required to be publicly released. The Department of Justice will comply with the request of any individual that his or her identity not be disclosed to anyone outside the Department of Justice, to the extent permitted by the Freedom of Information Act.⁴⁵⁹ Note, however, it is the policy of the Department of Justice not to introduce the comments and identity of individuals who request confidentiality as evidence in litigation over the plan, unless the individual waives his or her prior request for confidentiality or the disclosure is required by the court.

Procedure. The Department of Justice, through the U.S. Attorney General, has 60 days in which to interpose an objection to a preclearance submission.⁴⁶⁰ The Department of Justice can request additional information within the period of review and following receipt of the additional information, the Department of Justice has an additional 60 days to review the additional information.⁴⁶¹ A change, either approved or not objected to, can be implemented by the submitting jurisdiction. Without preclearance, proposed changes are not legally enforceable and cannot be implemented.

⁴⁵⁷ 28 C.F.R. § 51.28 (2008).

⁴⁵⁸ 28 C.F.R. § 51.29 (2008). “The communications should be mailed to the Chief, Voting Section, Civil Rights Division, Department of Justice, P.O. Box 66128, Washington, D.C. 20035-6128. The envelope and first page should be marked: Comment under Section 5 of the Voting Rights Act.” § 51.29(b).

⁴⁵⁹ 28 C.F.R. § 51.29(d) (2008).

⁴⁶⁰ 28 C.F.R. § 51.9 (2008). However, a jurisdiction can request expedited consideration. 28 C.F.R. § 51.34(a).

⁴⁶¹ 28 C.F.R. § 51.37 (2008).

If the Justice Department approves a change, a letter is sent to the submitting jurisdiction informing it of the approval. If the Justice Department objects to the proposed change, the submitting jurisdiction has two methods of recourse. The submitting jurisdiction can seek a declaratory judgment in the U.S. District Court for the District of Columbia, or it can request reconsideration by the Justice Department. Although requests for reconsideration are not subject to the 60-day review period, Justice Department guidelines call for expeditious action.

Effect of Preclearance on Section 2 Litigation

Preclearance of an electoral change does not preclude a subsequent Section 2 challenge to the electoral change.⁴⁶² In a number of cases, an electoral change that had been precleared under Section 5 has been held to violate Section 2.⁴⁶³

Application of Section 5 and Section 2 to Court-Ordered Plans

The Supreme Court has held that redistricting plans prepared and adopted by a federal court that remedy voting rights violations are exempt from Section 5 review.⁴⁶⁴ On the other hand, in *McDaniel v. Sanchez*, the Court held that a court-ordered remedy that reflects “the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—[is subject to] the preclearance requirement of the Voting Rights Act.”⁴⁶⁵ Court-ordered plans that are exempt from Section 5 review still must meet Section 2 requirements.⁴⁶⁶

Bail Out Provisions

The Voting Rights Act does provide a mechanism wherein a jurisdiction could escape preclearance. Jurisdictions that want to escape preclearance could use a process set out in Section 4 of the act, commonly referred to as “bail out.”⁴⁶⁷ A jurisdiction can bail out if it can demonstrate that, during the preceding 10-year period, it has

⁴⁶² “The Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction’s newly enacted voting ‘qualification, prerequisite, standard, practice or procedure’ may violate that section.” *Bossier Parish I*, 520 U.S. at 485.

⁴⁶³ See, e.g., *Major v. Treen*, 574 F. Supp. 325 (E.D.La. 1983); *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983).

⁴⁶⁴ *Connor v. Johnson*, 402 U.S. 690, 691 (1971).

⁴⁶⁵ 452 U.S. 130, 153 (1981).

⁴⁶⁶ *Winter v. Brooks*, 461 U.S. 921 (1983)(mem.).

⁴⁶⁷ Pub. L. No. 89-110, sec. 4, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973b(a)(1) (2006)).

complied with the Voting Rights Act and has undertaken efforts to ensure participation by minorities.⁴⁶⁸ This provision is rarely used.⁴⁶⁹

Conclusion

Since the Supreme Court's decision in *Gingles* in 1986, the federal courts have examined a number of issues that were left unaddressed or were partially addressed in *Gingles*.

1. Can Minority Groups Be Aggregated? The first prong of the Supreme Court's three-part test for determining whether vote dilution has occurred requires proof by the minority group that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Can two different minority groups be aggregated to meet this requirement? Courts have taken different approaches to that question. In *League of United Latin American Citizens (LULAC) v. Midland Ind. Sch. Dist.*, the district court ruled that Hispanic and Black minority populations living within a geographically compact area must be aggregated for the purpose of determining whether the first prong of the test is met.⁴⁷⁰ The court then examined whether the two groups were politically cohesive under the second prong of *Gingles*'s three-part test and found that the two groups often voted as a coalition and shared similar political goals—an indication of political cohesiveness.⁴⁷¹ In *Romero v. City of Pomona*, the district court ruled that Hispanics and Blacks could not constitute an effective single-member district because they were not politically cohesive.⁴⁷² Although *Romero* used the second prong of the *Gingles* test to address the first prong, its decision apparently would have been the same had it evaluated the two minority groups in the same manner that they were evaluated in *Midland*.

2. Total Population or Eligible Voters? Several lower courts also have addressed whether the total minority population or only the eligible voting age minority population should be counted in determining whether the minority group can constitute an effective single-member district. Most have decided that an effective single-member district is measured by the number of eligible voting age minorities.⁴⁷³ The assertion by the lower court in *Gingles v. Edmisten* that “no aggregation of less than 50 percent of an area's voting age population can possibly constitute an effective voting majority” was left undisturbed if not adopted by implication by the Supreme Court in *Thornburg v. Gingles*.⁴⁷⁴ This issue is of particular importance to Hispanic groups, whose population may include significant numbers of noncitizens who may not be counted if the jurisdiction requires

⁴⁶⁸ *Id.*

⁴⁶⁹ In 1976, New Mexico successfully petitioned the U.S. District Court for the District of Columbia for permission to bail out of preclearance. Several years later, New Mexico faced a Section 2 challenge to its 1982 redistricting. The resulting court order mandated that, for the 10-year period subsequent to the December 1984 order, New Mexico preclear any state legislative redistricting. More recently, Fairfax County, Va., has bailed out.

⁴⁷⁰ 648 F. Supp. 596 (W.D. Tex. 1986).

⁴⁷¹ *Id.* at 606-607.

⁴⁷² 665 F. Supp. 853, 857-858 (C.D. Cal. 1987).

⁴⁷³ See, e.g., *Romero*, 665 F. Supp. 853, 857; *Martin v. Allain*, 638 F. Supp. 1183, 1198 (S.D. Miss. 1987); but cf. *League of United Latin American Citizens v. Midland Indep. School Dist.*, 648 F. Supp. 596, 606 (W.D. Tex. 1986).

⁴⁷⁴ 590 F. Supp. at 381 n. 3.

a voting-majority district. The Supreme Court in *Bartlett v. Strickland*⁴⁷⁵ finally addressed the issue squarely and concluded that a numerical majority of voting age population—more than 50 percent—is the threshold for a district required by Section 2.

3. How Much Weight Should Be Given to Other Factors (Multiple Regression Analysis)? In light of the Supreme Court’s emphasis on racial polarization and minority electoral success in proving a vote dilution claim, lower courts have addressed the significance of other factors. Nearly all courts continue to make extensive findings based upon the Senate report factors, with emphasis on the factors of racial polarization, and continue to use the three-part test for minority vote electoral success.⁴⁷⁶ In particular, questions have arisen about the racial polarization factor and whether it is appropriate when examining racially polarized voting to look at other factors such as age, religion, party affiliation, education, etc., to determine whether “race” was the cause of a particular outcome in an election. Justice Brennan, writing for a plurality of the Court in *Gingles*, rejected the use of multiple regression analysis in determining racial polarization, stating that “the reasons black and white voters vote differently have no relevance to the central inquiry of Section 2.”⁴⁷⁷ Thus far, lower courts have adhered to the plurality opinion and have rejected defendants’ attempts to use multiple regression analysis to explain why White and minority voters may have voted differently.⁴⁷⁸

4. When Are Candidates “Minority Supported?” Another unresolved question about racially polarized voting is the point at which candidates become “minority-supported” candidates for purposes of demonstrating political cohesiveness among minorities and minority bloc voting. The *Gingles* Court stated that political cohesiveness and minority bloc voting occur when a “significant number” of minorities tend to vote for the same candidate.⁴⁷⁹ Although most cases show evidence that more than 50 percent of Black voters prefer Black candidates in most primary and general elections, in at least one case, a Black candidate has been considered a “minority-supported” candidate with just less than 50 percent of the Black vote and in spite of the fact that two White candidates received a higher percentage of the Black vote.⁴⁸⁰ This is arguably inconsistent with Justice Brennan’s statement, writing in the plurality opinion, that “it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important.”⁴⁸¹

5. How Does Section 2 Relate to Section 5? A final unresolved question is the relationship between Section 2 and Section 5 of the act. Enforcement of the Voting Rights Act has enfranchised minority voters and has eliminated many discriminatory electoral and districting schemes. Section 5 applies only to covered

⁴⁷⁵ No. 07-689 (U.S. Mar. 9, 2009).

⁴⁷⁶ See, e.g., *United States v. Marengo County Comm’n*, 731 F.2d 1546 (1st Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984).

⁴⁷⁷ 478 U.S. at 63.

⁴⁷⁸ *Romero*, 665 F. Supp. 853, 865-866; *Edgefield*, 650 F. Supp. 1176, 1194 n. 1 and accompanying text.

⁴⁷⁹ 478 U.S. at 56. A minority-supported candidate does not necessarily have to be of the same race or language as the minority voter group, although the minority voter and his preferred candidate will generally be of the same race or language minority.

⁴⁸⁰ *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987), cert. denied, 57 U.S.L.W. 3841 (U.S. June 15, 1989).

⁴⁸¹ *Gingles*, 478 U.S. at 68.

jurisdictions.⁴⁸² Section 2, on the other hand—which seeks to prevent a state or political subdivision from diluting voting strength—applies nationwide.

In 1982, when Congress amended Section 2, it reduced the burden of proof necessary for a plaintiff to establish a Section 2 violation. Before the 1982 amendments, a plaintiff had to show that the challenged electoral plan was intentionally designed to dilute the minority vote. The 1982 amendments eliminated the intent requirement and substituted the “results” test. This test enables plaintiffs to prove a Section 2 violation if they can demonstrate that, as a result of the challenged practice or structure, plaintiffs did not have an equal opportunity to participate in the political process and to elect candidates of their choice.⁴⁸³

When a covered jurisdiction attempts to change its electoral laws, it must first seek either preclearance from the Department of Justice or a declaratory judgment from the U.S. District Court for the District of Columbia. In *Beer v. United States*⁴⁸⁴ and *City of Lockhart v. United States*,⁴⁸⁵ the U.S. Supreme Court held that, as long as a proposed change does not lead to an actual retrogressive effect in minority voting strength, a declaratory judgment under Section 5 will be granted. In *Reno v. Bossier Parish School Board (Bossier Parish I)*,⁴⁸⁶ the Supreme Court held that, if a plan is not retrogressive, a possible violation of Section 2 of the Voting Rights Act is not a sufficient reason to deny preclearance under Section 5. Three years later, in *Reno v. Bossier Parish School Board (Bossier Parish II)*,⁴⁸⁷ the Supreme Court held that, under Section 5, a discriminatory purpose encompasses only intent to cause retrogression, not any other discriminatory intent. These interpretations of Section 5 were rejected by Congress in 2006, when it amended Section 5 to say that, “The term ‘purpose’ in subsections (a) and (b) of this section shall include any discriminatory purpose.”⁴⁸⁸ The Supreme Court has not yet confirmed that a violation of Section 2 now requires denial of preclearance under Section 5.

Table 7 lists major cases about racial and language minorities.

⁴⁸² See Table 6, Covered Jurisdictions, *supra* p. ?.

⁴⁸³ 42 U.S.C. § 1973(b) (2006).

⁴⁸⁴ 425 U.S. 130 (1976).

⁴⁸⁵ 460 U.S. 125 (1983).

⁴⁸⁶ 520 U.S. 471 (1997).

⁴⁸⁷ 528 U.S. 320, 328-330 (2000).

⁴⁸⁸ Act of July 27, 2006, Pub. L. No. 109-246, sec. 5(c), 120 Stat. 577, 581 (to be codified at 42 U.S.C. § 1973c(c)).

Table 7. Major Cases About Racial and Language Minorities

Major Cases About Section 2 of the Voting Rights Act

Gomillion v. Lightfoot, 364 U.S. 339 (1960) (Ala.)

The Supreme Court invalidated a district that excluded Black voters, saying it violated the 15th Amendment, which prohibits denial or abridgement of right to vote on basis of race. This case was decided before the Voting Rights Act became law in 1965.

White v. Regester, 412 U.S. 755 (1973) (Texas)

The Supreme Court said that, under the Equal Protection Clause of the 14th Amendment, a state was justified in deviating from equal population of districts to remedy the history that the Black and Mexican-American communities had been “effectively excluded from participation in the Democratic primary selection process.”

City of Mobile v. Bolden, 446 U.S. 55 (1980) (Ala.)

The Supreme Court ruled that to show a violation of the 15th Amendment requires showing not just a discriminatory effect, but also a discriminatory purpose. The Court noted that the 15th Amendment had equivalent language to Section 2 of the Voting Rights Act. The case spurred Congress in 1982 to amend Section 2 of the Voting Rights Act to declare that discriminatory effects would suffice for a Section 2 claim, and that discriminatory intent need not be proven.

Thornburg v. Gingles, 474 U.S. 808 (1986) (N.C.)

The Supreme Court interpreted the new language of Section 2 concerning discriminatory effects. The Court enunciated when Section 2 requires the breakup of multi-member districts into minority single-member districts. It is a determination based on the totality of circumstances that the minority group has unequal access to the political process and to the ability to elect representatives of its choice. But there are three preconditions:

1. That the minority group is sufficiently large and compact that it can be drawn as a majority of a single-member district;
2. That the minority group is politically cohesive; and
3. That the majority usually votes as a bloc so as to defeat the minority’s choices for representative.

Growe v. Emison, 507 U.S. 25 (1993) (Minn.)

The Supreme Court held that the *Gingles* requirements for breakup of a multi-member district apply as well to a Section 2 claim against a single-member district.

Voinovich v. Quilter, 507 U.S. 146 (1993) (Ohio)

The Supreme Court said a state is free to draw majority-minority districts, if doing so does not otherwise violate the law. A minority district does not have to be necessary to remedy Section 2 violations.

Johnson v. DeGrandy, 512 U.S. 997 (1994) (Fla.)

The Supreme Court upheld a plan where minority voters had formed effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting age population, even though more minority districts could have been drawn. The Court said Section 2 did not require maximization of minority districts. However, the Court issued caveats about the role of proportional representation: Proportionality is not an affirmative defense to a Section 2 claim, which needs to be pled; and proportionality does not always defeat a claim of vote dilution.

League of United Latin American Citizens (LULAC) v. Perry, No. 05-204, 548 U.S. 399 (2006) (Texas)

The Supreme Court said "influence districts" are not protected by Section 2. It said that, for the Hispanic minority in the case before the court, citizen voting age population was the proper measure for a district under Section 2. The Court also said the compactness precondition of *Gingles* refers not just to geographical compactness of the district, but also to compactness of the minority group.

Bartlett v. Strickland, No. 07-689, 129 S.Ct. 1231 (2009) (N.C.)

The Supreme Court ruled that the compactness precondition of *Gingles* requires that the minority group must be drawable into a numerical majority—more than 50 percent of voting age population—in the district. Section 2 does not mandate the drawing of "crossover" districts, in which the minority can elect its preferred candidate with the help of some White voters. The Court did not discuss the question of citizenship in the context of an African American minority.

Major Cases About Racial Gerrymandering

Shaw v. Reno, 509 U.S. 630 (1993) (N.C.)

The Supreme Court recognized a right to participate in a color-blind electoral process and a new claim of "racial gerrymandering." The Court said it is a legitimate Equal Protection claim to assert that a district is so extremely irregular on its face that it could rationally be viewed only as an effort to segregate races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification.

United States v. Hays, 515 U.S. 737 (1995) (La.)

The Supreme Court said standing equals injury in fact, causal connection, and likely redress by the remedy sought. For a racial gerrymandering claim against a district, those criteria can be met only by a resident in the district.

Miller v. Johnson, [515 U.S. 900](#) (1995) (Ga.)

The Supreme Court said that, even absent a bizarrely shaped district, an allegation that race was the Legislature's dominant and controlling rationale in drawing district lines was sufficient to state a racial gerrymandering claim.

Bush v. Vera, [517 U.S. 952](#) (1995) (Texas)

The Supreme Court said the drawing of a district in which race was the predominant motivating factor is subject to strict scrutiny as racial gerrymandering. The district cannot be justified by Section 2 unless there is a strong basis in evidence that the district was reasonably necessary to avoid the result of denial or abridgements of equal right to vote. The district cannot be justified by Section 5 unless it was reasonably necessary to prevent retrogression. Increasing a minority percentage in a district is not justified as prevention of retrogression.

Lawyer v. U.S. Department of Justice, [521 U.S. 567](#) (1997) (Fla.)

The Supreme Court said a state should be given the opportunity to make its own redistricting decision so long as that is practically possible and the state chooses to take the opportunity.

Easley v. Cromartie, [532 U.S. 234](#) (2001) (N.C.)

The Supreme Court upheld a minority district against a racial gerrymandering claim, saying that where racial identification correlates highly with political affiliation, the plaintiff in a racial gerrymandering case must show that the Legislature could have achieved its legitimate political objectives in alternative ways that were comparably consistent with traditional districting principles and yet would have brought about significantly greater racial balance.

Major Cases About Section 5 of the Voting Rights Act

South Carolina v. Katzenbach, [383 U.S. 301](#) (1966) (S.C.)

The Supreme Court upheld Section 5 and certain other parts of the Voting Rights Act. It said those provisions were appropriate means for carrying out Congress' constitutional responsibilities under the 15th Amendment and were consonant with all other provisions of the Constitution.

Beer v. United States, [425 U.S. 130](#) (1976) (La.)

The Supreme Court announced "retrogression" as the standard for Section 5 review.

Allen v. State Board of Elections, [393 U.S. 544](#) (1969) (Va.)

The Supreme Court said Section 5 covers all actions necessary to make a vote effective.

Presley v. Etowah County Commission, [502 U.S. 491](#) (1992) (Ala.)

The Supreme Court said Section 5 does not cover transfers of decision-making power among elected officials.

Reno v. Bossier Parish (Bossier II), [528 U.S. 320](#) (2000) (La.)

The Supreme Court said the “intent” language of Section 5 means intent to retrogress, not any intent to discriminate. (Reversed by 2006 amendment to Section 5, which said Section 5 covers any intent to discriminate.)

Georgia v. Ashcroft, [539 U.S. 461](#) (2003) (Ga.)

The Supreme Court said Section 5 protects districts in which minorities have influence, and the retrogression standard can be satisfied by breaking up effective minority districts into influence districts, in considering the plan as a whole. (Reversed in part by 2006 amendment to Section 5, which said Section 5 protects the ability of minorities not merely to influence elections but to elect candidates of their choice.)

Riley v. Kennedy, [No. 07-77](#), 128 S.Ct. 1970 (2008) (Ala.)

The Supreme Court said Section 5 does not cover change from temporary misapplication of state law, saying such a law is not in force or effect.

Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder, [No. 08-322](#), 557 U.S. ____ (2009) (Texas)

Plaintiff utility district challenged the preclearance requirement of Section 5 on the ground that it exceeded Congress’s enumerated constitutional powers. The Supreme Court expressed serious doubt that Section 5’s current burdens were justified by current needs, but avoided the constitutional issue by permitting the utility district to escape those burdens by “bailing out” of the preclearance requirement.

5. TRADITIONAL DISTRICTING PRINCIPLES

Introduction

What are “traditional districting principles” and why are they important? This chapter answers that question by reviewing what has been said on this issue by the Supreme Court and selected lower courts. Although the phrase “traditional districting principles” first appeared in *Shaw v. Reno*⁴⁸⁹ in 1993, the actual principles often are as old as our union, although they may be called something else, discussed in a different context, or simply taken for granted.

As explained in the preceding chapter, a state’s redistricting plan is subject to strict judicial scrutiny only if race is the dominant motive for the final shape of the district. If a state uses “traditional districting principles”—often more aptly called “traditional race-neutral districting principles”—as the primary basis for creating a district and race is simply one of many considerations, the plan will not be subject to strict scrutiny. If that plan is challenged, a state will only have to show a rational basis for the district’s shape, something that is relatively easy to do, especially given the custom of judicial deference to legislative enactments.

Before the advent of racial gerrymandering cases in the 1990s, court review of how states drew district lines often arose in the context of one person, one vote cases. (Those cases and their historical background are discussed in [chapter 3](#).) The concept of traditional districting principles grew out of the “rational state policy” used to justify population deviations. Rational state policy in this context was basically limited to maintaining compact political subdivisions.

Two Types of Traditional Districting Principles

Since 1993, seven policies or goals have been judicially recognized as “traditional districting principles:”

1. Compactness,⁴⁹⁰
2. Contiguity,⁴⁹¹

⁴⁸⁹ 509 U.S. 630 (1993).

⁴⁹⁰ *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 647 (1993); *Bush v. Vera*, 517 U.S. 952, 959 (1996); *DeWitt v. Wilson*, 856 F. Supp 1409, 1414 (E.D. Cal 1994), *summarily aff’d*, 515 U.S. 1170 (1995).

⁴⁹¹ *Shaw v. Reno (Shaw I)*, 509 U.S. 630, 647 (1993).

3. Preservation of counties and other political subdivisions,⁴⁹²
4. Preservation of communities of interest,⁴⁹³
5. Preservation of cores of prior districts,⁴⁹⁴
6. Protection of incumbents,⁴⁹⁵ and
7. Compliance with Section 2 of the Voting Rights Act.⁴⁹⁶

That is not to say others might not qualify, depending on a state's history; these seven have been most often cited by the courts. They can be divided into two broad categories as follows.

Geographical and natural—These are the objective principles, including, first and foremost, compactness, followed by contiguity and preservation of counties and political subdivisions.

Political and legal—These are the more subjective principles, including preservation of communities of interest, preservation of cores of prior districts, protection of incumbents, and compliance with Section 2 of the Voting Rights Act of 1965.

Districing Principles for 2000s Plans

Table 8 provides a summary of the districing principles used by each state during the 2000s round of redistricting. The text of the principles is shown in [Appendix E](#).

Table 8. Districing Principles for 2000s Plans
(in addition to population equality)

	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cores of Prior Districts	Protect Incumbents	Voting Rights Act
Alabama	C, L	C, L	C, L	C, L	C, L		C, L
Alaska	L	L	L	L			
Arkansas			C, L		C, L	YC, YL	C, L

⁴⁹²*Shaw v. Reno* (Shaw I), 509 U.S. 630, 647 (1993); *Abrams v. Johnson*, 521 U.S. 74 (1997).

⁴⁹³*Miller v. Johnson*, 515 U.S. 900, 919-20 (1995); *Abrams v. Johnson*, 521 U.S. 74 (1997).

⁴⁹⁴*Abrams v. Johnson*, 521 U.S. 74 (1997).

⁴⁹⁵*Abrams v. Johnson*, 521 U.S. 74 (1997).

⁴⁹⁶*Shaw v. Hunt* (Shaw II), 517 U.S. 899, 915 (1996).

	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cores of Prior Districts	Protect Incumbents	Voting Rights Act
Arizona	C, L	C, L	C, L	C, L		NC, NL	C, L
California	L	L	L	L		NL	L
Colorado	L	L	L	L			L
Connecticut		L	L				
Delaware		L				NL	
Florida		L					
Georgia		C, L	C, L		C, L	YC, YL	C, L
Hawaii	L	L	L	L		NL	
Idaho	C, L	C, L	C, L	C, L		NC, NL	C, L
Illinois	L	L					
Indiana		L					
Iowa	C, L	C, L	C, L			NC, NL	C, L
Kansas	C, L	C, L	C, L	C, L	L	NL	L
Kentucky		C	C	C	C		C
Louisiana		L	L		L		
Maine	L	L	L				
Maryland	L	C, L	L		YC, YL	YC, YL	C, L
Massachusetts		L	L				
Michigan	C, L	C, L	C, L				C
Minnesota	C, L	C, L	C, L	C, L			C, L
Mississippi	L	C, L	L				C, L
Missouri	C, L	C, L	L	L	L		L
Montana	L	L	L			NL	L
Nebraska	C, L	C, L	C, L			NC, NL	C, L
Nevada	C, L	L	C, L	L			C, L
New Hampshire		L	L				
New Jersey	L	C, L	L		C		C

	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cores of Prior Districts	Protect Incumbents	Voting Rights Act
New Mexico	C, L	C, L	C, L	C, L	YC, YL	YC, YL	C, L
New York	L	L	L				
North Carolina		C, L	C, L		C	YC	C, L
North Dakota	L	L	L				
Ohio	L	L	L				
Oklahoma	L	L	L	L			
Oregon		C, L	C, L	C, L		NC, NL	C, L
Pennsylvania	L	L	L				
Rhode Island	L						
South Carolina	C, L	C, L	C, L	C, L	C, L	YC, YL	C, L
South Dakota	L	L	L	L			L
Tennessee		L	L				L
Texas		L	L				
Utah	C, L	C, L					
Vermont	L	L	L	L		YL	
Virginia	C, L	C, L	YC, YL	YC, YL	YC, YL	YC, YL	C, L
Washington	C, L	C, L	C, L	C, L		NL	
West Virginia	C, L	C, L	C, L				
Wisconsin	L	L	L				
Wyoming	C, L	C, L	C, L	L		NL	L

Key:

- C = Required in congressional plans
- L = Required in legislative plans
- NC = Prohibited in congressional plans
- NL = Prohibited in legislative plans
- YC = Allowed in congressional plans
- YL = Allowed in legislative plans

Note: A few states used additional districting principles, such as “convenience” (Minnesota), “understandability to the voter” (Hawaii, Kansas, Nebraska), and “competitive districts” (Arizona).

Source: NCSL, 2009

Not all these principles were recognized in the first court cases. In *Shaw I*, the first case to use the term “traditional districting principles,” the Court identified them as compactness, contiguity and respect for political subdivisions.⁴⁹⁷ The *Shaw I* Court basically said, if you do not follow these principles, and if there is proof that race was a dominant factor, a plan will be subject to strict scrutiny. In *Miller v. Johnson*, the Court added communities defined by actual shared interests to expand to four the list of recognized traditional districting principles.⁴⁹⁸ Probably because the phrase “communities of interest” had been abused by the parties in the *Miller* litigation, the Court noted that the mere recitation that communities of interest existed in a challenged district would not be sufficient.⁴⁹⁹

Geographical and Natural

Compactness. Compactness is by far the oldest and most important traditional race-neutral districting principle, but what is it and how is it used?

Compactness in Racial Gerrymandering. In *Shaw I*, the Court said that “reapportionment is one area in which appearances do matter.”⁵⁰⁰ The Court in *Bush v. Vera* used an “eyeball approach” to evaluate compactness.⁵⁰¹ Compactness does not have to be measured, nor does a state have to show that it drew the most compact district possible, but compactness does have to be one of the primary goals.⁵⁰²

Compactness in Partisan Gerrymandering. *Karcher v. Daggett* was a partisan gerrymandering case decided in 1983, a decade before racial gerrymandering was addressed by the Supreme Court. Justice Stevens wrote a prescient concurrence focusing on the importance of compactness. He said that geographic compactness is a guard against all types of gerrymandering and that it serves “independent values; it facilitates political organization, electoral campaigning, and constitutional representation.”⁵⁰³ “Drastic departures from compactness are a signal that something may be amiss.”⁵⁰⁴

⁴⁹⁷ 509 U.S. 630, 647.

⁴⁹⁸ *Miller*, 515 U.S. 900, 919-20.

⁴⁹⁹ *Id.*

⁵⁰⁰ 509 U.S. at 647.

⁵⁰¹ 517 U.S. 952, 960.

⁵⁰² *Stone v. Hechler*, 782 F. Supp. 1116, 1127 (N.D. W. Va. 1992) (population deviation case). There are three generally accepted measures of compactness, as noted in *Karcher*: the total perimeter test, the Reock test, and the Schwartzberg test. Reock, “Measuring Compactness as a Requirement of Legislative Apportionment,” 5 *Midwest Journal of Political Science* 70 (1961); Schwartzberg, “Reapportionment, Gerrymanders, and the Notion of ‘Compactness,’” 50 *Minn L. Rev.* 443 (1966).

⁵⁰³ *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring).

⁵⁰⁴ *Id.* at 758.

In 1994, the compactness requirement was described by a federal district court in California in the partisan gerrymandering case of *DeWitt v. Wilson* as having a “functional” component:

Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further it speaks to relationships that are facilitated by shared interests and by membership in a political community including a county or a city.⁵⁰⁵

The Court emphasized that the California congressional plan, drawn by a panel of retired state judges, was a “thoughtful and fair example of applying traditional districting principles, while being conscious of race.”⁵⁰⁶ It helped of course, that “[n]o bizarre boundaries were created” and that “effort to comply with the Voting Rights Act emphasized geographical compactness.”⁵⁰⁷

Compactness in Minority Vote Dilution. The Court’s recent redistricting jurisprudence suggests that compactness can be used in analytically distinct ways, depending on the nature of the legal claim. In racial gerrymander cases under *Shaw*, it is used as part of a threshold test to establish a prima facie case of racial gerrymandering under the Equal Protection Clause of the 14th Amendment—whether race predominated in the drawing of district lines. Thus, districts with a substantially odd shape are subject to strict scrutiny under the Court’s equal protection analysis.⁵⁰⁸ In minority vote dilution cases, based on Section 2 of the Voting Rights Act of 1965, compactness is used in the complex interplay between proving a Section 2 violation and determining whether a remedy exists, both of which occur simultaneously.⁵⁰⁹

In a vote dilution case from 1977, the Supreme Court found no constitutional violation, in part because “sound districting principles” of compactness and population equality were followed.⁵¹⁰

In 2006, the Supreme Court’s majority opinion in *League of United Latin American Citizens v. Perry (LULAC)*⁵¹¹ demonstrated how compactness is used differently when analyzing minority vote dilution than when analyzing racial or partisan gerrymandering. Texas Congressional District 23, as drawn by a federal court in 2001, had included a Latino majority of the citizen voting age population. The Texas Legislature’s mid-decade redistricting had modified District 23 to include a Latino majority of the voting age population, but not of the citizen voting age population. To avoid retrogression under Section 5 of the Voting Rights Act, the Legislature’s plan created a new District 25 with a Latino majority of the citizen voting age population, drawing together two far-flung

⁵⁰⁵ *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal 1994), *summarily aff’d*, 515 U.S. 1170 (1995).

⁵⁰⁶ 856 F. Supp. at 1415.

⁵⁰⁷ 856 F. Supp. at 1413.

⁵⁰⁸ *See Miller v. Johnson*, 515 U.S. 900, 916-917 (1995).

⁵⁰⁹ *See Thornburg v. Gingles*, 478 U.S. 30. Where the elements or “preconditions” that are required to prove vote dilution encapsulate the remedy for a violation. Minority plaintiffs must prove that they can actually form a viable, cohesive voting bloc within a single district.

⁵¹⁰ *United Jewish Organizations v. Carey*, 430 U.S. 144, 168 (1977).

⁵¹¹ *League of United Latin American Citizens (LULAC) v. Perry*, No. 05-204, 548 U.S. 399 (2006).

Latino communities—one in the central part of Texas touching Austin and another on the southern border with Mexico.⁵¹²

The lower court considered the plaintiff's racial gerrymander claims by conducting a compactness inquiry on District 25. It found insufficient evidence that district lines were drawn with race as the predominant factor. It also found no minority vote dilution, given that District 25 was an effective Latino opportunity district.⁵¹³

The Supreme Court however, did find minority vote dilution in District 25. It analyzed the district in accordance with *Thornburg v. Gingles*, which requires that, in order to prove a minority vote dilution claim, the minority population must: 1) be sufficiently large and compact to constitute a majority in a single-member district; 2) be politically cohesive; and 3) the majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate. The Court distinguished the lower court's compactness analysis.⁵¹⁴ Specifically, the Court explained its divergence with the lower court:

The court's conclusion that the relative smoothness of the district lines made the district compact, despite this combining of discrete communities of interest, is inapposite because the [lower] court analyzed the issue only for equal protection purposes. In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines. Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations. The first *Gingles* precondition refers to the compactness of the minority population, not to the compactness of the contested district.⁵¹⁵

Thus, the traditional districting principle of compactness conveys markedly different ideas, depending on the type of analysis in which a court is involved. In the vote dilution context, geographical compactness and political cohesiveness are substantive requirements for effectuating plans with viable minority districts. Indeed, the Court stresses this sentiment: "Compactness is . . . about more than 'style points,' . . . it is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal 'opportunity . . . to participate in the political process and elect representatives of their choice.'"⁵¹⁶

This interpretation of the *Gingles* compactness requirement has been termed "cultural compactness" by some, because it suggests more than geographical compactness.⁵¹⁷ Some have gone on to theorize that perhaps the Court

⁵¹² The *LULAC* court also noted that 77 percent of District 25's population resided in split counties at the northern and southern ends of the district. *No. 05-204*, slip op. at 18 (2006).

⁵¹³ *Session v. Perry*, *No. 2:03-CV-354*, 298 F. Supp.2d 451, 503-512 (2004).

⁵¹⁴ *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

⁵¹⁵ *LULAC*, *No. 05-204*, slip op. at 26 (2006).

⁵¹⁶ *Id.* at 28.

⁵¹⁷ Daniel R. Ortiz, "Cultural Compactness," 105 *Mich. L. Rev. First Impressions* 48 (2006) <<http://www.michiganlawreview.org/firstimpressions/vol105/ortiz.pdf>>.

is attempting to broaden vote dilution claims so they can be used as a proxy for partisan gerrymandering claims, for which the Court has not yet found judicially manageable standards.⁵¹⁸

Regardless of the Court's larger intentions for the role of compactness, it is clear that the Court views it as central to the analysis of vote dilution claims. "While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries."⁵¹⁹

These additional principles are discussed in the next section.

Political and Legal

This category of districting principles is more subjective and amorphous. Courts are wary of hollow arguments created after the fact to justify a district's shape. However, political and legal principles, when supported by the evidence, have been recognized as traditional districting principles, although the courts have been slower to recognize them and require the presence of compactness, contiguity and respect for political boundaries before even reaching these principles.

As early as 1978, before the racial gerrymandering cases, the U.S. Supreme Court, in *Wise v. Liscomb*, said that preserving the cores of prior districts was a legitimate goal that might justify population variances.⁵²⁰ In a 1997 case, *Abrams v. Johnson*,⁵²¹ a challenge to Georgia's court-drawn plan, the Supreme Court recognized preserving cores of prior districts as a legitimate race-neutral districting principle, along with preserving the four corner districts (a configuration Georgia used for many years), not splitting political subdivisions, keeping an urban majority Black district and protecting incumbents. The Court added, however, that the goal of protecting incumbents should be subordinated to the others because it is inherently more political and therefore suspect and is more difficult to measure.

Abrams is an interesting case because the Court approved a plan that had only one majority-minority district out of 11, when, in Georgia's last constitutional plan, there was one majority-minority district out of 10. The Justice Department argued vigorously that this was retrogression, but the Court said that another compact majority-minority district could not be created without violating Georgia's traditional districting principles.⁵²²

If plan drafters do not adhere to the geographical and natural traditional districting principles, none of the other principles may save a plan in which racial considerations are dominant. As *Shaw* and *Bush* noted, preserving

⁵¹⁸ *Id.* at 49.

⁵¹⁹ *LULAC*, No. 05-204, slip op. at 27 (2006).

⁵²⁰ 437 U.S. 535 (1978).

⁵²¹ 521 U.S. 74 (1997).

⁵²² *Id.*; see also, *Johnson v. DeGrandy*, 512 U.S. 997, 106-08 (1994) (compliance with Section 2 of the Voting Rights Act does not require the creation of noncompact districts).

communities of interest and protecting incumbents are not sufficient insulation against a claim of racial gerrymandering when compactness and regularity have been ignored.⁵²³

Not Traditional Districting Principles

The Supreme Court has explicitly left open the question of whether compliance with a correct interpretation of Section 5 of the Voting Rights Act can be a race-neutral districting principle.⁵²⁴ It is clear, however, that compliance with the Justice Department's preclearance objections and avoidance of litigation are not permissible districting principles.⁵²⁵

The Foundation of a Defensible Plan

What does this mean for the 2010 round of redistricting? Now more than ever, identifying and using traditional race-neutral districting principles is key. In racial gerrymandering cases, courts are willing to pierce the veil of claimed traditional districting principles to see if they really were used; it is a highly fact-based inquiry. "That the legislature addressed these interests does not in any way refute the fact that race was the legislature's predominant consideration."⁵²⁶ A state also cannot invoke incumbency protection when race was used as a means of determining which voters an incumbent wants.⁵²⁷ Creating a district that looks good is not enough. The districts invalidated in *Bush* maintained the integrity of county lines, took their character from a principal city, and were compact in some respects. "Traditional districting criteria were not entirely neglected These characteristics are unremarkable in the context of large, densely populated urban counties."⁵²⁸

In dealing with minority populations, states and other line drawers must take the expanded view of compactness into account when comparing post-2010 maps with their predecessors to ensure that no retrogression has occurred for minority populations. The Court in *LULAC* has made clear that "A State cannot remedy a § 2 violation through the creation of a noncompact district."⁵²⁹ The meaning of "noncompact" has now been broadened to take into consideration cultural similarity in addition to geography. Line drawers cannot draw a district that dilutes voting strength for a group of voters with rights under Section 2 and compensate for that dilution by drawing another minority district for voters who would not have a Section 2 claim. Mere geographical compactness and a mathematical majority of minority voters in a district may not be sufficient if a redistricting plan relocates a minority district. Newly located minority districts must take into consideration communities of interest within the new district, perhaps separate and apart from race.

⁵²³ *Shaw v. Hunt*, 517 U.S. 899, 906-07 (1996) (Shaw II); *Bush*, 517 U.S. 952, 974-76.

⁵²⁴ *Miller*, 515 U.S. 900, 921.

⁵²⁵ *Id.*

⁵²⁶ *Shaw II*, 517 U.S. 899, 907.

⁵²⁷ *Bush*, 517 U.S. 952, 967-70.

⁵²⁸ *Id.* at 963.

⁵²⁹ *LULAC*, No. 05-204, slip op. at 25 (2006).

Applying traditional districting principles is both a science and an art. There is no shortcut or mathematical formula that will insulate a district from a challenge. Following the principles discussed in this chapter is a necessary first step.

6. PARTISAN GERRYMANDERING

Introduction

Partisan (or political) gerrymandering is the drawing of electoral district lines in a manner that intentionally discriminates against a political party. Courts recognize that politics is an inherent part of any redistricting plan. The question is how much partisan gerrymandering is too much, so that it denies a citizen the equal protection of the laws in violation of the 14th Amendment.

In *Davis v. Bandemer*⁵³⁰ the U.S. Supreme Court opened the courthouse doors to claims that a partisan gerrymander is unconstitutional, by saying the claims are “justiciable,” *i.e.*, they may be heard in court. The *Bandemer* Court said it was “not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided,”⁵³¹ and so would not reject them out of hand.

After nearly two decades of observing lower courts attempt to articulate what those standards might be, four members of the Supreme Court concluded in *Vieth v. Jubelirer* that there were none.⁵³² Nevertheless, two years after *Vieth*, the Supreme Court attempted to adjudicate a partisan gerrymandering claim in *League of United Latin American Citizens (LULAC) v. Perry*.⁵³³

Despite the uncertainty whether partisan gerrymandering claims can be effectively adjudicated by the courts, certain guidance can be gleaned from the case law. If a redistricting plan is so discriminatory that the state cannot articulate any legitimate governmental interest in drawing it, the plan may be rejected by a lower court and provide an occasion for the Supreme Court to articulate the necessary standard for determining its constitutionality. For now, redistricting plans are being examined on a case-by-case basis, with a strong focus on the circumstances surrounding their design and adoption, to determine whether the alleged partisan gerrymander goes beyond constitutional limits.

⁵³⁰ 478 U.S. 109 (1986).

⁵³¹ *Id.* at 123.

⁵³² 541 U.S. 267, 281 (2004).

⁵³³ 548 U.S. 399 (2006).

The Argument for Justiciability

Cases Leading to Bandemer

Before *Bandemer*, population equality and racial discrimination in redistricting clearly were the Court's primary concern, even when partisan gerrymandering was alleged. As early as the mid-1960s, the Supreme Court, in *Fortson v. Dorsey*⁵³⁴ and *Burns v. Richardson*,⁵³⁵ raised the question of invidious discrimination in reapportionment schemes that would impermissibly "minimize or cancel out the voting strength of racial or *political* elements"⁵³⁶ (emphasis added) without ever directly speaking to the justiciability of the partisan gerrymandering question. *Burns*, involving the reapportionment of the Hawaii Senate, also was the case in which the Supreme Court first essentially ruled that incumbent protection was allowable in a redistricting plan.

Clearly, however, the Court was not ready to allow partisan issues to overrule the basic one person, one vote principle. In a 1969 case, *Kirkpatrick v. Preisler*, the Supreme Court rejected an argument by the state of Missouri that variations in population between congressional districts were justifiable due to the interplay of politics, saying "problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster."⁵³⁷

In *Gafney v. Cummings*⁵³⁸ in 1973, the Supreme Court indirectly considered a partisan gerrymander of Connecticut legislative districts. In the challenged plan, the Apportionment Board "took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats."⁵³⁹ The Supreme Court's response to the assertion that the plan was invidiously discriminatory because of a "political fairness principle" was that:

[J]udicial interest should be at its lowest ebb when a state purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so ... neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.⁵⁴⁰

This decision begged the question of state plans that do minimize or eliminate party strength.

⁵³⁴ 379 U.S. 433, 439 (1965).

⁵³⁵ 384 U.S. 73, 88-89 (1966).

⁵³⁶ 384 U.S. at 89.

⁵³⁷ 394 U.S. 526, 533 (1969).

⁵³⁸ 412 U.S. 735 (1973).

⁵³⁹ *Id.* at 738.

⁵⁴⁰ 412 U.S. at 754.

By the early 1980s, principles established in the long history of redistricting cases were being considered in the context of partisan gerrymandering. The *Bandemer*⁵⁴¹ trial court panel held that partisan gerrymandering had taken place and that the Indiana Republican legislators had impermissibly discriminated against the Indiana Democrats in drawing legislative district lines. A 1983 congressional district equal population case, *Karcher v. Daggett*,⁵⁴² was significant primarily because Justice Stevens' analysis of gerrymandering in *Karcher* formed the basis of the decision for two of the three trial court judges. The *Bandemer* trial court also called upon the discriminatory purpose test used for racial vote dilution in *City of Mobile v. Bolden*.⁵⁴³

Following Justice Stevens' *Karcher* analysis, the trial court found that Indiana Democrats were a "politically salient class," whose "proportionate voting influence ... [had been] adversely affected," and who had presented a *prima facie* showing of discriminatory partisan gerrymandering. Components of that showing included shapes of districts, ignoring of "traditional political subdivisions," and a "lack of fairness in the procedure surrounding the legislature's enactment of the district lines."⁵⁴⁴ The lower court then found that the state failed to overcome the rebuttable presumption of impermissible gerrymandering, because the burden was on the state to prove that the reapportionment was "supported by adequate neutral criteria," such as "effectuation of a rational state policy."⁵⁴⁵

Davis v. Bandemer

When *Bandemer* reached the Supreme Court,⁵⁴⁶ the Court said for the first time, "we find ... political gerrymandering to be justiciable,"⁵⁴⁷ but reversed the trial court's decision because a violation of the Equal Protection Clause had not been proven. Justices Powell and Stevens dissented, believing that an impermissible partisan gerrymander was proven. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, concurred in the result of the case by restating the traditional argument that alleged partisan gerrymandering is nonjusticiable.

A plurality of the Court (Justices White, Brennan, Marshall and Blackmun) agreed with the trial court that it was necessary for those claiming an Equal Protection Clause violation "to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."⁵⁴⁸ The plurality upheld the trial court's finding of discriminatory intent, stating that "[a]s long as redistricting is done by a legislature it should not be very difficult to prove that the likely political consequences of the reapportionment were intended"⁵⁴⁹ (although the plurality cautioned in a footnote that intent still had to be proven).

⁵⁴¹ 603 F. Supp. 1479 (S.D. Ind. 1984).

⁵⁴² 462 U.S. 725 (1983).

⁵⁴³ 446 U.S. 55 (1980).

⁵⁴⁴ 603 F. Supp. 1479, 1492-1495 (1984).

⁵⁴⁵ 603 F. Supp. at 1495.

⁵⁴⁶ 478 U.S. 109 (1986).

⁵⁴⁷ *Id.* at 113.

⁵⁴⁸ *Id.* at 127.

⁵⁴⁹ *Id.* at 129.

The ruling in *Gaffney* allowing proportional representation of seats was offhandedly reaffirmed by the plurality, but the Court made it clear that the U.S. Constitution did not require such an arrangement. Indeed, “mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will *consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.*”⁵⁵⁰ (Emphasis added.) The Court noted that its reasoning rested in part on its perception that political influence is not limited to winning elections. “Thus, a group’s electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult”⁵⁵¹

Although agreeing with the lower court that the claim was a statewide one,⁵⁵² the plurality spoke to individual districts as well as to the entire state. The same standard is applied in both instances.

In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. In a challenge to an individual district, this inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. Statewide, however, the inquiry centers on the voters’ *direct or indirect influence on the elections of the state legislature as a whole*. And, as in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.⁵⁵³ (Emphasis added.)

The Court never explicitly identified the evidence necessary to show that direct or indirect influence of legislative elections had been precluded by a district plan. In an enumeration of findings the trial court failed to make, the Supreme Court gave a glimpse of what it might view as sufficient proof of an inability to influence the elections of the legislature as a whole. That evidence might include showings that the minority party had virtually no chance of winning enough seats to control one house of the legislature in the near future, and no ability to overcome its minority status before or following the next redistricting. “Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause.”⁵⁵⁴

The plurality seemed to realize that this approach on an individual district level is unlikely to be successful.

This participatory approach to the legality of individual multimember districts is not helpful where the claim is that such districts discriminate against Democrats, for it could hardly be said that Democrats, any more than Republicans, are excluded from participating in the affairs of their own party or from the processes by which candidates are nominated and elected. For

⁵⁵⁰ *Id.* at 132.

⁵⁵¹ 478 U.S. 109, 132.

⁵⁵² *Id.* at 127.

⁵⁵³ *Id.* at 132-133.

⁵⁵⁴ *Id.* at 136.

constitutional purposes, the Democratic claim in this case, insofar as it challenges *vel non* the legality of the multi-member districts in certain counties, is like that of the Negroes in *Whitcomb* who failed to prove a racial gerrymander, for it boils down to a complaint that they failed to attract a majority of the voters in the challenged multimember districts.⁵⁵⁵

In addition to evidence of an inability to assume control of the legislature, the Court held that the finding of an equal protection violation would have to be based on a history of disproportionate results along with an effective disenfranchisement of the minority. Thus, evidence would have to be presented that demonstrates a lack of political power and denial of fair representation. Those conditions exist where excluded groups have “less opportunity to participate in the political processes and to elect candidates of their choice [cites omitted]”⁵⁵⁶ and where elected officials are not responsive to concerns of the excluded group.

The plurality departed from the body of equal protection cases by demanding more than a *de minimis* (i.e., trifling) effect to prove a *prima facie* partisan gerrymandering case. A plaintiff needs to show “that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts”⁵⁵⁷

Justice O’Connor, joined by Chief Justice Burger and Justice Rehnquist, concurred with the majority’s decision to dismiss the claim of partisan gerrymandering, but would have done so on the ground that the claims are political questions and, therefore, nonjusticiable.⁵⁵⁸ Citing *Baker v. Carr*,⁵⁵⁹ she argued that when there is “‘a lack of judicially discoverable and manageable standards for resolving it,’ or where ‘the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion’ is apparent,” then the question is political and nonjusticiable.⁵⁶⁰ Justice O’Connor pointed to the difficulty of ascertaining voter strength of a political party as just one of the factors rendering the majority’s standard unmanageable. To avoid this difficulty, the courts would necessarily gravitate to requiring some form of proportional representation, which would involve making an initial policy decision of a nonjudicial nature.

Of course, in one sense a requirement of proportional representation . . . is judicially manageable. If this Court were to declare that the Equal Protection Clause required proportional representation within certain fixed tolerances, I have no doubt that district courts would be able to apply this edict. The flaw in such a pronouncement, however, would be the use of the Equal Protection Clause as the vehicle for making a fundamental policy choice that is contrary to the intent of its Framers and to the traditions of this Republic. The political question doctrine as articulated in *Baker v. Carr* rightly requires that we refrain from making

⁵⁵⁵ *Id.* at 137.

⁵⁵⁶ 478 U.S. 109, 131.

⁵⁵⁷ *Id.* at 134.

⁵⁵⁸ *Id.* at 144.

⁵⁵⁹ 369 U.S. 186, 217 (1962).

⁵⁶⁰ 478 U.S. 109, 148 (quoting *Baker v. Carr*, 369 U.S. at 217 (1962)).

such policy choices in order to evade what would otherwise be a lack of judicially manageable standards.⁵⁶¹

Specifically, she cited the Supreme Court's treatment of a bipartisan gerrymander in *Gaffney* (constitutionally permissible) versus its treatment of a partisan gerrymander (potentially impermissible) as the type of policy decision the courts should strive to avoid by declaring political gerrymandering issues nonjusticiable.⁵⁶²

In Search of a Standard

Applications of the Bandemer Standard

As might have been expected from a careful reading of the threshold established by the Court in *Bandemer*, demonstration of discriminatory effect has proved to be elusive. The first case to wrestle with the *Bandemer* decision was *Badham v. Eu*⁵⁶³ in 1989. Although the case involved congressional rather than legislative redistricting, the lower court held that the case was justiciable and (using the *Bandemer* plurality's analysis) ruled on the merits of the case by granting the defendants' motion to dismiss. The majority held that "[a]s an initial matter, it is clear that the complaint sufficiently alleges a discriminatory intent."⁵⁶⁴ However, consistent with the high standard established in *Bandemer*, the court then applied a two-prong "effects" test: 1) a history of disproportionate results (which the court did not resolve because it held that the plaintiffs could not satisfy the second prong); and 2) "strong indicia of lack of political power and the denial of fair representation."⁵⁶⁵ The court stated that "[p]articularly conspicuous by its absence is any allegation that plaintiffs' interests are being 'entirely ignore[d]' by their congressional representatives"⁵⁶⁶ As for being "shut out" of the political process," the district court took judicial notice that California had a Republican governor and a Republican U.S. Senator, that 40 percent of the congressional seats were held by Republicans and that a "recent former Republican Governor of California has for seven years been President of the United States." The court concluded that "[i]t simply would be ludicrous for plaintiffs to allege that their interests are being 'entirely ignore[d]' in Congress"⁵⁶⁷

On appeal, the Supreme Court dismissed *Badham* for want of jurisdiction. Subsequently the Supreme Court granted plaintiffs' petition for reconsideration of the dismissal and, in 1989, by a 6-3 vote, summarily affirmed the lower court's ruling.⁵⁶⁸

⁵⁶¹ 478 U.S. at 158.

⁵⁶² *Id.* at 155.

⁵⁶³ 694 F. Supp. 664 (N.D. Cal. 1988).

⁵⁶⁴ *Id.* at 669.

⁵⁶⁵ 694 F. Supp. at 670.

⁵⁶⁶ *Id.*

⁵⁶⁷ 694 F. Supp. at 672.

⁵⁶⁸ 488 U.S. 1024 (1989).

Other district courts have applied *Bandemer* in the same manner as the court in *Badham*. In *Republican Party of Virginia v. Wilder*,⁵⁶⁹ the court found the requisite intent to discriminate, but there had been no election subsequent to the redistricting to show a discriminatory effect. The plaintiffs unsuccessfully attempted to distinguish their case from *Bandemer* by claiming that their case was one of pairing incumbent Republicans together in the same district, while *Bandemer* was a vote dilution case.

In *Pope v. Blue*⁵⁷⁰ and *Fund for Accurate and Informed Representation Inc. (“FAIR”) v. Weprin*,⁵⁷¹ district courts similarly found no viable claim of discriminatory effect. In *Pope*, the plaintiffs argued that the redistricting plan was drafted without meaningful input by the minority party, but the Court stated that “the plaintiffs must show that they have been or will be consistently degraded in their participation in the entire political process, not just in the process of redistricting.”⁵⁷² Likewise in *FAIR*, plaintiffs’ allegation that they were denied fair and effective representation by the redistricting plan of one legislative chamber was held insufficient to show the discriminatory effect required by *Bandemer*. The Court concluded:

[A] political party which is precluded from one house of a bicameral legislature is not necessarily foreclosed from the state’s political process as a whole. Under *Bandemer*, plaintiffs cannot prevail on their political gerrymandering claim *vis-a-vis* the Assembly apportionment plan without showing that the gerrymandering contaminated the Senatorial apportionment as well.⁵⁷³

Vieth v. Jubelirer

In 2004, the Supreme Court took up the case of *Vieth v. Jubelirer*,⁵⁷⁴ a challenge to a Pennsylvania congressional redistricting plan. A plurality of the Court (Justices Scalia, Rehnquist, O’Connor and Thomas) concluded that claims of partisan gerrymandering were nonjusticiable because there were “no judicially discernible and manageable standards for adjudicating” the claims.⁵⁷⁵ Justice Kennedy concurred in the plurality’s vote to dismiss the claim, but on the ground it failed to state a claim on which relief might be granted, rather than barring all future partisan gerrymandering claims.⁵⁷⁶ Four members of the Court dissented from the plurality’s opinion. Three separate dissenting opinions were filed, each setting forth its own judicial standard for determining the constitutionality of a partisan gerrymander.

The plurality returned to Justice O’Connor’s line of reasoning in *Bandemer*, focusing on the lack of judicially discernible and manageable standards. The plurality noted the “puzzlement and consternation” of the lower

⁵⁶⁹ 774 F. Supp. 400 (W.D. Va. 1991).

⁵⁷⁰ 809 F. Supp. 392 (W.D. N.C. 1992), *aff’d* 506 U.S. 801 (1992) (mem.).

⁵⁷¹ 796 F. Supp. 662 (N.D. N.Y. 1992) (*per curiam*) *aff’d* 506 U.S. 1017 (1992) (mem.).

⁵⁷² 809 F. Supp. at 397.

⁵⁷³ 796 F. Supp. at 669.

⁵⁷⁴ 541 U.S. 267 (2004).

⁵⁷⁵ *Id.* at 281.

⁵⁷⁶ *Id.* at 306.

courts in their attempts to formulate a standard for constitutionality. “Throughout this case we have borne witness to the powerful, conflicting forces nurtured by *Bandemer*’s holding that the judiciary is to address ‘excessive’ partisan line-drawing, while leaving the issue virtually unenforceable.”⁵⁷⁷ The “lower courts continue to struggle in an attempt to interpret and apply the ‘discriminatory effect’ prong of the [*Bandemer*] standard.”⁵⁷⁸ Based in part on these observations, the plurality concluded that, after 18 years of effort by the lower courts, the *Bandemer* standard had proved unworkable.⁵⁷⁹

Having rejected the *Bandemer* standard, the plurality opinion examined other standards proposed for resolving partisan gerrymandering claims to see if any manageable standard could be found. The appellants in *Vieth* proposed an intent-plus-effect standard that required: 1) a showing of a *predominant* intent to achieve partisan advantage, 2) that the plan systemically “packed” and “cracked” the opposing party’s voters and 3) that under a “totality of the circumstances” the plan could “thwart the plaintiffs’ ability to translate a majority of votes into a majority of seats.”⁵⁸⁰ The appellants’ standard was based on the standards developed in the racial gerrymandering line of cases. The plurality opinion rejected appellants’ standard because racial gerrymandering cases are not analogous to partisan gerrymandering cases. Political purposes are an inherent part of the redistricting process and are, by and large, ordinary and lawful.

By contrast, the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered. Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is substantially affected by the excess of an ordinary and lawful motive as to invalidate it.⁵⁸¹

Furthermore, race is an immutable characteristic, while political affiliation not only can, but often does change, rendering it much more difficult to measure. “These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.”⁵⁸² For similar reasons the plurality opinion rejected the standard set forth by Justice Stevens in his dissent, which was based in large part on the standards established in racial gerrymandering cases.⁵⁸³

In examining other proposed standards—Justice Powell’s standard in *Bandemer* and Justice Souter’s and Justice Breyer’s standards in their dissenting opinions—the plurality pointed to the failure of each standard to provide adequate guidance on when partisan gerrymandering rises to the level of unconstitutionality. Justice Powell’s standard, based on discerning “fairness” from a totality of the circumstances, was rejected by the Court as

⁵⁷⁷ *Id.* at 282-83 (citing *Session v. Perry*, No. 2:03-CV-354, 298 F. Supp.2d 451 (E.D. Tex. Jan. 6, 2004), *vacated and remanded sub nom. Jackson v. Perry*, 543 U.S. 941 (2004) (mem.)).

⁵⁷⁸ *Id.* at 283 (citing *Martinez v. Bush*, No. 02-20244-CIV-JORDAN, 234 F. Supp.2d 1275, 1352 (S.D. Fla. 2002) (three-judge court) (Jordan, J., concurring)).

⁵⁷⁹ 541 U.S. 267, 281.

⁵⁸⁰ *Id.* at 284-87.

⁵⁸¹ *Id.* at 286.

⁵⁸² *Id.* at 287.

⁵⁸³ *Id.* at 292-95.

unmanageable in that the plurality could conceive of “fair” districting plans that would include all of the alleged flaws inherent in the *Vieth* plan.⁵⁸⁴ Justice Souter’s proposal would require a five-step *prima facie* showing by the plaintiff, which would then be rebuttable by evidence by the state of a legitimate governmental interest. The plurality opinion rejected this standard, arguing that each of the findings required by the *prima facie* test are just as vague and immeasurable as the overall question of whether the political motivation and effect were too much.⁵⁸⁵ Justice Breyer did not provide a standard so much as a series of scenarios designed to guide lower courts in their adjudication of partisan gerrymandering cases. The plurality found the examples to be unhelpful, since they all relied at least in part on making difficult determinations, such as partisan voter strength, and ultimately tried to discern the vague concept of “unjustified entrenchment” by the minority party.⁵⁸⁶

Having rejected all proposed standards to apply in partisan gerrymandering cases, the plurality opinion returned to the formulation in *Baker* that the lack of discernible and judicially manageable standards renders an issue nonjusticiable. The plurality concluded, therefore, that partisan gerrymandering cases were nonjusticiable and must be dismissed.⁵⁸⁷

In his concurring opinion, Justice Kennedy argued that to dismiss the partisan gerrymandering claim as nonjusticiable would foreclose the possibility of the Court formulating a constitutional standard in the future.⁵⁸⁸ While finding that no standard currently existed to measure the burden the plaintiffs claimed to have suffered, the 14th Amendment, and possibly the First Amendment, still provided some general standard for constitutionality that the Court could use as a basis for determining when political groups’ representational rights have been unconstitutionally burdened.⁵⁸⁹ Since the plaintiffs failed to demonstrate a constitutional violation, Justice Kennedy voted to dismiss their partisan gerrymandering claim for failure to state a claim on which relief might be granted.

Post-Vieth Decisions

While the Supreme Court’s plurality opinion in *Vieth* strove to settle the partisan gerrymandering issue, the fact that a majority of the Court in that case expressed the view that the claims should continue to be adjudicated by the courts has created diverse decisions in the cases following *Vieth*. Some courts are receptive to the argument that partisan gerrymandering that goes too far is unconstitutional. However, since political discrimination is inherent in every districting plan, the problem is to identify how far is too far.⁵⁹⁰ Two months after *Vieth*, Justice Stevens stated as much in *Cox v. Larios*.⁵⁹¹ “The record in this case, like the allegations in *Gomillion* and in *Vieth*,

⁵⁸⁴ 541 U.S. 267, 291.

⁵⁸⁵ *Id.* at 296-97.

⁵⁸⁶ *Id.* at 300.

⁵⁸⁷ *Id.* at 306.

⁵⁸⁸ *Id.* at 309-10.

⁵⁸⁹ 541 U.S. at 314-15.

⁵⁹⁰ *Id.* at 344 (Souter, J., dissenting).

⁵⁹¹ 542 U.S. 947 (2004).

reinforce my conclusion that ‘the unavailability of judicially manageable standards’ cannot justify a refusal ‘to condemn even the most blatant violations of a state legislature’s fundamental duty to govern impartially.’”⁵⁹² Justice Stevens opined that “had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case.”⁵⁹³

The lower courts have taken differing views on what the *Vieth* decision means. In *Johnson-Lee v. City of Minneapolis*⁵⁹⁴ (an unpublished opinion) the district court concluded that *Vieth* overruled the *Bandemer* standard for determining the constitutionality of a partisan gerrymander. However, since five of the justices in *Vieth* found the issue justiciable, the district court attempted to adjudicate the matter using a proper standard. The court found the most applicable standard to be that expressed by Justice Kennedy in *Vieth*—the 14th Amendment standard.⁵⁹⁵ The court sought to determine whether the districting plan was rationally related to a legitimate governmental interest. The court held that the plan was constitutional because it was adopted to meet statutory requirements and neutral districting principles, which are legitimate governmental interests.⁵⁹⁶

In another unpublished opinion, *Kidd v. Cox*,⁵⁹⁷ the district court followed the plurality in *Vieth* and dismissed an equal protection claim of partisan gerrymandering as nonjusticiable. The court relied on the lack of any manageable standard for determining constitutionality as the basis for its decision. The court, however, also addressed a separate claim that the partisan gerrymandering had also violated the First Amendment rights of the plaintiffs to free political expression. This claim was based on the argument that the gerrymander had the effect of burdening the plaintiffs’ representational right to elect a candidate of their choice because of their political views and affiliation.⁵⁹⁸ The court held there was no First Amendment violation because plaintiffs’ right to political expression had not been burdened.

Plaintiffs are every bit as free under the new plan to run for office, express their political views, endorse and campaign for their favorite candidates, vote, or otherwise influence the political process through their expression. Instead, Plaintiffs essentially contend that the First Amendment entitles them to success in those endeavors. We reject that suggestion.⁵⁹⁹

In *League of United Latin American Citizens (LULAC) v. Perry*⁶⁰⁰ in 2006, the Supreme Court again addressed partisan gerrymandering. After the 2000 census, the Texas Legislature was unable to agree on a redistricting plan for the state’s congressional seats. Through litigation, a three-judge court drew the redistricting plan that was

⁵⁹² *Id.* at 946-47 (citations omitted).

⁵⁹³ *Id.* at 946.

⁵⁹⁴ No. 02-1139, 2004 WL 2212044 (D. Minn. Sep. 30, 2004)

⁵⁹⁵ *Id.* at 12.

⁵⁹⁶ *Id.* at 13.

⁵⁹⁷ No. 1:06-CV-0997-BBM, 2006 WL 1341302, 2006 U.S. Dist. LEXIS 29689 (N.D. Ga. May 16, 2006).

⁵⁹⁸ *Id.* at 15.

⁵⁹⁹ *Id.* at 17.

⁶⁰⁰ 548 U.S. 399 (2006).

adopted and in effect for the 2002 general elections. Those elections gave Republicans control of both houses of the Legislature. The Legislature then adopted a new redistricting plan in 2003 that was gerrymandered to secure the Republicans' control of the state Legislature. Plaintiffs, along with claims of violations of [Section 2](#) of the Voting Rights Act, claimed that this new redistricting plan was an unconstitutional partisan gerrymander.⁶⁰¹

The issue of justiciability was not directly addressed by the Court. Instead, after quickly noting the disagreement as to justiciability, the Court examined the proposed constitutional standard put forth by the plaintiffs and other standards that might be applied to resolve the issue. Writing for the Court, Justice Kennedy first analyzed the plaintiffs' proposed standard. Plaintiffs' standard focused on the motivation behind the decision to formulate and adopt a redistricting plan. Plaintiffs argued that, since the decision to adopt a mid-decade redistricting plan had no other motivation than to disadvantage the opposing political party, that, in and of itself, should be sufficient to prove a claim of unconstitutional partisan gerrymandering without the necessity of analyzing the discriminatory effects of the plan.⁶⁰²

The Court rejected this standard for various reasons. First, "[a]s the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts."⁶⁰³ In addition, under the Constitution "there is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own."⁶⁰⁴ The decision to redistrict mid-decade is, therefore, not suspect in the first place. Furthermore, such a test would favor districting plans drawn subsequent to a decennial census over mid-decade plans even though a decennial plan might be more discriminatory in its effect.⁶⁰⁵

Second, plaintiffs' proposed standard did not require any showing of a burden on their representational rights. "[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights."⁶⁰⁶ The Court concluded that the plaintiffs would ultimately have the Court invalidate a statute based on unlawful motive "without reference to the content of the legislation enacted."⁶⁰⁷ The Court was skeptical of taking that action and ordered that the claim of partisan gerrymandering be dismissed for failure to state a claim on which relief might be granted. It should be noted that this is the same ground for dismissal Justice Kennedy argued for in his concurring opinion in *Vieth*.⁶⁰⁸

As in *Vieth*, the Supreme Court was greatly divided in *Perry*, with no less than six justices authoring opinions. Justice Kennedy was joined by Justices Stevens, Souter, Ginsberg and Breyer in the opinion that partisan

⁶⁰¹ *Id.* at 411-13.

⁶⁰² *Id.* at 413-17.

⁶⁰³ *Id.* at 416.

⁶⁰⁴ *Id.* at 418.

⁶⁰⁵ 548 U.S. 399, 419 (2006).

⁶⁰⁶ *Id.*

⁶⁰⁷ *Id.*

⁶⁰⁸ 541 U.S. at 306.

gerrymandering cases are justiciable.⁶⁰⁹ While concurring with the Court’s judgment in rejecting the plaintiffs’ proposed standard for constitutionality, Justices Roberts and Alito reserved their judgment on whether the claims were justiciable.⁶¹⁰ Finally, Justices Scalia and Thomas reiterated their opinion expressed in *Vieth* that partisan gerrymandering claims lack any manageable standard and therefore are nonjusticiable.⁶¹¹

Conclusion

The issue of whether courts should adjudicate partisan gerrymandering claims remains unsettled more than 20 years after *Bandemer* appeared to resolve that question. This uncertainty, however, has not stopped political parties from bringing litigation claiming they have been unconstitutionally burdened by partisan gerrymandering. A plaintiff’s burden in these claims remains the subject of much debate. The courts agree that more than discriminatory intent is required. A discriminatory effect also must be demonstrated. The extent of the showing, however, has been the subject of numerous and diverse opinions. In its search for a workable standard for litigating partisan gerrymanders, the Supreme Court has distinguished two separate challenges that plaintiffs must overcome. First, a reliable measure of how much partisan dominance a plan achieves, and second, “a standard for deciding how much partisan dominance is too much.”⁶¹²

It is fairly clear that mid-decade redistricting, incumbent protection, unproportional representation in a single election and pairing minority party incumbents in the same district are not, by themselves, sufficient to support a constitutional claim of partisan gerrymandering.

Table 9 presents the leading cases on partisan gerrymandering.

⁶⁰⁹ 548 U.S. at 447, 483 and 491.

⁶¹⁰ *Id.* at 492.

⁶¹¹ *Id.* at 511.

⁶¹² *Id.* at 420.

Table 9. Partisan Gerrymandering Cases

Burns v. Richardson, [384 U.S. 73, 89](#) (1966) (Hawaii)

The Supreme Court noted that the drawing of district boundaries “in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.”

Kirkpatrick v. Preisler, [394 U.S. 526, 533](#) (1969) (Mo.)

The Supreme Court ruled that, when a state legislature is attempting to draw districts of equal population, “the rule is one of ‘practicability’ rather than political ‘practicality.’” “Problems created by partisan politics cannot justify an apportionment that does not otherwise pass constitutional muster.”

Gaffney v. Cummings, [412 U.S. 735, 754](#) (1973) (Conn.)

The Supreme Court upheld the state legislature’s consideration of “political fairness” between major political parties when drawing legislative districts. (In this case, the plan took into account the party voting results in the preceding three statewide elections and, on that basis, created a proportionate number of Republican and Democratic legislative seats.)

White v. Weiser, [412 U.S. 783, 791, 797](#) (1973) (Texas)

The Supreme Court reaffirmed its earlier holding in *Burns* that district boundaries that have been drawn “in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.”

City of Mobile v. Bolden, [446 U.S. 55](#) (1980) (Ala.)

Although this was a racial multimember district case, the Supreme Court put forth the discriminatory purpose test for violations of the Equal Protection Clause—later used for partisan gerrymandering purposes.

Davis v. Bandemer, [478 U.S. 109](#) (1986) (Ind.)

The Supreme Court held that partisan gerrymandering was a justiciable issue, but ruled that a violation of the Equal Protection Clause by the Indiana legislature had not been proven.

Badham v. Eu, 488 U.S. 1024 (1989), summarily aff’g 694 F. Supp. 664 (N.D. Cal. 1988) (Calif.)

The Supreme Court upheld (without a written opinion) a lower court decision dismissing a partisan gerrymandering challenge to the redistricting of the California congressional delegation.

Vieth v. Jubelirer, [541 U.S. 267](#) (2004) (Pa.)

Because of the lack of any discernible and manageable standards for determining constitutionality, a plurality of the Supreme Court would overturn the ruling of *Davis v. Bandemer* that partisan gerrymandering claims are justiciable.

League of United Latin American Citizens (LULAC) v. Perry, [548 U.S. 399](#) (2006) (Texas)

The Supreme Court did not address the justiciability of partisan gerrymandering claims, but rejected plaintiffs' proposed standard for determining the constitutionality of a partisan gerrymander and ruled that plaintiffs' partisan gerrymandering claim should be dismissed for failure to state a claim on which relief may be granted.

Source: NCSL, 2009.

7. FEDERALISM

Introduction

As race was a dominant issue in redistricting litigation in the 1990s, so was the other race: the race to the courthouse. Following the 2000 round of redistricting, redistricting plaintiffs found themselves with a more sound legal basis for pursuing equitable remedies in state court that, if granted, would result in court-drawn redistricting plans for the legislature or Congress. These legal principles also evidence federal courts' rekindled respect for the principle of federalism.

The trend toward litigation in state and federal courts continued from the 1990s, with a total of 41 states experiencing litigation in either state or federal courts, if not both. Of considerable interest, 28 states experienced some litigation in state court related to legislative redistricting, and an additional 19 had some state litigation related to congressional redistricting. (See *2000s Redistricting Case Summaries*, at geo.commissions.leg.state.mn.us/CaseSum03/.) As in the 1990s, a question of paramount importance was, "How should all this parallel litigation be coordinated?"

The Race Between State and Federal Courts

In a 1965 case, *Scott v. Germano*,⁶¹³ the Supreme Court had recognized that state courts have a significant role in redistricting and ordered the federal district court to defer action until the state authorities, including the state courts, had had an opportunity to redistrict.

In the 1990s, some federal district courts properly deferred action pending the outcome of state proceedings,⁶¹⁴ but others did not.⁶¹⁵

⁶¹³ 381 U.S. 407 (*per curiam*).

⁶¹⁴ See, e.g., *Members of the Cal. Democratic Congressional Delegation v. Eu*, 790 F. Supp. 925 (N.D. Cal. 1992), *rev'd*, *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994) (deferral until conclusion of state proceedings was proper; dismissal "went too far"); *State ex rel. Stephan v. Graves*, No. 92-4097-R, 1992 WL 152251 (D. Kan. June 24, 1992); *Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D. Pa. Aug. 13, 1992) (*per curiam*); Pretrial Order No. 10, *N.A.A.C.P. v. Austin*, No. Civ. 92-72696 (S.D. Mich. Sep. 16, 1992); *Marylanders for Fair Representation Inc. v. Schaefer*, 795 F. Supp. 747 (D. Md. 1992).

⁶¹⁵ See, e.g., *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991), *aff'd sub nom. Richards v. Terrazas*, 112 S. Ct. 3019 (1992) (mem.) and *Slagle v. Terrazas*, 113 S. Ct. 29 (1992) (mem.); *Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 677 (E.D. N.Y. 1992), *injunction stayed sub nom. Gantt v. Skelos*, 504 U.S. 902 (1992) (mem.).

In Minnesota, after a state court had issued a preliminary order correcting the technical errors in the legislative plan enacted by the Legislature, the federal district court enjoined the state court from issuing its final plan.⁶¹⁶ The U.S. Supreme Court summarily vacated the injunction a month later.⁶¹⁷ After the state court issued its final order on the legislative plan and had held its final hearing before adopting a congressional plan, the federal court threw out the state court's legislative plan, issued one of its own, and enjoined the secretary of state from implementing any congressional plan other than the one issued by the federal court.⁶¹⁸ The federal court's order regarding the legislative plan was stayed pending appeal,⁶¹⁹ but the congressional plan was allowed to go into effect for the 1992 election. After the election, the Supreme Court reversed.

In *Grove v. Emison*,⁶²⁰ the Court held that the district court had erred in not deferring to the state court. The Court repeated its words from several previous cases, that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."⁶²¹ As the court said:

Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer.⁶²²

Rather than coming to the rescue of the Minnesota electoral process, the federal court had raced to beat the state court to the finish line, even tripping it along the way.⁶²³ It would have been appropriate for the federal court to have established a deadline by which, if the state court had not acted, the federal court would proceed.⁶²⁴ However, the Supreme Court found that the state court had been both willing and able to adopt a congressional plan in time for the elections.⁶²⁵ The Supreme Court reversed the federal court's decision in its entirety, allowing the state court's congressional plan to become effective for the 1994 election.

Since *Grove*, parties have filed petitions in several states seeking declaratory and injunctive relief that would require the state courts to play an active role in the development of redistricting plans. While the following is by no means an exhaustive list of the cases, it illustrates the varied responses state supreme courts have offered to the opportunity the *Grove* court provide states in the interest of federalism.

⁶¹⁶ *Emison v. Grove*, Order, No. 4-91-202 (D. Minn. Dec. 5, 1991).

⁶¹⁷ *Cotlow v. Emison*, 502 U.S. 1022 (1992) (mem.).

⁶¹⁸ *Emison v. Grove*, 782 F. Supp. 427 (D. Minn. 1992).

⁶¹⁹ *Grove v. Emison*, No. 91-1420 (Mar. 11, 1992) (Blackmun, J., in chambers).

⁶²⁰ 507 U.S. 25 (1993).

⁶²¹ *Id.* at 34.

⁶²² *Id.* at 35.

⁶²³ *Id.* at 37.

⁶²⁴ *Id.* at 34.

⁶²⁵ *Id.*

In *Alexander v. Taylor*,⁶²⁶ the Oklahoma Supreme Court affirmed a lower court's congressional redistricting plan. Citing *Grove*, the court made clear that the Oklahoma courts had a role to play in developing the congressional plan. While no specific provision of statutory or constitutional law clearly granted subject-matter jurisdiction to the courts, the general authority of courts to provide remedies for civil wrongs was an adequate basis to conclude that the courts could proceed. Regarding principles for redistricting, the court made clear that in fashioning a plan it should follow the principles and policies evinced in the most recent congressional redistricting plan.

While the Oklahoma courts had little difficulty in finding a basis for subject-matter jurisdiction and principles for devising a plan, the Mississippi Supreme Court found the matter insoluble in state court. In *Mauldin v. Branch*,⁶²⁷ the Mississippi Supreme Court sitting en banc concluded that Mississippi's statutory scheme for congressional redistricting made the Legislature the sole governmental authority empowered to develop a redistricting plan. The court further noted that equity courts might protect civil and property rights, but the chancery court's subject-matter jurisdiction did not extend to the protection of political rights. In Mississippi, chancery court has subject-matter jurisdiction over certain enumerated causes of action and suits in equity. The court also cited the U.S. District Court opinion in *Smith v. Clark*,⁶²⁸ wherein the federal court was sharply critical of a summary opinion of the Mississippi Supreme Court in *In re Mauldin*,⁶²⁹ in which the Mississippi court concluded that chancery courts do have subject-matter jurisdiction in redistricting cases.

A third approach taken by state courts is that of the Wisconsin Supreme Court in *Jensen v. Wisconsin Elections Bd.*⁶³⁰ In this case, petitioners sought to invoke the original jurisdiction of the Supreme Court to direct a legislative redistricting plan. In denying the relief sought, the court raised concerns about the principles a court should apply in cases wherein the court is called upon to carry out what is a political function. The court also went on to note that since a three-judge federal court had already been constituted to hear a complaint regarding redistricting and that any decision of a Wisconsin court would most likely be attacked collaterally, the court should not entertain the petition as filed. By this approach, the court conceded the race to the parties who filed in federal court.

Each of these cases exemplifies a different approach to subject-matter jurisdiction, competing federal lawsuits, and the sources for principles to guide the courts on devising plans.

It should be noted that, just as some state courts appear unwilling to step into the redistricting fray, some federal courts are not willing to abstain. In *Cano v. Davis*,⁶³¹ a three-judge U.S. District Court refused to defer to two state court actions involving the redistricting of the California State Senate. In refusing to defer or abstain, the court noted that the two state court proceedings dealt with parts of the state other than where the federal court plaintiffs lived, and the remedies granted by the state courts might do little more than address the district boundaries in the areas of contention in the state action. While those knowledgeable in redistricting are aware

⁶²⁶ No. 97836, 51 P.3d 204 (Okla. 2002).

⁶²⁷ No. 2002-CA-00146, 886 So.2d 429 (Miss. 2003).

⁶²⁸ No. 3:01-CV-855WS, 189 F. Supp.2d. 503 (S.D. Miss. 2002).

⁶²⁹ No. 2001-M-01891 (Miss. Dec. 13, 2001).

⁶³⁰ 2002 WI 13, 249 Wis.2d. 706, 639 N.W.2d 537 (2002).

⁶³¹ No. CV 01-08477 MMM (RCx), 191 F. Supp.2d 1140 (C.D. Cal. 2002), *aff'd* 537 U.S. 1100 (2003) (mem.).

that one change in one district can and usually does ripple across the state, it appears that the federal judges were either unaware of this or were not to be persuaded of the obvious.

Federal Court Review of State Court Decisions

Once a state court has completed its work, the Full Faith and Credit Act⁶³² requires a federal court to give the state court's judgment the same effect as it would have in the state's own courts.⁶³³ A federal district court cannot simply modify or reverse the state court's judgment. That may be done only by the U.S. Supreme Court on appeal from or writ of certiorari to the state's highest court.⁶³⁴ This principle is known as the "*Rooker-Feldman* doctrine."⁶³⁵

Although the state court's judgment on a redistricting plan is not subject to review or direct attack in federal district court, the plan remains subject to collateral attack. That is, it may be attacked for different reasons or by different parties in federal court.

The judicial doctrines that establish limits on those collateral attacks are called *res judicata* and collateral estoppel. *Res judicata* translates literally as "the matter has been decided." It means that a decision by a court of competent jurisdiction on a matter in dispute between two parties is forever binding on those parties and any others who were working with ("in privity with") them. *Res judicata* applies when the parties are the same, the cause of action is the same, and the factual issues are the same. If the parties and the issues are the same, but the cause of action is different, the term "collateral estoppel" is used to describe the same concept. What this means for those who draw redistricting plans is that, if an issue was not raised and decided in state court, it is open for decision in a federal court. It also means that, if parties raise in federal court the same issue raised by different parties in state court, the federal court may come to a different conclusion.

How federal review of state court decisions can proceed is illustrated by the parallel litigation over Pennsylvania's congressional districts. In *Nerch v. Mitchell*,⁶³⁶ plaintiffs filed three suits in federal district court that paralleled a suit in state court, *Mellow v. Mitchell*,⁶³⁷ seeking to have the 1982 congressional plan invalidated and, in the absence of legislative action, a new plan drawn by the court. The three-judge federal court stayed its own proceedings pending the outcome of the state court proceedings.

After the Supreme Court of Pennsylvania adopted its congressional plan, the plaintiffs in the three suits challenged the plan on the grounds that its overall range of 57 people violated the Equal Protection Clause of the 14th Amendment and that the reduction of the African American population in District 2 (Philadelphia) and District 14 (Pittsburgh) violated Section 2 of the Voting Rights Act and the 15th Amendment to the U.S. Constitution. Some of the plaintiffs had participated in the state court action and some had not. None of the plaintiffs in the

⁶³² 28 U.S.C. § 1738.

⁶³³ *Parsons Steel Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986).

⁶³⁴ *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

⁶³⁵ See also *Lance v. Dennis*, No. 05-555, 546 U.S. 459 (2006); *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281 (1970).

⁶³⁶ No. 3:CV-92-0095, (M.D. Pa. Aug. 13, 1992) (per curiam).

⁶³⁷ 530 Pa. 44, 607 A.2d 204 (1992), cert. denied sub nom. *Loeper v. Mitchell*, 506 U.S. 828 (1992) (mem.).

state court action were African Americans who were entitled to vote in either of the districts challenged under Section 2.

The federal district court dismissed the complaints of the parties who had participated in the state court action on the basis of the *Rooker-Feldman* doctrine. However, it also found that none of the parties to the state court action had had standing to raise the Section 2 claims, since none were African Americans who were entitled to vote in either of the challenged districts, and that it was therefore proper for the federal court to consider those claims when brought by African American voters in those districts.

In *Johnson v. DeGrandy*,⁶³⁸ where the Florida Supreme Court had rejected a series of challenges to the Legislature's legislative plan "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act,"⁶³⁹ the U.S. Supreme Court found that the parties to the state court proceeding had not had the "full and fair opportunity to litigate" that *res judicata* requires, that the judgment of the Florida Supreme Court was not final under state law, and that the parties to the state court suit were therefore not precluded from bringing the same claims in federal court.⁶⁴⁰ The United States was not barred by the *Rooker-Feldman* doctrine or by *res judicata* from bringing a Section 2 challenge in federal court, since it was not a party to the state court action.⁶⁴¹

In addition to issues of *res judicata* and collateral estoppel, another nuance of post-*Grove* federalism arising from decisions in the 2000s should be pointed out. While we now know that state courts can play a role in the redistricting process, that role cannot cause delays in the implementation of plans that could affect qualifying deadlines and primaries. In *Branch v. Smith*,⁶⁴² the U.S. Supreme Court upheld a federal district court-devised plan and injunction against state court action in Mississippi's congressional redistricting. The court affirmed the district court's basis for its ruling on the ground that a state court plan could not be made final and submitted to the Department of Justice under Section 5 of the Voting Rights Act in time for the 2002 qualifying deadlines for Mississippi's congressional primaries. Litigants in other covered jurisdictions should take note of the possibility that state court action brought to draw new districts could be enjoined if a federal court plaintiff can make a reasonable argument that preclearance timelines could affect candidates qualifying for primary elections.

While case law from the 2000 cycle of redistricting still makes clear the proposition that state courts have a role to play in the redistricting process, legislators and potential litigants should remain mindful of a constitutional argument that could result in state courts losing their authority to redraw congressional district boundaries. This argument is based on the elections clause of the United States Constitution, [Article 1, Section 4](#):

The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

⁶³⁸ 512 U.S. 997 (1994).

⁶³⁹ 597 So.2d at 285-286.

⁶⁴⁰ 512 U.S. 997, 1004-05, slip op. at 6-7.

⁶⁴¹ *Id.* at 1006, slip op. at 8.

⁶⁴² 538 U.S. 254 (2003).

In *Branch v. Smith*⁶⁴³ and *Lance v. Coffman*,⁶⁴⁴ the U.S. Supreme Court declined to rule on the merits of arguments raising the elections clause. In *Branch*, the court affirmed a district court decision enjoining a state court in Mississippi from implementing a court-drawn congressional plan but vacated the portion of the decision based on the elections clause. In *Coffman*, the court dismissed the complaint of four citizens on the basis of their lacking standing to sue under the elections clause.

It is entirely possible that claims will be raised in federal court collaterally attacking a state court congressional redistricting plan.

Federal Court Deferral to State Remedies

After a federal court has determined that a state redistricting plan violates federal law, it will usually allow the state authorities a reasonable time to conform the plan to federal law. In North Carolina, Georgia⁶⁴⁵ and Texas,⁶⁴⁶ the federal district court that had struck down a congressional plan as a racial gerrymander allowed the legislature an opportunity to correct the plan at its next session. Only when the Georgia⁶⁴⁷ and Texas⁶⁴⁸ legislatures failed to enact a corrected plan did the federal courts in those states impose plans of their own. In contrast, however, the federal district court in Florida imposed a legislative plan of its own within three hours of having struck down the plan enacted by the Legislature and approved by the Florida Supreme Court. The court's order imposing its plan was immediately stayed by the U.S. Supreme Court⁶⁴⁹ and eventually was reversed on the merits without comment on the conduct of the district court in so hastily imposing a remedy.⁶⁵⁰

If the state's legislative and judicial branches fail to conform a redistricting plan to federal law after having been given a reasonable opportunity to do so, a federal court can impose its own remedy. Even then, however, the federal court must follow discernible state redistricting policy to the fullest extent possible.⁶⁵¹ The federal court must adopt a plan that remedies the violations but incorporates as much of the state's redistricting law as possible.⁶⁵²

⁶⁴³ *Id.*

⁶⁴⁴ No. 06-641, 549 U.S. 437(2007).

⁶⁴⁵ *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 515 U.S. 900 (1995).

⁶⁴⁶ *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

⁶⁴⁷ *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995) and 922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom. Abrahms v. Johnson*, 521 U.S. 74 (1997).

⁶⁴⁸ *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996); 980 F. Supp. 251 (S.D. Tex. 1997); 980 F. Supp. 254 (S.D. Tex. 1997).

⁶⁴⁹ *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992) (mem.).

⁶⁵⁰ See *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

⁶⁵¹ *Upham v. Seamon*, 456 U.S. 37 (1982).

⁶⁵² *Id.* at 43; *White v. Weiser*, 412 U.S. 783, 793-97 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971).

Representing the Legislature in Federal Court

Although the U.S. Supreme Court has been unanimous in holding that a federal court must defer to a state court that is in the process of redistricting,⁶⁵³ in *Lawyer v. Dept. of Justice* it split 5-4 on the question of what procedure a federal court should follow when deferring to a state legislature whose redistricting plan has come under attack.⁶⁵⁴

Florida Senate District 21 (Tampa Bay) had been challenged in federal court on the ground that it violated the Equal Protection Clause of the U.S. Constitution. The district had been drawn by the Florida Legislature; the Justice Department had refused to preclear it because it failed to create a majority-minority district in the area; the governor and legislative leaders had refused to call a special session to revise the plan; the state Supreme Court, performing a review mandated by the Florida Constitution before the plan could be put into effect, had revised the plan to accommodate the Justice Department's objection; and the plan had been used for the 1992 and 1994 elections. A suit had been filed in April 1994, and a settlement agreement was presented for court approval in November 1995. The Florida attorney general appeared representing the State of Florida, and lawyers for the president of the Senate and the speaker of the House appeared representing their respective bodies. All parties but two supported the settlement agreement, and in March 1996 the district court approved it. Appellants argued that the district court had erred in not affording the Legislature a reasonable opportunity to adopt a substitute plan of its own. The Supreme Court did not agree.

Justice Stevens, writing for the majority, found that action by the Legislature was not necessary. He found that the state was properly represented in the litigation by the attorney general and that the attorney general had broad discretion to settle it without either a trial or the passage of legislation.⁶⁵⁵

Justice Scalia, writing for the four dissenters, argued that:

The "opportunity to apportion" that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.⁶⁵⁶

Conclusion

As in the 1990s and 2000s, state court litigation over redistricting plans based on the 2010 census is a continuing possibility. While a few ominous notes sounded above indicate some federal courts' unwillingness to defer to state courts, the trend toward state court litigation continues to grow. Once the state court proceedings are concluded, and even while they are in progress, legislatures must be prepared to defend the plans in federal court as well. In both courts, legislatures will want to remain on good terms with their attorney general, or seek the right to represent the legislature through an independent counsel.

⁶⁵³ *Growe v. Emison*, 507 U.S. 25 (1993).

⁶⁵⁴ 521 U.S. 567 (1997).

⁶⁵⁵ 521 U.S. 567, 577-78.

⁶⁵⁶ 521 U.S. 567, 589.

8. MULTIMEMBER DISTRICTS

Introduction

As of 2009, 13 states still had multimember districts in at least one of their legislative bodies, as shown in table 10. Before the 1982 amendments to the Voting Rights Act, challenges to the use of multimember legislative districts had been based upon alleged discrimination in violation of the 14th Amendment (the Equal Protection Clause) or the 15th Amendment (the right of citizens to vote) to the U.S. Constitution. The question of the constitutional validity of multimember districts had “focused not on population-based apportionment but on the quality of representation afforded by the multimember districts as compared with single-member districts.”⁶⁵⁷ However, as a result of the Supreme Court’s holdings in *City of Mobile v. Bolden*⁶⁵⁸ and *Thornburg v. Gingles*,⁶⁵⁹ and the Voting Rights Act amendments of 1982, it seems likely that, henceforth, courts will consider challenges by racial groups to multimember districts under the Voting Rights Act as amended in 1982 and not under the Equal Protection Clause of the 14th Amendment. (The Voting Rights Act is examined in detail in [chapter 4](#).) The following overview of the case law regarding multimember legislative districts includes a discussion of challenges to multimember legislative districts by racial groups or on a partisan basis, an examination of a preference discouraging multimember legislative districts in court-constructed redistricting plans, and a discussion of the relevant law concerning congressional districts.

⁶⁵⁷ *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971).

⁶⁵⁸ 446 U.S. 55 (1980).

⁶⁵⁹ 478 U.S. 30 (1986).

Table 10. Multimember Districts in Each State

	State Houses						State Senates					
	Number of Districts		Number of Multimember Districts		Largest Number of Seats in a District		Number of Districts		Number of Multimember Districts		Largest Number of Seats in a District	
	1990s	2000s	1990s	2000s	1990s	2000s	1990s	2000s	1990s	2000s	1990s	2000s
Arizona	30	30	30	30	2	2						
Arkansas	97	100	2	0	3	1						
Idaho	35	35	35	35	2	2						
Maryland	63	65	44	44	3	3						
Nevada							16	19	5	2	2	2
New Hampshire	195	103	99	92	11	13						
New Jersey	40	40	40	40	2	2						
North Carolina	98	120	17	0	3	1	42	50	8	0	2	1
North Dakota	49	94	49	47	2	2						
South Dakota	35	37	35	33	2	2						
Vermont	108	108	42	42	2	2	13	13	10	10	6	6
Washington	49	49	49	49	2	2						
West Virginia	56	56	23	23	7	7	17	17	17	17	2	2

Source: NCSL, 2009.

Judicial Review of Multimember Districts

Today, a challenge to multimember legislative districts typically will arise when a racial group is of sufficient population that, if placed in a single-member legislative district, the racial group would constitute either a majority of the population or a significant percentage of the population in that district. As a majority or significant percentage of the population of a single-member legislative district, the racial group would have a considerable effect on the outcome of elections in the district. However, when placed in a multimember legislative district and combined with a larger population of another race, the racial group becomes a significantly smaller percentage of the population in the district and, consequently, its effect on the outcome of elections is proportionately diminished.

The question of the constitutional validity of multimember legislative districts has been reviewed by the U.S. Supreme Court since the first of the modern reapportionment cases.⁶⁶⁰ In 1964, in *Reynold v. Sims*,⁶⁶¹ the Supreme Court held that the Equal Protection Clause of the 14th Amendment to the U.S. Constitution requires that seats in both houses of a bicameral state legislature must be apportioned based on population.⁶⁶² With respect to the effect of this equal protection standard on the concept of bicameralism and its continued justification, the Supreme Court commented, in dictum, that “[o]ne body could be composed of single-member districts while the other could have at least some multimember districts.”⁶⁶³ In 1965, the Supreme Court cited this dictum in *Fortson v. Dorsey*, when it rejected the notion that the equal protection standard necessarily requires the formation of single-member districts.⁶⁶⁴ The Court in *Fortson* found that a redistricting plan that consisted of a mixture of multimember and single-member districts did not on its face deny residents in a multimember district a vote approximately equal in weight to that of voters in a single-member district. In 1966, the Court reaffirmed this position in *Burns v. Richardson*, stating that:

Where the requirements of *Reynolds v. Sims* are met, apportionment schemes including multimember districts will constitute an invidious discrimination only if it can be shown that “designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.”⁶⁶⁵

Application of the Equal Protection Clause

In 1973, the Court in *White v. Regester* upheld a lower court finding that certain multimember legislative districts were in violation of the Equal Protection Clause. In reaching this conclusion, the Court stated:

Plainly, under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.⁶⁶⁶

⁶⁶⁰ 377 U.S. 533, 577 (1964).

⁶⁶¹ 377 U.S. 533.

⁶⁶² *Id.* at 577.

⁶⁶³ *Id.*

⁶⁶⁴ 379 U.S. 433, 436 (1965).

⁶⁶⁵ 384 U.S. 73, 88 (1966).

⁶⁶⁶ 412 U.S. 755, 765-66 (1973) (citations omitted).

Thus, the Supreme Court invalidated the use of multimember legislative districts in two Texas counties because the redistricting plan had operated to cancel out or minimize the voting strength of Black and Mexican American communities.

However, starting with *Whitcomb v. Chavis* in 1971, the Supreme Court acknowledged that multimember districts violate the Equal Protection Clause if the districts were “conceived or operated as purposeful devices to further racial or economic discrimination.”⁶⁶⁷ In its 1980 decision in *City of Mobile v. Bolden*,⁶⁶⁸ the Supreme Court, citing *Whitcomb v. Chavis*, refused to find a violation of the Equal Protection Clause of the 14th Amendment,⁶⁶⁹ the 15th Amendment (the right of citizen’s to vote),⁶⁷⁰ or Section 2 of the Voting Rights Act because the Court found that the plaintiffs failed to show a discriminatory purpose.⁶⁷¹

In *Rogers v. Lodge*,⁶⁷² the Supreme Court reaffirmed its holding in *Bolden* and upheld, for the first time since *Regester* nine years earlier, a lower court finding of a violation of the Equal Protection Clause in the use of multimember districting (albeit a county governing board rather than a state legislative body). Just two days before the Supreme Court handed down its decision in *Rogers v. Lodge*, the 1982 amendments to the Voting Rights Act were signed into law.

The Supreme Court first construed the 1982 amendments to the Voting Rights Act in *Thornburg v. Gingles*.⁶⁷³ In that decision, the Court explained that:

The amendment [Section 2] was largely a response to this Court’s plurality opinion in *Mobile v. Bolden*, which had declared that, in order to establish a violation of either § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose. Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the “results test.”⁶⁷⁴

Therefore, the Supreme Court applied the new standard set forth in Section 2 (discriminatory results) to the case, rather than proceeding under the more difficult constitutional standard (discriminatory purpose and discriminatory results).

⁶⁶⁷ 403 U.S. 124, 149 (1971).

⁶⁶⁸ 446 U.S. 55 (1980).

⁶⁶⁹ *Id.* at 66.

⁶⁷⁰ *Id.* at 65.

⁶⁷¹ *Id.* at 61.

⁶⁷² 458 U.S. 613 (1982).

⁶⁷³ 478 U.S. 30 (1986).

⁶⁷⁴ *Id.* at 35 (citations omitted).

In *Thornburg*, the Supreme Court reaffirmed that multimember legislative districts and at-large election schemes do not, *per se*, violate the rights of minority voters.⁶⁷⁵ The Court stated that minority voters who contend that the multimember form of districting violates their constitutional rights must prove that the use of a multimember electoral structure operates to minimize or cancel their ability to elect their preferred candidates.⁶⁷⁶ Specifically, the Court held that, unless there is a conjunction of the following circumstances, the use of multimember legislative districts generally will not impede the ability of minority voters to elect representatives of their choice:

1. The minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member legislative district;
2. The minority group must show that it is politically cohesive; and
3. The minority group must demonstrate that the majority votes sufficiently as a bloc to enable the majority to usually defeat the preferred candidate of the minority.⁶⁷⁷

(An in-depth discussion of the holdings in *Thornburg* and related cases can be found in [chapter 4](#).)

Challenges by Political Parties

In 1986, the Supreme Court held that political gerrymandering cases are properly justiciable under the Equal Protection Clause of the 14th Amendment.⁶⁷⁸ A constitutional challenge to multimember legislative districts based on a claim of partisan gerrymandering generally arises when a political group alleges that the use of multimember legislative districts has diminished its influence on the political process. However, to succeed in such a claim, the plaintiffs must prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.⁶⁷⁹ (Partisan gerrymandering is examined in detail in [chapter 6](#).)

Districts Drawn by Courts

In the 1970s, the Supreme Court made clear its preference for single-member legislative districts by discouraging the use of multimember districts in court-drawn plans. In *Connor v. Johnson*, the Court held that, as a general rule, single-member districts are preferable to large multimember districts when district courts are required to fashion apportionment plans.⁶⁸⁰ Similarly, in *Chapman v. Meier*, the Supreme Court stated that “(t)he standards for evaluating the use of multimember districts thus clearly differ depending on whether a federal court or a state legislature has initiated the use ... Absent particularly pressing features calling for multimember districts, a United

⁶⁷⁵ *Id.* at 48.

⁶⁷⁶ *Id.* at 48.

⁶⁷⁷ *Id.* at 50-51.

⁶⁷⁸ *Davis v. Bandemer*, 478 U.S. 109 (1986).

⁶⁷⁹ *Id.* at 127.

⁶⁸⁰ 402 U.S. 690, 692 (1971).

States district court should refrain from imposing them upon a State.”⁶⁸¹ However, a U.S. Court of Appeals has held that the preference for single-member districts in court-drawn plans “is not an unyielding one” and a court-drawn plan can use multimember districts if the court determines that 1) significant interests, which are not rooted in racial discrimination, would be advanced by the use of multimember districts and the use of single-member districts would jeopardize constitutional requirements; or 2) multimember districts afford minorities a greater opportunity for participation in the political processes than do single-member districts.⁶⁸²

Congressional Districts

In 1967, Congress enacted legislation that provided that, in each state entitled to more than one representative under an apportionment made pursuant to the decennial census of the population, “there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.”⁶⁸³ However, Congress has not repealed legislation enacted in 1929 providing to the contrary that:

Until a State is redistricted in the manner provided by the law thereof after any apportionment ... (2) if there is an increase in the number of Representatives, such additional ... Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State ... or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.⁶⁸⁴

Addressing the inconsistency between the statutes enacted in 1929 and 1967, a U.S. District Court (in a decision affirmed by the U.S. Supreme Court) held that the 1967 statute ([section 2c](#)), repealed by implication [section 2a\(c\)\(5\)](#), which addressed a decrease in the number of representatives as a result of reapportionment.⁶⁸⁵ The district court found that nothing in [section 2c](#) suggested any limitation on its applicability, and that the floor debate on the legislation enacting [section 2c](#) indicated that Congress intended to eliminate the possibility of at-large elections, including those in situations where the legislature had failed to enact a plan.⁶⁸⁶ It would appear that the reasoning of the district court with respect to [2 U.S.C. § 2a\(c\)\(5\)](#) would equally apply to the provision concerning increases in the number of representatives set forth in [2 U.S.C. § 2a\(c\)\(2\)](#).

⁶⁸¹ [420 U.S. 1, 18-19](#) (1975).

⁶⁸² *Zimmer v. McKeithen*, 485 F.2d 1297, 1308 (5th Cir. 1973), *aff'd per curiam on other grounds sub nom. East Carroll Parish Sch. Bd. v. Marshall*, [424 U.S. 636](#) (1976).

⁶⁸³ [2 U.S.C. § 2c](#).

⁶⁸⁴ [2 U.S.C. § 2a\(c\)](#).

⁶⁸⁵ *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 926 (W.D. Mo. 1982), *aff'd sub nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982) (mem.).

⁶⁸⁶ *Id.*

Conclusion

The U.S. Supreme Court has held that the use of multimember legislative districts is not unconstitutional *per se*. However, the Court has invalidated the use of multimember legislative districts where their use impedes the ability of minority voters to elect representatives of their choice. Multimember districts that discriminate against a racial group will most likely be challenged under Section 2 of the Voting Rights Act, which requires only showing that an election practice results in discrimination.

Challenges to multimember legislative districts on the ground that the districts discriminate against members of a political party will continue to be raised under the Equal Protection Clause of the 14th Amendment. In these cases, a discriminatory purpose and discriminatory results are necessary elements of a successful challenge.

The Supreme Court has made clear its preference for single-member legislative districts by discouraging the use of multimember districts in court-drawn plans absent extraordinary circumstances. Congress has prohibited multimember districts for the purposes of redistricting seats in the U.S. House of Representatives. Table 11 summarizes multimember district cases.

Table 11. Multimember District Cases

Fortson v. Dorsey, 379 U.S. 433, 436 (1965) (Ga.)

The Supreme Court, affirming its position in *Reynolds v. Sims*, 377 U.S. 533 (1964), held that the Equal Protection Clause does not necessarily require the formation of all single-member districts.

Burns v. Richardson, 384 U.S. 73, 88 (1966) (Hawaii)

The Supreme Court ruled that the Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single-member legislative districts.

Connor v. Johnson, 402 U.S. 690, 692 (1971) (Miss.)

The Supreme Court stated that, in court-ordered reapportionment schemes, “we agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multimember districts as a general matter.”

Whitcomb v. Chavis, 403 U.S. 124, 143 (1971) (Ind.)

The Supreme Court reaffirmed its holding that the use of multimember state legislative districts is not, *per se*, unconstitutional under the Equal Protection Clause, but may be “subject to challenge where the circumstances of a particular case may ‘operate to minimize or cancel out the voting strength of racial or political elements of the voting population.’”

Connor v. Williams, 404 U.S. 549, 551 (1972) (Miss.)

The Supreme Court affirmed its preference for single-member districts in court-ordered reapportionment plans.

White v. Regester, 412 U.S. 755, 765 (1973) (Texas)

The Supreme Court, affirming the district court’s findings, invalidated the use of multimember districts in two Texas counties because the Black and Mexican American communities had been “effectively excluded from participation in the Democratic primary selection process.”

Chapman v. Meier, 420 U.S. 1, 19 (1975) (N.D.)

The Supreme Court held that, “[a]bsent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State.”

City of Mobile v. Bolden, 446 U.S. 55 (1980) (Ala.)

The Supreme Court ruled that a discriminatory purpose, as well as a discriminatory result, was necessary for an Equal Protection Clause violation.

Rogers v. Lodge, [458 U.S. 613](#) (1982) (Ga.)

The Supreme Court reaffirmed its ruling requiring a discriminatory purpose, but also upheld a lower court ruling of unconstitutional multimember districting.

Thornburg v. Gingles, [478 U.S. 30](#) (1986) (N.C.)

The Supreme Court applied the new Voting Rights Act language for racial multimember district violation, which necessitated looking only to discriminatory results.

Source: NCSL, 2009.

9. REDISTRICTING LOCAL GOVERNMENTS

State political subdivisions that have general governmental powers have been subjected over time to most of the same legal standards for redistricting as have the states. Justice White opined for a majority of the U.S. Supreme Court in *Avery v. Midland County*, that “We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns and counties.”⁶⁸⁷

The U.S. Supreme Court did recognize in the *Avery* case that neither the Court nor the U.S. Constitution should throw up “roadblocks in the path of innovation, experiment, and development among units of local government.”⁶⁸⁸ As a consequence of this reasoning, the Court has allowed greater latitude to political subdivisions regarding equal population standards than to larger political units. As the Court said in *Abate v. Mundt*:

[T]he facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes⁶⁸⁹

In general, the lower federal courts have allowed an overall range of up to 10 percent.⁶⁹⁰ Nonetheless, in *Hulme v. Madison County*,⁶⁹¹ the District Court for the Southern District of Illinois ruled that a county apportionment plan with an overall range of 9.3 percent was unconstitutional because plaintiffs proved that the apportionment

⁶⁸⁷ 390 U.S. 474, 481 (1968).

⁶⁸⁸ *Id.* at 485.

⁶⁸⁹ 403 U.S. 182, 185 (1971).

⁶⁹⁰ See, e.g., *Moore v. Itawamba County*, No. 05-60060, 431 F.3d 257, 259 (5th Cir. 2005) (stating that “[w]ith a deviation less than ten percent, a plaintiff must prove that the redistricting process was tainted by arbitrariness or discrimination” and rejecting challenge of a plan with a 9.38 percent overall range due to lack of facts in the record supporting allegations of bad faith, arbitrariness or discrimination); and *Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 312, 314, 317 (E.D.N.Y. 2003) (stating that a county redistricting plan with an overall range of 8.94 percent is presumptively constitutional and rejecting “conclusory allegations of ‘bad faith’” and political motivations as insufficient to overcome the presumption).

⁶⁹¹ 188 F. Supp. 2d 1041, 1051-52 (S.D. Ill. 2001).

process demonstrated a “complete disregard for the Constitutional mandate that a legislative body make ‘an honest and good faith effort to construct districts...as nearly of equal population as practicable’” when the chairman of the apportionment committee took threatening and coercive actions, the plan divided political subdivisions, minority party incumbents were placed in the same district, and technology could have easily made more equitable distributions.

Some lower federal courts have followed the lead of the Supreme Court and permitted those “slightly greater percentage deviations.”⁶⁹² They have not, however, accepted every argument that affording representation to political subdivisions justifies a deviation greater than 10 percent.⁶⁹³

The most apparent differences between local jurisdiction redistricting and state and congressional redistricting tend to be dissimilarities of scale and complexity. Although it may be easier to redistrict the state of Montana than New York City, in most instances local jurisdiction redistricting will be less complex than either state or congressional redistricting.

The sheer number and variety of “players,” i.e., office holders, special interest groups and interested parties, generally is smaller in local redistricting than at the higher levels. It is considerably easier to comply with the neutral redistricting principles of compactness and contiguity in local jurisdictions—such as municipalities with census boundaries that run for the most part on existing street grids—than it is to satisfy those principles at the state level where large expanses of sparsely populated areas must be taken into account.

The same is generally true for the “communities of interest” redistricting principle. Although sometimes a topic of heated debate, most local jurisdictions have readily recognizable neighborhoods that are clearly “communities of interest” for redistricting purposes, while less developed areas outside most local jurisdiction boundaries tend to be less identifiable.

Racial principles for redistricting, however, have been applied to local jurisdictions as well as to states. There are many local jurisdictions in 16 different states that fall under the provisions of Section 5 of the Voting Rights Act,⁶⁹⁴ which require preclearance by the federal justice department of any change in the election procedures or districts in those jurisdictions. All local jurisdictions fall under the aegis of Section 2 of the Voting Rights Act.⁶⁹⁵

⁶⁹² See, e.g., *Frank v. Forest County*, 194 F. Supp. 2d 867 (E.D. Wis. 2002) (ruling that a county districting plan with an overall range of 18.03 percent and an average deviation of 3.585 percent was constitutional because the county had a rational policy of protecting communities of interest based on public services and school district boundaries and districts were drawn with regard to traditional redistricting principles), *aff'd*, No. 02-2433, 336 F.3d 570 (7th Cir. 2003) (affirming constitutionality of county plan stating that the “10 percent rule...was devised for elections in large electoral units” and that plans districting small populations unevenly distributed across a geographical area are more easily proved constitutional over 10 percent), *cert. denied* 540 U.S. 1106 (2004).

⁶⁹³ See, e.g., *Regensburger v. City of Bowling Green*, No. 99-3928, 278 F.3d 588 (6th Cir. 2002) (ruling that the city apportionment plan with a deviation from absolute population equality of at least 66.85 percent exceeded constitutional limits despite advancing a rational state policy); *Blackmoon v. Charles Mix County*, No. CIV-05-4017, 2005 U.S. Dist. LEXIS 27551, 2005 WL 2738954 (D. S.D. October 24, 2005) (ruling that a county redistricting plan with a 19.02 percent overall range was unconstitutional despite the county’s asserted justification of maintaining the integrity of political subdivisions, due to the county’s admission that the deviation was greater than necessary to keep the political subdivision intact), *summary judgment denied, motion to dismiss denied*, No. CIV-05-4017, 505 F. Supp. 2d 585 (D. S.D. 2007).

⁶⁹⁴ 42 U.S.C. Sec.1973c; Appendix to 28 C.F.R. Part 51 (2007).

⁶⁹⁵ 42 U.S.C. Sec. 1973.

The U.S. Supreme Court has repeatedly held in disfavor local multimember district plans that dilute minority voting strength.⁶⁹⁶ The Court established the now-famous “not-retrogression standard” in *Beer v. United States*,⁶⁹⁷ a Voting Rights Act challenge to the combination at-large and ward election system in the city of New Orleans. The “objective criteria” to determine racial discrimination that must be analyzed to arrive at a judgment on the “totality of circumstances” review required by *Thornburg v. Gingles*⁶⁹⁸ actually originated in local jurisdiction redistricting cases.⁶⁹⁹

More recently, courts have applied the rulings in *Shaw v. Reno*⁷⁰⁰ and *Bush v. Vera*⁷⁰¹ to local governments. In *Clark v. Putnam County*,⁷⁰² the Eleventh Circuit Court of Appeals held a county redistricting plan unconstitutional as racial gerrymandering because it found that race was the predominant factor in the redistricting and the county failed to show that the districts were narrowly tailored to satisfy some compelling state interest.

⁶⁹⁶ See *Chapman v. Meier*, 420 U.S. 1, 20 (1975), *White v. Regester*, 412 U.S. 755 (1973), and *Conner v. Finch*, 431 U.S. 407 (1977).

⁶⁹⁷ 425 U.S. 130 (1976).

⁶⁹⁸ 478 U.S. 30 (1986).

⁶⁹⁹ See *Zimmer v. McKeithen*, 485 F.2d 1297 (1973) and *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

⁷⁰⁰ 509 U.S. 630 (1993).

⁷⁰¹ 517 U.S. 952 (1996).

⁷⁰² No. 01-10859, 293 F.3d 1261 (11th Cir. 2002).

10. REDISTRICTING THE COURTS

The U.S. Supreme Court affirmed without comment in 1986⁷⁰³ and 1990⁷⁰⁴ lower court decisions that applied Section 5 of the Voting Rights Act to judicial districts. In 1991, the Court in *Clark v. Roemer*⁷⁰⁵ affirmed its earlier decisions requiring jurisdictions covered by Section 5 to obtain Section 5 preclearance before implementing any changes affecting voting in judicial districts. The Court has continued that position as recently as 1996 in *Lopez v. Monterey County*.⁷⁰⁶

In addition to applying Section 5 preclearance provisions to judicial districts, the Supreme Court, since 1991, has held that judicial elections are subject to Section 2 of the Voting Rights Act.⁷⁰⁷

The courts seem to have little or no problem evaluating cases for compliance with Section 5. However, no case has reached the Supreme Court where the court has set forth procedures for first determining if there is a Section 2 vote violation and second determining what remedies must be applied to overcome the violation.

The Supreme Court has affirmed its holding that the one person, one vote standard does not apply to a judicial election,⁷⁰⁸ but has rejected the position that a vote dilution case cannot be proved without the one person, one vote standard.⁷⁰⁹

Section 2 challenges to judicial districts have been brought in numerous states since 1990, and the various courts have found problems dealing with the challenges. Most courts require plaintiffs to satisfy the three-prong *Gingles*⁷¹⁰ test to prove vote dilution. Then, applying the “totality of circumstances” test, the courts, when

⁷⁰³ *Haith v. Martin*, 618 F Supp 410 (E.D. N.C. 1985, *aff'd*, 477 U.S. 901 (1986) (mem.).

⁷⁰⁴ *Brooks v. Georgia St. Bd. of Elections*, 775 F. Supp. 1470, *aff'd*, 498 U.S. 916 (1980) (mem.).

⁷⁰⁵ 500 U.S. 646, 653 (1991).

⁷⁰⁶ 519 U.S. 9 (1996).

⁷⁰⁷ *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers Ass’n v. Texas Attorney Gen.*, 501 U.S. 419 (1991).

⁷⁰⁸ 501 U.S. 380, 402; *see also Wills v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972) *aff'd*, 409 U.S. 1095 (1973) (mem.).

⁷⁰⁹ 501 U.S. 380, 403.

⁷¹⁰ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

considering the importance of “linkage” (that a judge serve the entire jurisdiction from which he or she is elected), have had difficulty with perfecting a remedy. Remedies such as single-member districts, cumulative voting, or increasing the size of the court have created serious problems so that, for the most part, those remedies have been rejected.

A judicial election case of note in the Sixth Circuit is *Cousin v. Sundquist*.⁷¹¹ The Sixth Circuit applied the three-prong *Gingles* test and found that the plaintiffs did not meet it. The court rejected as a remedy either cumulative voting or subdistricting (single-member districts).

⁷¹¹ 145 F.3d 818 (6th Cir. 1998), *cert. denied* 525 U.S. 1138 (1999).

11. ENACTING A REDISTRICTING PLAN

Introduction

This chapter reviews the procedures states have used to enact legislative and congressional redistricting plans. A major question considered is whether to write into the law a metes and bounds description of the districts, list in the law the census tracts and blocks in each portion of a city or town that is split, or enact maps instead of either a legal description or a list of census units.

What the States Have Done

Enacting Plans

During the 2000s, 16 states⁷¹² used legislative plans drawn by a commission. In these states, when the commission has agreed upon a plan, it files the plan, in the form of maps and a table of census units in each district, with the secretary of state or other chief election officer, who proceeds to implement it. Twelve states⁷¹³ used plans drawn by a court. When a court draws a plan, it issues an order adopting the plan, consisting of maps and a table of census units, and orders the chief election officer to implement it. Courts frequently must amend their orders, but those amendments do not appear in the statutes.⁷¹⁴

One procedural step required of the Pennsylvania commission, and followed by the Minnesota and California state courts, is to issue a preliminary plan and allow interested parties to comment on it. The Pennsylvania Constitution requires a comment period of at least 30 days before the plan becomes final.⁷¹⁵

⁷¹² Alaska, Arizona, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Illinois, Maine, Missouri, Montana, New Jersey, Ohio, Pennsylvania, Texas and Washington.

⁷¹³ Colorado (congressional), Georgia (legislative), Maine (congressional and senate), Minnesota, Mississippi (congressional), New Hampshire (legislative), New Mexico (congressional), Oklahoma (congressional), Oregon (congressional), South Carolina, Texas (house and congressional) and Wisconsin (legislative).

⁷¹⁴ See, e.g., *In re 2003 Apportionment of the State Senate and U. S. Congressional Districts*, 2004 ME 55 (April 22, 2004).

⁷¹⁵ Pa. Const. art. 2, § 17.

In the 2000s, Arkansas, Iowa and West Virginia enacted congressional plans based on whole counties.⁷¹⁶ Those plans took less than a page of statutory language.⁷¹⁷ Five states⁷¹⁸ used whole precincts or wards, listing whole counties, whole cities and towns, and the precincts or wards in cities that were split. In order to be able to use whole precincts, some of those states⁷¹⁹ allowed their local governments to redraw precinct boundaries before drawing legislative and congressional boundaries.

Twenty-nine⁷²⁰ of the legislatures that enacted legislative or congressional plans for the 2000s did so by listing the census units in each district, rather than by drawing a metes and bounds description. Virginia avoided the problem of describing split cities and towns by describing them in the law only as “part” and filing with the clerk of the Senate (for senate districts) and the clerk of the House (for house districts) a statistical report showing the blocks assigned to each district.⁷²¹ Oklahoma enacted a house plan listing the census tracts and blocks in each district, but also instructed the state Department of Transportation to publish maps and a metes and bounds description of the districts and provide them to the State Election Board.⁷²²

Ten state legislatures⁷²³ enacted plans in the 2000s by listing the whole counties, cities and towns in a district and drawing a metes and bounds description of the line splitting a city or town.

Minnesota contemplates that a redistricting plan can be enacted by reference to the computer plan file used to produce maps and reports describing the plan to the members and the public. A statute⁷²⁴ requires that, upon enactment of a redistricting plan, the plan be deposited with the secretary of state and used to inform the county auditors and city clerks of the precise boundaries of each district. The revisor of statutes must prepare the legal description for publication in Minnesota Statutes. Any additional refinements found necessary must be presented in bill form to the next Legislature. In 2002, the court used this procedure to file its plan with the secretary of state. No metes and bounds description was published.

⁷¹⁶ See Ark. Code §§ 7-2-101 to -105 (2009); Ia. Code Ann. § 40.1 (2009); W. Va. Code § 1-2-3 (2008).

⁷¹⁷ *Id.*

⁷¹⁸ Indiana (congressional, house), Massachusetts, New Hampshire, New Mexico and Wisconsin.

⁷¹⁹ New Hampshire and Wisconsin.

⁷²⁰ Alabama, California, Delaware, Florida, Georgia (congressional), Illinois (congressional), Indiana (senate), Kansas, Kentucky, Louisiana, Maine (house), Maryland, Michigan, Missouri (congressional), Nevada, North Carolina, Ohio (congressional), Oklahoma (legislative), Oregon, Pennsylvania (congressional), South Carolina, South Dakota, Tennessee, Texas (congressional), Virginia, Washington, West Virginia (legislative), Wisconsin (congressional) and Wyoming.

⁷²¹ Va. Code § 24.2-303.1 (senate), Va. Code § 24.2-304.01 (house) (2009).

⁷²² Okla. Stat. Ann. tit. 14, § 130 (2009).

⁷²³ Idaho, Iowa (legislative), Maine (senate), Massachusetts, Mississippi (legislative), Nebraska, New York, North Dakota, Rhode Island and Vermont (house).

⁷²⁴ Minn. Stat. § 2.91 (2008).

In the 2000s, Utah enacted its plans by reference to maps filed with the lieutenant governor,⁷²⁵ and made them available for viewing on the lieutenant governor's website.⁷²⁶

Table 12 shows the method used by each of the states to adopt redistricting plans for seats in Congress, the Senate, and House of Representatives or Assembly based on the 2000 census.

Table 12. Method of Adopting Redistricting Plans in the 2000s

	Metes and Bounds	List of Census Units	Maps and Census Units
Alabama		C, S, H	
Alaska			S, H
Arizona			C, S, H
Arkansas	C		S, H
California		C, S, A	
Colorado			C, S, H
Connecticut			C, S, H
Delaware		S, H	
Florida		C, S, H	
Georgia		C	S, H
Hawaii			C, S, H
Idaho	C, S, H		
Illinois		C	S, H
Indiana	C, H	S	
Iowa	C, S, H		
Kansas		C, S, H	
Kentucky		C, S, H	
Louisiana		C, S, H	
Maine	S	H	
Maryland		C, S, H	
Massachusetts	C, S, H		
Michigan		C, S, H	
Minnesota			C, S, H
Mississippi			C, S, H
Missouri		C	S, H
Montana			S, H
Nebraska	C, S		
Nevada		C, S, H	
New Hampshire	C, S, H		

⁷²⁵ See Utah Code § 20A-13-1-102(1)(b) and S.B. 2002, 2nd Sp. Sess. (2001); § 36-1-101(3)(b) and S.B. 2001, 2nd Sp. Sess. (2001); § 36-1-201(2)(b) and H.B. 2001, 2nd Sp. Sess. (2001).

⁷²⁶ See Utah Code § 20A-13-1-102(4).

	Metes and Bounds	List of Census Units	Maps and Census Units
New Jersey			C, S, H
New Mexico	C, S, H		
New York	C, S, A		
North Carolina		C, S, H	
North Dakota	S, H		
Ohio		C	S, H
Oklahoma		S, H	C
Oregon		C, S, H	
Pennsylvania		C	S, H
Rhode Island	C, S, H		
South Carolina		C, S, H	
South Dakota		S, H	
Tennessee		C, S, H	
Texas		C	S, H
Utah			C, S, H
Vermont	S, H		
Virginia		C, S, H	
Washington		C, S, H	
West Virginia	C	S, H	
Wisconsin	S, H	C	
Wyoming		S, H	

Key:

C = Congressional

S = Senate

H = House or Assembly

Source: NCSL, 2009.

Making Technical Corrections

Most states that have enacted plans show evidence of technical problems, in that they have had to amend their laws once, twice or three times to make various corrections. The states that have avoided amending their redistricting laws are those that never enacted them—states where the plan was drawn by a commission or court and never appeared in the statutes.

States have enacted a variety of statutory procedures to allow administrative corrections of technical problems. For example, several states have language in their statutes that assigns duplicate or omitted territory to the smallest contiguous district. California, in 1982, specifically authorized the Secretary of State to “undertake necessary measures to insure compliance with” the assignment of duplicate or omitted territory.⁷²⁷

⁷²⁷ Cal. Election Code § 30010 (West 1989). Rhode Island uses similar language but omits “necessary.” R.I. Gen. Laws § 22-1-2(vi) (2009).

Indiana addresses the problem of “islands” by saying that any part of the state that is entirely surrounded by a district is incorporated into the district that surrounds it.⁷²⁸

New York specifically authorizes the State Board of Elections to correct technical errors that go beyond duplicate, omitted or noncontiguous territory. They include:

. . . erroneous nomenclature; lack of adequate maps or descriptions of political subdivisions, wards, or other divisions thereof, or of their boundary line; street closings, changes in names of streets, or other changes of public places; alteration of the boundary or courses of waters or waterways, filling in or lands under water; accretion or other changes in shorelines; or alteration of courses, rights of way, or lines of public utilities or other conditions⁷²⁹

New York grants this authority to make corrections “at the request of any person aggrieved thereby, or any candidate affected thereby.”⁷³⁰

California, in 1982, authorized maps that had been prepared by the Legislature or a legislative committee in connection with the enactment of a plan to be deposited with the secretary of state in order to illustrate the boundary lines set forth in the law, and authorized the secretary of state and county clerks to use the maps to help them interpret the law and conduct elections.⁷³¹ In 1983, the Legislature and secretary of state used this authority to make sufficient corrections to the congressional redistricting plan to save it from constitutional attack.⁷³²

Maine gives its secretary of state broad authority to “resolve ambiguities concerning the location of election district lines.”⁷³³

New York further directs that the statutes be revised in accordance with the corrections made by the State Board of Elections.⁷³⁴

Minnesota and Utah authorize their chief election officer to make administrative corrections to the plan in accordance with certain statutory principles similar to those in the states previously mentioned.⁷³⁵

⁷²⁸ Ind. Code Ann. § 2-1-9-7(c) (2009).

⁷²⁹ N.Y. STATE LAW § 128 (2009).

⁷³⁰ *Id.*

⁷³¹ Cal. Election Code § 30000 (West 1989).

⁷³² See *Badham v. U.S. Dist. Ct. for N.D. of Cal.*, 721 F.2d 1170, 1178-79 (9th Cir. 1983).

⁷³³ Me. Rev. Stat. Ann. tit. 21A, § 1207(1) (2008).

⁷³⁴ N.Y. STATE LAW § 128 (2009).

⁷³⁵ Minn. Stat. § 2.91 (2008); e.g., Utah Code §§ 20A-13-1-103, 20A-13-104 (2008).

APPENDIX A

DEADLINES FOR REDISTRICTING

Alabama

First legislative session following the decennial census. However, the federal district court has ruled that the Legislature is not limited to apportion representation during the first session after the census. The federal district court will order reapportionment where the court is convinced that further delay is inappropriate.

Alaska

Commission must report plan 90 days after official census data are delivered.

Arizona

No specific date by which the Legislature must redistrict.

Arkansas

The Board of Apportionment must redistrict on or before February 1 of the year following the decennial census.

California

Commission must redraw legislative districts by Sept. 15, 2011. No specific date by which the Legislature must redraw congressional districts.

Colorado

The Reapportionment Commission must publish a preliminary plan within 90 days after the commission meets or when the census data are available, whichever is later. The final plan must be approved by the state Supreme Court by March 15, 2012.

Connecticut

The Legislature must adopt a plan by Sept. 15, 2011. If the Legislature fails to meet the deadline, the governor appoints eight members designated by the legislative leaders to a commission; the eight select a ninth. It must submit a plan to the secretary of the state by Nov. 30, 2011.

Delaware

The Legislature must adopt a plan by June 30, 2011.

Florida

The Legislature at its regular session in the second year following each decennial census shall apportion the state into legislative districts. The regular session may convene earlier than the first Tuesday after the first Monday in March (see, FLA. CONST. Art. III, § 3(b)). The deadline for completing redistricting is indeterminate (see, FLA. CONST. Art. III, § 16); if the Legislature fails to timely enact a valid plan, the Florida Supreme Court redistricts. Redistricting plans must be enacted and approved prior to the dates for qualifying for federal or state office, which are June 18-22, 2012 (see, Fla. Stat. § 99.061(1) and (9)).

Georgia

No specific date by which the Legislature must redistrict.

Hawaii

The reapportionment commission has 150 days from the date the members of the commission are certified to adopt a plan.

Idaho

The Legislature must adopt a plan 90 days after appointment of the commission.

Illinois

The Legislature must adopt a plan by May 31, 2011. If the Legislature fails to meet the deadline, an eight-member commission must be formed by July 10, 2011, and must file a report with the secretary of state by Aug. 10, 2011. If the commission does not adopt a plan by that date, the state Supreme Court selects two people by September 1, 2011, one of whom is chosen (at random) to be the commission tie-breaker. By Oct. 5, 2011, the nine-member commission must file its report.

Indiana

The congressional deadline is April 29, 2011 (end of first regular session). If that date is not met, the Redistricting Commission adopts an interim plan. The Legislature must adopt a legislative plan by April 29, 2011. Failure to meet that date can result in a special session of the General Assembly, if called by the governor.

Iowa

The Legislature must adopt a plan by Sept. 1, 2011. Apportionment shall become law by Sept. 15, 2011. If the Legislature fails to meet the deadline, the state Supreme Court must adopt a plan before Dec. 31, 2011.

Kansas

The Legislature must adopt a plan before *sine die* adjournment of the 2012 legislative session.

Kentucky

The Legislature must adopt a plan by May 2013.

Louisiana

The Legislature must redistrict by December 31 of the year following the year in which the census data is reported to the president. Failure to meet that deadline will result in the state supreme court, upon petition of any elector, redrawing the districts for both houses.

Maine

Advisory commission submits plan to Legislature no later than 90 calendar days after the convening of the 2013 legislative session. The Legislature must adopt the commission plan or a plan of its own by a two-thirds vote of each house within 30 calendar days.

Maryland

Governor has redistricting authority. He or she submits a plan to the Legislature on the first day of the regular session in the second year following the census. The Legislature has 45 days to amend and adopt that plan or adopt one of its own. If it does not act, the plan, as introduced by the governor, goes into effect.

Massachusetts

The Legislature must draw new districts in time for the 2012 election.

Michigan

No specific date by which the Legislature must redistrict.

Minnesota

Twenty-five weeks before the state primary election in the year ending in two (March 20, 2012).

Mississippi

Due to Mississippi's use of odd-year elections, the Legislature will be required to redistrict itself in 2011, the year in which census data becomes available, in order to have plans in effect for the 2011 elections.

Missouri

Commission has six months from the date of appointment to develop a plan.

Montana

The Districting and Apportionment Commission must file its congressional plan with the secretary of state within 90 days after the official final decennial census figures are available.

The Districting and Apportionment Commission must submit its legislative plan to the Legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission of the plan, the Legislature must return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan with the secretary of state and it shall become law.

Nebraska

No specific date by which the Legislature must redistrict.

Nevada

By June 6, 2011. (Mandatory duty of the Legislature to apportion itself at first legislative session following decennial census).

New Hampshire

No specific date by which the Legislature must redistrict.

New Jersey

The Redistricting Commission must certify a congressional plan by the third Tuesday of each year ending in two, or within three months after receipt of census by governor, whichever is later.

The Apportionment Commission must certify a legislative plan within one month of receipt by the governor of the census count for the state from the clerk of the U.S. House, or on or before Feb. 1, 2011, whichever is later.

New Mexico

No specific date by which the Legislature must redistrict.

New York

The Legislature must draw new districts in time for the 2012 election.

North Carolina

First regular session after return of the decennial federal census. Practically, in time for Section 5 preclearance before filing opens first Monday in January 2012.

North Dakota

First legislative session following the decennial census.

Ohio

The Apportionment Board must meet between Aug. 1 and Oct. 1, 2011, and the plan must be published by Oct. 5, 2011.

Oklahoma

May 25, 2011.

Oregon

July 1, 2011.

Pennsylvania

The Legislative Reapportionment Commission must file a preliminary plan no later than 90 days from the time the commission membership is certified or when the census data has been received, whichever is later. Aggrieved parties have 30 days to file exceptions, and the commission must file a final plan within 30 days of the last exception. Any aggrieved person may file an appeal of the final plan directly to the state Supreme Court within 30 days. If the court finds the plan contrary to law, the commission must adopt another plan.

Rhode Island

No specific date by which the Legislature must redistrict.

South Carolina

No specific date by which the Legislature must redistrict.

South Dakota

Dec. 1, 2011.

Tennessee

No specific date by which the Legislature must redistrict.

Texas

The first regular legislative session following release of the census figures: applies to ongoing regular session in 2011.

Utah

“No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States... .” The 2012 General Session begins on Jan. 23, 2012, and ends on March 8, 2012.

Vermont

At the biennial session following the taking of the decennial census.

Virginia

Prior to House and Senate elections that are scheduled for November 2011.

Washington

Jan. 1, 2012.

West Virginia

No specific date by which the Legislature must redistrict.

Wisconsin

First legislative session following the decennial census.

Wyoming

Early March, 2012.

APPENDIX B

REDISTRICTING AUTHORITY IN EACH STATE

State	Congressional Districts	State Legislative Districts
Alabama	L	L
Alaska	L	C
Arizona	C	C
Arkansas	L	B
California	L	C
Colorado	L	C
Connecticut	L	L
Delaware	L	L
Florida	L	L
Georgia	L	L
Hawaii	C	C
Idaho	C	C
Illinois	L	L
Indiana	L	L
Iowa	L	L
Kansas	L	L
Kentucky	L	L
Louisiana	L	L
Maine	L	L
Maryland	L	G/L
Massachusetts	L	L
Michigan	L	L
Minnesota	L	L
Mississippi	L	L
Missouri	L	C
Montana	C	C
Nebraska	L	L
Nevada	L	L
New Hampshire	L	L
New Jersey	C	C

New Mexico	L	L
New York	L	L
North Carolina	L	L
North Dakota	L	L
Ohio	L	B
Oklahoma	L	L
Oregon	L	L
Pennsylvania	L	C
Rhode Island	L	L
South Carolina	L	L
South Dakota	L	L
Tennessee	L	L
Texas	L	L
Utah	L	L
Vermont	L	L
Virginia	L	L
Washington	C	C
West Virginia	L	L
Wisconsin	L	L
Wyoming	L	L

Key:

L=Legislature

G=Governor

C=Commission

B=Board

Source: NCSL, 2008.

APPENDIX C

REDISTRICTING COMMISSIONS: LEGISLATIVE PLANS

Commissions with Primary Responsibility for Drawing a Plan

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
Alaska ALASKA CONST. art. 6	5	Governor appoints two; then president of the Senate appoints one; then speaker of the House appoints one; then chief justice of the Supreme Court appoints one. At least one member must be a resident of each judicial district. No member can be a public employee or official.	By Sept. 1, 2010	30 days after census officially reported	90 days after census officially reported
Arizona ARIZ. CONST. art. 4, pt. 2, § 1	5	The commission on appellate court appointees creates a pool of 25 nominees, 10 from each of the two largest parties and five not from either of the two largest parties. The highest ranking officer of the House appoints one from the pool, then the minority leader of the House appoints one, then the highest ranking officer of the Senate appoints one, then the minority leader of the Senate appoints one. These four appoint a fifth from the pool, not a member of any party already represented on the commission, as chair. If the four deadlock, the Commission on Appellate Court Appointments appoints the chair.	By Feb. 28, 2011	None	None

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
Arkansas ARK. CONST. 1874, art. 8	3	Commission consists of the governor, secretary of state and the attorney general.	None	By Feb. 1, 2011	Plan becomes official 30 days after it is filed.
California CALIF. CONST. art. XXI, § 2 Cal. Gov. Code §§ 8251-8253.6	14	Five registered with largest political party, five registered with second largest political party and four not registered with either of the two largest political parties. Must have voted in two of the last three statewide general elections and not changed registration within the last five years. Must not have been politically active for last 10 years. Chosen at random from three pools, starting with 20 candidates each selected by a board of three state auditors, then reduced by up to eight strikes by legislative leaders. Prohibited from holding appointive public office or working as legislative staff or lobbyist for five years after appointment.	By Dec. 31, 2010	None	Sept. 15, 2011
Colorado COLO. CONST. art. V, § 48	11	Legislature selects four: (speaker of the House; House minority leader; Senate majority and minority leaders; or their delegates). Governor selects three. Judiciary selects four. Maximum of four from the legislature. Each congressional district must have at least one person, but no more than four people representing it on the commission. At least one member must live west of the Continental Divide.	By May 15, 2011	Within one hundred thirteen days after the commission has been convened or the necessary census data are available, whichever is later	Dec. 14, 2012

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
Hawaii HAW. CONST. art. IV	9	President of the Senate selects two. Speaker of the House selects two. Minority Senate party selects two. These eight select the ninth member, who is the chair. No commission member can run for the Legislature in the two elections following redistricting.	By March 1, 2011	80 days after the commission forms	150 days after commission formation
Idaho IDAHO CONST. art. III, § 2	6	Leaders of two largest political parties in each house of the legislature each designate one member; chairs of the two parties whose candidates for governor received the most votes in the last election each designate one member. No member can be an elected or appointed official in the state at the time of designation.	Within 15 days after the secretary of state orders creation of a commission	None	90 days after the commission is organized, or after census data is received, whichever is later
Missouri MO. CONST. art. III, § 2	House: 18 Senate: 10	There are two separate redistricting committees. Governor picks one person from each list of two submitted by the two main political parties in each congressional district to form the House committee. Governor picks five people from two lists of 10 submitted by the two major political parties in the state to form the Senate committee. No commission member can hold office in the legislature for four years after redistricting.	Within 60 days of the census data becoming available	Five months after the commission forms	Six months after formation

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
Montana MONT. CONST. art. V, § 14	5	Majority and minority leaders of both houses of the Legislature each select one member. Those four select a fifth, who is the chair. If they cannot do so by a majority vote, the state Supreme Court picks the fifth. None can be a public official. Members cannot run for legislative office in the two years after the redistricting plan becomes effective.	The legislative session before the census data is available	The commission must give the plan to the Legislature at the first regular session after its appointment	30 days after the plan is returned by the Legislature
New Jersey N.J. CONST. art. IV, § 3	10	The chairs of the two major parties each select five members. If these 10 members cannot develop a plan in the allotted time, the chief justice of the state Supreme Court will appoint an 11th member.	Dec. 1, 2010	Feb. 1, 2011, or one month after the census data becomes available, whichever is later	The initial deadline, or one month after the 11th member is picked
Ohio OHIO CONST. art. XI	5	Board consists of the governor, auditor, secretary of state and two people selected by the legislative leaders of each major political party.	Between Aug. 1 and Oct. 1, 2011	None	Oct. 5, 2011
Pennsylvania PA. CONST. art. II, § 17	5	Majority and minority leaders of the legislative houses each select one member. These four select a fifth to chair. If they fail to do so within 45 days, a majority of the state Supreme Court will select the fifth member. The chair cannot be a public official.	None listed	90 days after the availability of the census data or after commission formation, whichever is later	30 days after the last public exception that is filed against the initial plan
Washington WASH. CONST. art. II, § 43	5	Majority and minority leaders of the House and Senate each select one. These four select a non-voting fifth to chair the commission. If they fail to do so by Jan. 1, 2011, the state Supreme Court will select the fifth by Feb. 5, 2011. No commission member can be a public official.	Jan. 31, 2011	None	Jan. 1, 2012

Advisory Commissions

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
<p>Maine</p> <p>ME. CONST. art. IV, pt. 3, § 1-A</p>	15	<p>Speaker of the House appoints three. House minority leader appoints three. President of the Senate appoints two. Senate minority leader appoints two. Chairs of two major political parties may serve or appoint a designee. The members from the two parties represented on the commission each appoint a public member, and the two public members choose a third public member.</p>	<p>Within three calendar days of convening the Legislature in 2013</p>	<p>The commission must submit its plan to the Legislature within 120 days after the Legislature convenes in 2013. The Legislature must enact the plan, or another plan, by a 2/3 vote of both houses within 30 days after it receives the commission's plan.</p>	<p>Within 60 days after the Legislature fails to meet its deadline, the Supreme Judicial Court must adopt a plan</p>
<p>Vermont</p> <p>Vt. Stat. Ann. tit. 17, ch. 34A</p>	5	<p>Chief justice appoints the chair; governor appoints one member from each political party that received 25 percent of the vote in the last gubernatorial election; those parties each select one. Secretary of state is secretary of the board but does not vote. No commissioner can be a member or employee of the legislature.</p>	<p>July 1, 2010</p>	<p>April 1, 2011</p>	<p>May 15, 2011. Legislature must adopt the plan or a substitute at that biennial session.</p>

Backup Commissions

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
Connecticut CONN. CONST. art. III, § 6	9	President pro tem of the Senate, Senate minority leader, speaker of the House and House minority leader each select two; these eight must select the ninth within 30 days.	After legislature fails to meet deadline (Sept. 15, 2011)	None	Nov. 30, 2011
Illinois ILL. CONST. art. IV, § 3	8	President of the Senate, Senate minority leader, speaker of the House and House minority leader each select two, one of whom is a legislator and the other is not. No more than four from the same party. If the commission fails to develop a plan by Aug. 10, 2011, the state Supreme Court selects two people not of the same political party, one of whom is chosen by lot to be the ninth member.	July 10, 2011 (if legislature fails to meet its deadline of June 30)	None	Oct. 5, 2011
Mississippi MISS. CONST. art. 13, § 254	5	Chief justice of Supreme Court is chair; attorney general, secretary of state, speaker of the House and president pro tem of the Senate	After Legislature fails to meet deadline (60 days after end of second regular session following decennial census)	None	180 days after special apportionment session adjourns
Oklahoma OKLA. CONST. § V-11A	3	Attorney general, superintendent of public instruction and state treasurer	After Legislature fails to meet deadline (90 days after convening first regular session following decennial census)	None	None
Texas TEX. CONST. art. 3, § 28	5	Lieutenant governor, speaker of the House, attorney general, comptroller of public accounts and commissioner of the general land office	Within 90 days after Legislature fails to meet deadline (adjournment of the first regular session following decennial census)	None	60 days after formation

Source: NCSL, 2009.

APPENDIX D

REDISTRICTING COMMISSIONS: CONGRESSIONAL PLANS

Commissions with Primary Responsibility for Drawing a Plan

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
<p>Arizona</p> <p>ARIZ. CONST. art. 4, pt. 2, § 1</p>	5	Commission on Appellate Court Appointees creates a pool of 25 nominees, 10 from each of the two largest parties and five not from either of the two largest parties. The highest ranking officer of the House appoints one from the pool, then the minority leader of the House appoints one, then the highest ranking officer of the Senate appoints one, then the minority leader of the Senate appoints one. These four appoint a fifth from the pool, not a member of any party already represented on the commission, as chair. If the four deadlock, the Commission on Appellate Court Appointments appoints the chair.	By Feb. 28, 2011	None	None
<p>Hawaii</p> <p>HAW. CONST. art. IV</p>	9	President of the Senate selects two. Speaker of the House selects two. Minority Senate party selects two. These eight select the ninth member, who is the chair. No commission member can run for the Legislature in the two elections following redistricting.	By March 1, 2011	80 days after commission forms	150 days after commission forms

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
Idaho IDAHO CONST. art. III, § 2	6	Leaders of two largest political parties in each House of the Legislature each designate one member; chairs of the two parties whose candidates for governor received the most votes in the last election each designate one member. No member can be an elected or appointed official in the state at the time of designation.	Within 15 days after secretary of state orders creation of a commission	None	90 days after commission is organized, or after census data is received, whichever is later
Montana MONT. CONST. art. V, § 14	5	Majority and minority leaders of both Houses of the Legislature each select one member. Those four select a fifth, who is the chair. If they cannot do so by a majority vote, the state Supreme Court picks the fifth. None can be a public official. Members cannot run for legislative office in the two years after the redistricting plan becomes effective.	The legislative session before census data is available	None	90 days after the final decennial census figures are available
New Jersey N.J. CONST. art. II, § 2	13	President of the Senate, speaker of the General Assembly, Senate minority leader, House minority leader and chairs of the two largest political parties each appoint two members. Seven of these members can vote to appoint the 13 th , independent member, to serve as chair. Otherwise, the state Supreme Court selects the independent chair, choosing between the two candidates who received the most votes on the commission's last ballot.	Aug. 1, 2011	Jan. 15, 2012	Jan. 15, 2012
Washington WASH. CONST. art. II, § 43	5	Majority and minority leaders of the House and Senate each select one. These four select a nonvoting fifth to chair the commission. If they fail to do so by Jan. 1, 2011, the state Supreme Court will select the fifth by Feb. 5, 2011. No commission member can be a public official.	Jan. 31, 2011	None	Jan. 1, 2012

Backup Commissions

State	Number of Members	Selection Requirements	Formation Date	Initial Deadline	Final Deadline
Connecticut CONN. CONST . art. III, § 6	9	President pro tem of the Senate, Senate minority leader, speaker of the House and House minority leader each select two; these eight must select the ninth within 30 days.	After Legislature fails to meet deadline (Sept. 15, 2011)	None	Nov. 30, 2011
Indiana IND. CODE tit.3 art. 3, § 2	5	Speaker of the House, president of the Senate, chairs of redistricting committees in each House; governor appoints fifth legislator.	Adjournment of legislative session that fails to adopt required plan	None	30 days after adjournment of regular session

Source: NCSL, 2009.

APPENDIX E

DISTRICTING PRINCIPLES FOR 2000S PLANS

Alabama

Constitution, Article IX

Section 198. *** apportionment of house based on decennial census of United States. *** The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States ***.

Section 199. *** each county entitled to at least one representative. *** each county shall be entitled to at least one representative.

Section 200. *** senatorial districts. *** senatorial districts *** shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more ***. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.

Guidelines for Legislative and Congressional Redistricting, adopted by Reapportionment Committee

a. As a general proposition, deviations from the “ideal district” population should be justifiable either as a result of the limitations of census geography, or as a result of the promotion of a rational state policy.

III. Voting Rights Act

1. Redistricting plans must meet the provisions of the Voting Rights Act and shall be constructed so as not to impede the opportunities of blacks and other racial and ethnic groups protected by the Act to participate in the political process and elect representatives of their choice.
2. Proposed redistricting plans must not employ standards, practices, or procedures which have the purpose of, or result in, the denial or abridgment of the right to vote on account of race or color or because a person is a member of a language minority group.
3. Redistricting plans are subject to the preclearance process established in Section 5 of the Voting Rights Act.

IV. Criteria For Legislative and Congressional Districts

1. A redistricting plan will not have either the purpose or the effect of diluting minority voting strength, and shall otherwise comply with Sections 2 and 5 of the Voting Rights Act and the fourteenth and fifteenth amendments to the Constitution.
2. All legislative and congressional districts will be composed of contiguous and reasonably compact geography.
3. Where possible, legislative and congressional districts should attempt to preserve communities of interest, including without limitation municipalities and concentrations of blacks and other ethnic minorities, where such efforts do not violate the other stated criteria.
4. Counties should be used as district building blocks where possible, and to the extent consistent with other aspects of these criteria.
 - a. Where county lines cannot be maintained, district boundaries should follow as closely as practicable the local voting precinct boundary lines in order to minimize voter confusion and cost of election administration.
 - b. Where voting precinct boundary lines cannot be followed and also meet the geographic guidelines as stated in this section, district lines must follow census block geography in order to maintain the integrity of the statistical analysis.

* * *

6. Efforts will be made to preserve cores of existing districts where such efforts are consistent with and do not violate the other criteria stated herein.

Alaska

Constitution, Article VI

Section 6. **Redistricting.** * * * Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socioeconomic area. Each shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

Arizona

Constitution, Article 4, pt. 2

Section 1. * * *

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

- A. Districts shall comply with the United States Constitution and the United States voting rights act;
- B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;
- C. Districts shall be geographically compact and contiguous to the extent practicable;
- D. District boundaries shall respect communities of interest to the extent practicable;
- E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;
- F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

Arkansas

House Concurrent Resolution No. 1006, 1991 Session

* * *

- 3. The committees acknowledge a preference for continuity of representation. Counties, cities, and established geographical boundaries should be maintained, if possible.
- 4. The dilution of voting strength and participation by recognized minorities within the state population is contrary to the Voting Rights Act of 1965, the U.S. Constitution, and the public policy of Arkansas. The right of meaningful political participation of all citizens is desired and recognized. Therefore, any plan or proposed amendment to a plan having the objective of diluting the voting strength of minority citizens shall be unacceptable.

California

Constitution, Article 21

Section 1. * * *

- (1) Each member of Congress shall be elected from a single-member district.
- (2) The population of all congressional districts shall be reasonably equal. After following this criterion, the Legislature shall adjust the boundary lines according to the criteria set forth and prioritized in paragraphs (2), (3), (4), and (5) of subdivision (d) of Section 2. * * *
- (3) Congressional districts shall be numbered consecutively commencing at the northern boundary of the State and ending at the southern boundary.

Section 2. * * *

(4) The commission shall establish single-member districts for the Senate, Assembly, and State Board of Equalization pursuant to a mapping process using the following criteria as set forth in the following order of priority:

(a) Districts shall comply with the United States Constitution. Senate, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law.

(b) Districts shall comply with the federal Voting Rights Act (42 U.S.C. Section 1971 and following).

(c) Districts shall be geographically contiguous.

(d) The geographic integrity of any city, county, city and county, neighborhood, or community of interest shall be respected to the extent possible without violating the requirements of any of the preceding subdivisions. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(e) To the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population.

(f) To the extent practicable, and where this does not conflict with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts, and each Board of Equalization district shall be comprised of 10 whole, complete, and adjacent Senate districts.

(e) The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.

(f) Districts for the Senate, Assembly, and State Board of Equalization shall be numbered consecutively commencing at the northern boundary of the State and ending at the southern boundary.

Colorado

Constitution, Article V

Section 46. **Senatorial and representative districts.** The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Section 47. **Composition of districts.** (1) Each district shall be as compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precincts. Districts of the same house shall not overlap.

(2) Except when necessary to meet the equal population requirements of section 46, no part of one county shall be added to all or part of another county in forming districts. Within counties whose territory is contained in more than one district of the same house, the number of cities and towns whose territory is contained in more than one district of the same house shall be as small as possible. When county, city, or town boundaries are changed, adjustments, if any, in legislative districts shall be as prescribed by law.

(3) Consistent with the provisions of this section and section 46 of this article, communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district wherever possible.

Final Report, adopted by Reapportionment Commission, March 2002

Districts must satisfy the equal population requirements of the 14th Amendment and the right-to-vote provisions of the 15th Amendment to the U.S. Constitution.

Reapportionment plans must not deny to members of a racial, color, or language minority an equal opportunity to participate in the political process and to elect representatives of their choice. Federal Voting Rights Act, 42 U.S.C. § 1973.

As applied, this requirement meant that minorities should neither be unnecessarily “packed” into a single district nor unnecessarily “fractured” among two or more districts.

Connecticut

Constitution, Article III, Section 3, as amended by Article II, Section 1, and Article XV, Section 1, of the Amendments to the Constitution of the State of Connecticut

Senate, number, qualifications.

Section 3. * * * Each senatorial district shall be contiguous as to territory

Constitution, Article III, Section 4, as amended by Article II, Section 2, and Article XV, Section 2, of the Amendments to the Constitution of the State of Connecticut

House of representatives, how constituted.

Section 4. * * * Each assembly district shall be contiguous as to territory For the purpose of forming assembly districts no town shall be divided except for the purpose of forming assembly districts wholly within the town.

Constitution, Article III, Section 5, as amended by Article XVI, Section 1, of the Amendments to the Constitution of the State of Connecticut

Congressional and general assembly districts to be consistent with federal standards.

Section 5. The establishment of congressional districts and of districts in the general assembly shall be consistent with federal constitutional standards.

Delaware

29 Delaware Code

§ 804. Determining district boundaries; criteria.

In determining the boundaries of the several representative and senatorial districts within the State, the General Assembly shall use the following criteria. Each district shall, insofar as is possible:

- (1) Be formed of contiguous territory;
- (2) Be nearly equal in population;
- (3) Be bounded by major roads, streams or other natural boundaries;
- (4) Not be created so as to unduly favor any person or political party.

Florida

Constitution, Article III

Section 16. Legislative apportionment.

(a) **Senatorial and Representative Districts.** The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory.

* * *

Georgia

Constitution, Article III, Section II

Paragraph II. Apportionment of General Assembly.

The General Assembly shall apportion the Senate and House districts. Such districts shall be composed of contiguous territory. * * *

Guidelines, adopted by the House Committee on Congressional and Legislative Reapportionment and Redistricting, 1991-92

* * *

3. A redistricting plan should not have either the purpose or the effect of diluting minority voting strength and should otherwise comply with Sections 2 and 5 of the Voting Rights Act.

* * *

5. Districts should be composed of contiguous territory. Areas which meet at the points of adjoining corners are not contiguous.

6. Where the above stated criteria are met, efforts may be made to maintain the integrity of political subdivisions and the cores of existing districts and consideration may be given to avoiding contests between incumbents.

7. Local voting district boundary lines should serve as the basic district building blocks in order to minimize voter confusion and the cost of election administration.

Hawaii

Constitution, Article IV

Section 6. Apportionment Within Basic Island Units. * * *

1. No district shall extend beyond the boundaries of any basic island unit.

2. No district shall be so drawn as to unduly favor a person or political faction.

3. Except in the case of districts encompassing more than one island, districts shall be contiguous.

4. Insofar as practicable, districts shall be compact.

5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and, when practicable, shall coincide with census tract boundaries.

6. Where practicable, representative districts shall be wholly included within senatorial districts.

7. Not more than four members shall be elected from any district.

8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Hawaii Revised Statutes, Section 25-2(b)(1) to (6)

* * * In effecting the reapportionment and districting, the commission shall be guided by the following criteria:

- (1) No district shall be drawn so as to unduly favor a person or political party;
- (2) Except in the case of districts encompassing more than one island, districts shall be contiguous;
- (3) Insofar as practicable, districts shall be compact;
- (4) Where possible, district lines shall follow permanent and easily recognized features such as streets, streams, and clear geographical features, and when practicable, shall coincide with census tract boundaries;
- (5) Where practicable, state legislative districts shall be wholly included within congressional districts; and
- (6) Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Idaho*Constitution, Article III*

Section 5. Senatorial and Representative Districts. A senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States. A county may be divided into more than one legislative district when districts are wholly contained within a single county. No floterial district shall be created. Multi-member districts may be created in any district composed of more than one county only to the extent that two representatives may be elected from a district from which one senator is elected. The provisions of this section shall apply to any apportionment adopted following the 1990 decennial census.

Idaho Code

§ 72-1506. Criteria governing plans. Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission, shall be governed by the following criteria:

* * *

- (1) To the maximum extent possible, districts shall preserve traditional neighborhoods and local communities of interest.
- (2) Districts shall be substantially equal in population and should seek to comply with all applicable federal standards and statutes.
- (3) To the maximum extent possible, the plan should avoid drawing districts that are oddly shaped.

(4) Division of counties should be avoided whenever possible. Counties should be divided into districts not wholly contained within that county only to the extent reasonably necessary to meet the requirements of the equal population principle. In the event that a county must be divided, the number of such divisions, per county, should be kept to a minimum.

(5) To the extent that counties must be divided to create districts, such districts shall be composed of contiguous counties.

(6) District boundaries should retain, as far as practicable, the local voting precinct boundary lines to the extent those lines comply with the provisions of section 34-306, Idaho Code.

(7) Counties shall not be divided to protect a particular political party or a particular incumbent.

Instructions and Criteria for Redistricting Plans, Commission for Reapportionment, draft March 19, 1991

* * *

3. Voting Rights Act

The plan must not dilute the votes of compact racial and language minorities.

4. Gerrymandering

The plan must not be constructed to protect a particular political party or a particular incumbent legislator. To the maximum extent possible the plan should avoid drawing districts that are oddly shaped or that split traditional neighborhoods or communities of interest.

5. Criteria for Legislative Districts

* * *

(1) Division of counties should be avoided whenever possible. Counties should only be divided into districts not wholly contained within that county to meet the requirements of the equal population principle or the Voting Rights Act. Sometimes, it will be necessary to divide a county into districts not wholly contained within that county. The number of such divisions, per county, should be kept to a minimum.

(2) To the extent that counties must be divided to create districts, such districts shall be composed of contiguous counties.

(3) Where a county is divided, district boundaries should retain as far as practicable the local voting precinct boundary lines to the extent those lines comply with Idaho Code subsection 34-306.

(4) Counties should not be divided to protect a party or an incumbent..

(5) Where possible, legislative districts should attempt to preserve communities of interest.

Illinois

Constitution, Article IV

Section 3. Legislative redistricting.

(a) Legislative Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population.

Indiana

Constitution, Article 4

Section 5. Legislative apportionment.

*** The territory in each district shall be contiguous.

Iowa

Constitution, Article III

Section 34. Senate and house of representatives--limitation. *** Each district so established shall be of compact and contiguous territory. ***

Section 37. Congressional districts. When a congressional district is composed of two or more counties it shall not be entirely separated by a county belonging to another district and no county shall be divided in forming a congressional district.

Iowa Code

§ 42.4. Redistricting standards.

1. Legislative and congressional districts shall be established on the basis of population.

a. Senatorial and representative districts, respectively, shall each have a population as nearly equal as practicable to the ideal population for such districts, determined by dividing the number of districts to be established into the population of the state reported in the federal decennial census. Senatorial districts and representative districts shall not vary in population from the respective ideal district populations except as necessary to comply with one of the other standards enumerated in this section. In no case shall the quotient, obtained by dividing the total of the absolute values of the deviations of all district populations from the applicable ideal district population by the number of districts established, exceed one percent of the applicable ideal district population. No senatorial district shall have a population which exceeds that of any other senatorial district by more than five percent, and no representative district shall have a population which exceeds that of any other representative district by more than five percent.

b. Congressional districts shall each have a population as nearly equal as practicable to the ideal district population, derived as prescribed in paragraph “a” of this subsection. No congressional district shall have a

population which varies by more than one percent from the applicable ideal district population, except as necessary to comply with Article III, section 37 of the Constitution of the State of Iowa.

c. If a challenge is filed with the supreme court alleging excessive population variance among districts established in a plan adopted by the general assembly, the general assembly has the burden of justifying any variance in excess of one percent between the population of a district and the applicable ideal district population.

2. To the extent consistent with subsection 1, district boundaries shall coincide with the boundaries of political subdivisions of the state. The number of counties and cities divided among more than one district shall be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions shall be divided before the less populous, but this statement does not apply to a legislative district boundary drawn along a county line which passes through a city that lies in more than one county.

3. Districts shall be composed of convenient contiguous territory. Areas which meet only at the points of adjoining corners are not contiguous.

4. Districts shall be reasonably compact in form, to the extent consistent with the standards established by subsections 1, 2, and 3. In general, reasonably compact districts are those which are square, rectangular, or hexagonal in shape, and not irregularly shaped, to the extent permitted by natural or political boundaries. If it is necessary to compare the relative compactness of two or more districts, or of two or more alternative districting plans, the tests prescribed by paragraphs "a" and "b" shall be used.

a. Length-width compactness. The compactness of a district is greatest when the length of the district and the width of the district are equal. The measure of a district's compactness is the absolute value of the difference between the length and the width of the district. In general, the length-width compactness of a district is calculated by measuring the distance from the northernmost point or portion of the boundary of a district to the southernmost point or portion of the boundary of the same district and the distance from the westernmost point or portion of the boundary of the district to the easternmost point or portion of the boundary of the same district. The absolute values computed for individual districts under this paragraph may be cumulated for all districts in a plan in order to compare the overall compactness of two or more alternative districting plans for the state, or for a portion of the state.

b. Perimeter compactness. The compactness of a district is greatest when the distance needed to traverse the perimeter boundary of a district is as short as possible. The total perimeter distance computed for individual districts under this paragraph may be cumulated for all districts in a plan in order to compare the overall compactness of two or more alternative districting plans for the state, or for a portion of the state.

5. No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group. In establishing districts, no use shall be made of any of the following data:

a. Addresses of incumbent legislators or members of Congress.

b. Political affiliations of registered voters.

c. Previous election results.

d. Demographic information, other than population head counts, except as required by the Constitution and the laws of the United States.

6. In order to minimize electoral confusion and to facilitate communication within state legislative districts, each plan drawn under this section shall provide that each representative district is wholly included within a single senatorial district and that, so far as possible, each representative and each senatorial district shall be included within a single congressional district. However, the standards established by subsections 1 through 5 shall take precedence where a conflict arises between these standards and the requirement, so far as possible, of including a senatorial or representative district within a single congressional district.

* * *

Kansas

Guidelines and Criteria for 2002 Congressional and Legislative Redistricting, adopted by House Select Committee on Redistricting, April 25, 2001, adopted by Senate Committee on Reapportionment, April 26, 2001

Legislative Redistricting

* * *

2. Districts should be numerically as equal in population as practical within the limitations of Census geography and application of guidelines set out below. Deviations should not exceed plus or minus 5 percent of the ideal population of 21,378 for each House district and 66,806 for each Senate district, except in unusual circumstances. (The range of deviation for House districts could be plus or minus 1,069 persons, for districts that could range in population from 20,309 to 22,447. The overall deviation for House districts could be 2,138 persons. The range of deviation for Senate districts could be plus or minus 3,340 persons, for districts that could range in population from 63,466 to 70,147. The overall deviation for Senate districts could be 6,681 persons.)

3. Redistricting plans will have neither the purpose nor the effect of diluting minority voting strength.

4. Subject to the requirement of guideline No. 2:

a. The “building blocks” to be used for drawing district boundaries shall be voting districts (VTDs) as described on official 2000 Redistricting U.S. Census maps.

b. Districts should be as compact as possible and contiguous.

c. The integrity and priority of existing political subdivisions should be preserved to the extent possible.

d. There should be recognition of similarities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation (generally termed “communities of interest”), should be considered. While some communities of interest lend themselves more readily than others to being embodied in legislative districts, the Committee will attempt to accommodate interests articulated by residents.

e. Contests between incumbent members of the Legislature or the State Board of Education will be avoided whenever possible.

f. Districts should be easily identifiable and understandable by voters.

Congressional Redistricting

1. * * * The “building blocks” to be used for drawing district boundaries shall be Kansas counties and voting districts (VTDs) as their population is reported in the 2000 U.S. Decennial Census.
2. Districts are to be as nearly equal to 672,105 population as practicable.
3. Redistricting plans will have neither the purpose nor the effect of diluting minority voting strength.
4. Districts should attempt to recognize “community of interests” when that can be done in compliance with the requirement of guideline No. 2.
 - a. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation (generally termed “communities of interest”), should be considered.
 - b. If possible, preserving the core of the existing districts should be undertaken when considering the “community of interests” in establishing districts.
 - c. Whole counties should be in the same congressional district to the extent possible while achieving population equality among districts. County lines are meaningful in Kansas and Kansas counties have historically been significant political units. Many officials are elected on a countywide basis, and political parties have been organized in county units. Election of the Kansas members of Congress is a political process requiring political organizations which in Kansas are developed in county units. To a considerable degree most counties in Kansas are economic, social, and cultural units, or parts of a larger socioeconomic unit. These interests common to the population of the area, generally termed “community of interests” should be considered during the creation of congressional districts.
5. Districts should be as compact as possible and contiguous, subject to the requirement of guideline No. 2.

Kentucky

Criteria/Standards for Congressional Redistricting, adopted by Interim Joint Committee on State Government’s Redistricting Subcommittee, July 11, 1991

* * *

2. All congressional districts will be composed of contiguous geography.
3. Kentucky is covered by the provisions of Section 2 of the federal Voting Rights Act. All congressional district plans will meet the applicable provisions.
4. Where possible, congressional districts should attempt to preserve communities of interest where such efforts do not violate the other stated criteria.
5. Counties should be used as district building blocks where possible, and to the extent consistent with other aspects of these criteria, recognizing that some counties will of necessity be split in order to achieve stated equality of population goals.

a. Where county lines cannot be maintained, district boundaries should follow as closely as practicable the local voting precinct boundary lines in order to minimize voter confusion and cost of election administration.

b. Where voting precinct boundary lines cannot be followed and also meet the population criteria as stated in these guidelines, district lines must follow census block geography in order to maintain the integrity of the statistical analysis. If a proposed congressional district line follows a precinct line that splits a census block, the district line should be moved to the boundary of the split census block.

* * *

8. Efforts will be made to preserve cores of existing districts where such efforts are consistent with and do not violate the other criteria stated herein, with the realization that Kentucky will lose one congressional district.

Louisiana

Rules for Redistricting, Louisiana House of Representatives, Subcommittee on Reapportionment of the Committee on House and Governmental Affairs, adopted June 27, 2001

To promote the development of a constitutionally acceptable redistricting plan, the committee adopts the following rules for itself, declaring the same to constitute minimally acceptable criteria for redistricting of the House of Representatives [and] Congress * * *.

I. Criteria

- A. All redistricting plans shall provide for single-member districts.
- B. All redistricting plans for the House of Representatives * * * shall provide for an absolute deviation of population within plus or minus five percent of the ideal district population as follows:
 1. House of Representatives: 42,561 (40,433 to 44,689)

* * *
- C. All redistricting plans for Congress shall provide that each congressional district shall have a population as nearly equal to 638,425 as practicable.
- D. All redistricting plans shall contain whole election precincts established pursuant to R.S. 18:532 and 532.1.
- E. All redistricting plans shall provide that each district is composed of contiguous geography.
- F. All redistricting plans shall respect the recognized political boundaries and natural geography of this state, to the extent practicable.
- G. All redistricting plans shall comply with applicable state and federal statutory and constitutional law and jurisprudence.
- H. In order to minimize voter confusion, due consideration shall be given to traditional district alignments.

* * *

Maine

Constitution, Article IV, Part First

Section 2. **Number of Representatives; biennial terms; division of the State into districts for House of Representatives.** * * * Each Representative District shall be formed of contiguous and compact territory and shall cross political subdivision lines the least number of times necessary to establish as nearly as practicable equally populated districts. Whenever the population of a municipality entitles it to more than one district, all whole districts shall be drawn within municipal boundaries. Any population remainder within the municipality shall be included in a district with contiguous territory and shall be kept intact.

Maine Revised Statutes Annotated, title 21A

§ 1206-A. Reapportionment of state legislative districts.

* * * When reapportioning districts, where possible, the Legislative Apportionment Commission shall attempt to form functionally contiguous and compact territories. For purposes of this section, a "functionally contiguous and compact territory" is one that facilitates representation by minimizing impediments to travel within the district. Impediments to travel include, but are not limited to, physical features such as mountains, rivers, oceans and discontinued roads or lack of roads. The commission shall recognize that all political subdivision boundaries are not of equal importance and give weight to the interests of local communities when making district boundary decisions.

Maryland

Constitution, Article III

Section 4. **Requirements for districts.** Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Legal Standards for Plan Development, adopted by Governor's Redistricting Advisory Committee, 2001

* * *

B. Minority Representation

Congressional and legislative district plans may not dilute minority voting strengths in violation of the 1965 Voting Rights Act, as amended. No plan shall be acceptable if it affords members of a racial or language minority group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

1. Districts should not be created which would either illegally “pack” a super-majority of a racial or language minority group into a district, or illegally “fracture” such a group into more than one district so as to dilute their ability to elect their chosen representatives.

2. Multi-member districts are clearly allowable, but they must not be created so as to violate the Voting Rights Act by allowing a racial or language majority group, voting as a bloc, to defeat candidates supported by a politically cohesive, geographically insular minority group, which could constitute a majority in a single-member district.

C. Contiguity

The territory of each legislative district should be contiguous. Although it is not legally or constitutionally required, the Governor’s Redistricting Advisory Committee will endeavor to propose Congressional districts, to the extent reasonable and possible, that are contiguous, including contiguity by water.

D. Compactness

To the extent permitted by other controlling considerations and by the geographical configuration of the State, the subdivisions, and election precincts, each legislative district should be compact in form. Although it is not legally or constitutionally required, the Governor’s Redistricting Advisory Committee will endeavor to recommend Congressional districts, to the extent possible, that are compact. To the extent possible, recognition may also be given to prior legislative district boundaries.

E. Political Subdivisions

Due regard should be given to the boundaries of political subdivisions, and, where possible, the splitting of municipalities should be avoided.

F. Natural Boundaries

Due regard should be given to natural boundaries, such as bodies of water, mountain ranges, and other significant geological and topographic features.

G. Precinct Lines

To the extent possible, the plan, as recommended, should follow established 2000 Voting District (precinct) lines as shown on the Maryland Department of Planning’s Precincts 2000 maps and the census VTD (precinct) population counts.

H. Communities of Interest

To the extent permitted by federal case law, the recommended plan should be cognizant of, and give consideration to, preserving identifiable communities of interest.

I. Cognizance of Existing Lines

It is permissible for the recommended plan to consider existing congressional and legislative districts and incumbent representation.

J. Voting Behavior

To the extent permitted by law, it is permissible for the recommended plan to consider the voting behavior of the electorate.

K. Subdistricting

Subdistricting, with respect to legislative districts, may be permitted to protect the integrity of political subdivisions and to comply with the Voting Rights Act.

Among the foregoing legal constraints, it is clear that requirements regarding equal population (A) and minority representation (B) have the highest priority under constitutional and judicial standards. Constraints regarding contiguity, compactness, natural boundaries, and political subdivisions then follow. It is recognized that the application of the legal constraints may foreclose a uniform application of guidelines G through J, and that the application of one or more of those guidelines may be precluded, in given situations, by the application of other guidelines. However, the total set of guidelines A through J should be adopted, subject to these limitations.

Massachusetts

Constitution, Article CI, as amended by Article CIX

Section 1. * * * The General Court shall * * * divide the Commonwealth into one hundred and sixty representative districts of contiguous territory so that each representative will represent an equal number of inhabitants, as nearly as may be; and such districts shall be formed, as nearly as may be, without uniting two counties or parts of two or more counties, two towns or parts of two or more towns, two cities or parts of two or more cities, or a city and a town, or parts of cities and towns, into one district. Such districts shall also be so formed that no town containing less than twenty-five hundred inhabitants according to said census shall be divided.

Section 2. * * * The General Court shall * * * divide the Commonwealth into forty districts of contiguous territory, each district to contain, as nearly as may be, an equal number of inhabitants according to said census; and such districts shall be formed, as nearly as may be, without uniting two counties, or parts of two or more counties, into one district.

Michigan

Constitution, Article IV

[Section 2.](#) * * * Each such district shall follow incorporated city or township boundary lines to the extent possible and shall be compact, contiguous, and as nearly uniform in shape as possible.

Michigan Compiled Laws

[§ 3.63](#) Redistricting plan; guidelines.

Except as otherwise required by federal law for congressional districts in this state, the redistricting plan shall be enacted using only these guidelines in the following order of priority:

-
- (a) The constitutional guideline is that each congressional district shall achieve precise mathematical equality of population in each district.
- (b) The federal statutory guidelines in no order of priority are as follows:
- (i) Each congressional district shall be entitled to elect a single member.
 - (ii) Each congressional district shall not violate section 2 of title I of the voting rights act of 1965, Public Law 89-110, 42 U.S.C. 1973.
- (c) The secondary guidelines in order of priority are as follows:
- (i) Each congressional district shall consist of areas of convenient territory contiguous by land. Areas that meet only at points of adjoining corners are not contiguous.
 - (ii) Congressional district lines shall break as few county boundaries as is reasonably possible.
 - (iii) If it is necessary to break county lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.
 - (iv) Congressional district lines shall break as few city and township boundaries as is reasonably possible.
 - (v) If it is necessary to break city or township lines to achieve equality of population between congressional districts as provided in subdivision (a), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift.
 - (vi) Within a city or township to which there is apportioned more than 1 congressional district, district lines shall be drawn to achieve the maximum compactness possible.
 - (vii) Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district.
 - (viii) If a discontinuous township island exists within an incorporated city or discontinuous portions of townships are split by an incorporated city, the splitting of the township shall not be considered a split if any of the following circumstances exist:
 - (A) The city must be split to achieve equality of population between congressional districts as provided in subdivision (a) and it is practicable to keep the township together within 1 district.
 - (B) A township island is contained within a whole city and a split of the city would be required to keep the township intact.
 - (C) The discontinuous portion of a township cannot be included in the same district with another portion of the same township without creating a noncontiguous district.

- (ix) Each congressional district shall be numbered in a regular series, beginning with congressional district 1 in the northwest corner of the state and ending with the highest numbered district in the southeast corner of the state.

§ 4.261. Redistricting plan for senate and house of representatives; enactment by legislature; guidelines.

* * *

- (c) Senate and house of representatives districts shall be areas of convenient territory contiguous by land. Areas that meet only at the points of adjoining corners are not contiguous.
- (d) Senate and house of representatives districts shall have a population not exceeding 105% and not less than 95% of the ideal district size for the senate or the house of representatives unless and until the United States supreme court establishes a different range of allowable population divergence for state legislative districts.
- (e) Senate and house of representatives district lines shall preserve county lines with the least cost to the principle of equality of population provided for in subdivision (d).
- (f) If it is necessary to break county lines to stay within the range of allowable population divergence provided for in subdivision (d), the fewest whole cities or whole townships necessary shall be shifted. Between 2 cities or townships, both of which will bring the districts into compliance with subdivisions (d) and (h), the city or township with the lesser population shall be shifted.
- (g) Within those counties to which there is apportioned more than 1 senate district or house of representatives district, district lines shall be drawn on city and township lines with the least cost to the principle of equality of population between election districts consistent with the maximum preservation of city and township lines and without exceeding the range of allowable divergence provided for in subdivision (d).
- (h) If it is necessary to break city or township lines to stay within the range of allowable divergence provided for in subdivision (d), the number of people necessary to achieve population equality shall be shifted between the 2 districts affected by the shift, except that in lieu of absolute equality the lines may be drawn along the closest street or comparable boundary.
- (i) Within a city or township to which there is apportioned more than 1 senate district or house of representatives district, district lines shall be drawn to achieve the maximum compactness possible within a population range of 98% to 102% of absolute equality between districts within that city or township.
- (j) Compactness shall be determined by circumscribing each district within a circle of minimum radius and measuring the area, not part of the Great Lakes and not part of another state, inside the circle but not inside the district.
- (k) If a discontinuous township island exists within an incorporated city or discontinuous portions of townships are split by an incorporated city, the splitting of the township shall not be considered a split if any of the following circumstances exist:
- (i) The city must be split to stay within the range of allowable divergence provided for in subdivision (d) and it is practicable to keep the township together within 1 district.

- (ii) A township island is contained within a whole city and a split of the city would be required to keep the township intact.
 - (iii) The discontinuous portion of a township cannot be included in the same district with another portion of the same township without creating a noncontiguous district.
- (l) Senate and house districts shall not violate the precedents established in *Miller v Johnson*, 115 S Ct 2475; 132 L Ed 2d 762 (1995); *Bush v Vera*, 116 S Ct 1941; 135 L Ed 2d 248 (1996); and, *Shaw v Hunt*, 116 S Ct 1894; 135 L Ed 2d 207 (1996).

§ 4.261a. Senate and house districts; violation of voting rights act of 1965 prohibited

Senate and house districts shall not violate section 2 of title I of the voting rights act of 1965, Public Law 89-110, 42 U.S.C. 1973.

Minnesota

Constitution, Article IV

Section 2. * * * The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

Section 3. * * * Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.

Minnesota Statutes

§ 2.91. Redistricting plans.

* * *

Subd. 2. **Corrections.** The legislature intends that a redistricting plan encompass all the territory of this state, that no territory be omitted or duplicated, that all districts consist of convenient contiguous territory substantially equal in population, and that political subdivisions not be divided more than necessary to meet constitutional requirements. * * *

Order Stating Redistricting Principles and Requirements for Plan Submissions, Zachman v. Kiffmeyer, No. CO-01-160 (Minn. Spec. Redis. Panel Dec. 11, 2001)

Congressional Districts

* * *

2. The districts must be as nearly equal in population as is practicable. * * * Because a court-ordered redistricting plan must conform to a higher standard of population equality than a legislative redistricting plan, absolute population equality will be the goal. * * *

3. The congressional district numbers will begin with district one in the southeast corner of the state and end with district eight in the northeast corner of the state.
4. Districts will consist of convenient, contiguous territory structured into compact units. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district. Districts with areas that connect at only a single point will be considered noncontiguous. * * *
5. Congressional districts shall not be drawn with either the purpose or effect of diluting racial or ethnic minority voting strength and must otherwise comply with the Voting Rights Act of 1965, as amended, and the Fourteenth and Fifteenth Amendments to the United States Constitution.
6. The districts will be drawn with attention to county, city, and township boundaries. A county, city, or township will not be divided into more than one district except as necessary to meet equal population requirements or to form districts that are composed of convenient, contiguous, and compact territory. When any county, city, or township must be divided into one or more districts, it will be divided into as few districts as possible. * * *
7. Communities of interest will be preserved where possible in compliance with the preceding principles. For purposes of this principle, “communities of interest” include, but are not limited to, groups of Minnesota citizens with clearly recognizable similarities of social, geographic, political, cultural, ethnic, economic, or other interests. Additional communities of interest will be considered if persuasively established and not in violation of applicable law.
8. Districts may not be drawn for the purpose of protecting or defeating an incumbent. However, as a factor subordinate to all redistricting criteria, the panel may view a proposed plan’s effect on incumbents to determine whether the plan results in either undue incumbent protection or excessive incumbent conflicts.

Legislative Districts

* * *

2. No representative district shall be divided in the formation of a senate district. * * *
3. Legislative redistricting plans will faithfully adhere to the concept of population-based representation. * * * The plans will not exceed a maximum population deviation of plus or minus 2%. * * * Because a court-ordered redistricting plan must conform to a higher standard of population equality than a legislative redistricting plan, *de minimis* deviation from the ideal district population will be the goal. * * *
4. The legislative districts must be numbered in a regular series, beginning with House District 1A in the northwest corner of the state and proceeding across the state from west to east, north to south, but bypassing the seven-county metropolitan area until the southeast corner has been reached; then to the seven-county metropolitan area outside the cities of Minneapolis and St. Paul; then to Minneapolis and St. Paul.
5. Districts will consist of convenient, contiguous territory structured into compact units. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district. Districts with areas that connect at only a single point will be considered noncontiguous. * * *

6. Legislative districts shall not be drawn with either the purpose or effect of diluting racial or ethnic minority voting strength and must otherwise comply with the Voting Rights Act of 1965, as amended, and the Fourteenth and Fifteenth Amendments to the United States Constitution.
7. The districts will be drawn with attention to county, city, and township boundaries. A county, city, or township will not be divided into more than one district except as necessary to meet equal population requirements or to form districts that are composed of convenient, contiguous, and compact territory. When any county, city, or township must be divided into one or more districts, it will be divided into as few districts as possible. * * *
8. Communities of interest will be preserved where possible in compliance with the preceding principles. For purposes of this principle, “communities of interest” include, but are not limited to, groups of Minnesota citizens with clearly recognizable similarities of social, geographic, political, cultural, ethnic, economic, or other interests. Additional communities of interest will be considered if persuasively established and not in violation of applicable law.
9. Districts may not be drawn for the purpose of protecting or defeating an incumbent. However, as a factor subordinate to all redistricting criteria, the panel may view a proposed plan’s effect on incumbents to determine whether the plan results in either undue incumbent protection or excessive incumbent conflicts.

Mississippi

Mississippi Code of 1972

§ 5-3-101. Guidelines and standards for apportionment.

In accomplishing the apportionment, the committee shall follow such constitutional standards as may apply at the time of the apportionment and shall observe the following guidelines unless such guidelines are inconsistent with constitutional standards at the time of the apportionment, in which event the constitutional standards shall control:

- (a) Every district shall be compact and composed of contiguous territory and the boundary shall cross governmental or political boundaries the least number of times possible; and
- (b) Districts shall be structured, as far as possible and within constitutional standards, along county lines; if county lines are fractured, then election district lines shall be followed as nearly as possible.

Criteria for Congressional Redistricting, adopted by the Standing Joint Congressional Redistricting Committee, May 10, 2001

1. District populations should be as equal as practicable.
2. Districts should be composed of contiguous territory.
3. The Committee should comply with the Constitution of the United States and Sections 2 and 5 of the Voting Rights Act of 1965.

Criteria for Legislative Redistricting, adopted by the Standing Joint Legislative Committee on Reapportionment, February 26, 2002

1. The population of each district should be relatively equal in size with a deviation not greater than 5% above or below the ideal district size.
2. Districts should be composed of contiguous territory.
3. The redistricting plan should comply with all applicable state and federal laws, including Sections 2 and 5 of the Voting Rights Act of 1965 and the Mississippi and United States Constitutions.

Missouri

Constitution, Article 3

Section 2. Election of representatives--apportionment commission, appointment, duties, compensation. * *

* Each district shall be composed of contiguous territory as compact as may be.

Section 45. Congressional apportionment. * * * [T]he general assembly shall by law divide the state into districts * * * composed of contiguous territory as compact and as nearly equal in population as may be.

Redistricting Standards and Guidelines, adopted by the House Committee on Redistricting, 1991

Districts will be:

- (1) composed of contiguous territory
- (2) be compact

* * *

- (4) not dilute the voting strength of racial or language minority populations
- (5) not degrade a voter's or a group of voters influence on the political process as a whole.

Other guidelines:

- (1) does not divide counties, except in large metropolitan areas
- (2) does not divide cities, except in large metropolitan areas and except when cities are in more than one county
- (3) preserves long-standing communities of interest based on social, cultural, ethnic, and economic similarities
- (4) preserves the geographic cores of existing districts

Montana

Constitution, Article V

Section 14. **Districting and apportionment.** (1) * * * Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

Montana Code Annotated

§ 5-1-115. Redistricting criteria.

- (1) Subject to federal law, legislative and congressional districts must be established on the basis of population.
- (2) In the development of legislative districts, a plan is subject to the Voting Rights Act and must comply with the following criteria, in order of importance:
 - (a) The districts must be as equal as practicable, meaning to the greatest extent possible, within a plus or minus 1% relative deviation from the ideal population of a district as calculated from information provided by the federal decennial census. The relative deviation may be exceeded only when necessary to keep political subdivisions intact or to comply with the Voting Rights Act.
 - (b) District boundaries must coincide with the boundaries of political subdivisions of the state to the greatest extent possible. The number of counties and cities divided among more than one district must be as small as possible. When there is a choice between dividing local political subdivisions, the more populous subdivisions must be divided before the less populous, unless the boundary is drawn along a county line that passes through a city.
 - (c) The districts must be contiguous, meaning that the district must be in one piece. Areas that meet only at points of adjoining corners or areas separated by geographical boundaries or artificial barriers that prevent transportation within a district may not be considered contiguous.
 - (d) The districts must be compact, meaning that the compactness of a district is greatest when the length of the district and the width of a district are equal. A district may not have an average length greater than three times the average width unless necessary to comply with the Voting Rights Act.
- (3) A district may not be drawn for the purposes of favoring a political party or an incumbent legislator or member of congress. The following data or information may not be considered in the development of a plan:
 - (a) addresses of incumbent legislators or members of congress;
 - (b) political affiliations of registered voters;
 - (c) partisan political voter lists; or
 - (d) previous election results, unless required as a remedy by a court.

Criteria and Guidelines for Legislative Districts, adopted by Districting and Apportionment Commission, April 18, 2001

Mandatory Criteria for Legislative Districts

1. **Population equality and maximum population deviation.** All legislative districts must be as nearly equal in population as is practicable within a maximum deviation of no more than plus or minus 5% from the ideal population⁶ of 9,022 persons. (U. S. and Montana Constitutions and U.S. Supreme Court decisions)
2. **Compact and contiguous districts.** Each district shall consist of a compact and contiguous territory. The Commission will use a general appearance test regarding compactness and consider its functional compactness in terms of travel and transportation, communication, and geography. (Montana Constitution)
3. **Protection of minority voting rights and compliance with the Voting Rights Act.** No district, plan, or proposal for a plan is acceptable if it affords members of a racial or language minority group "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice". (U.S. Constitution and 42 U.S.C. 1973)
4. Race cannot be the predominant factor to which the traditional discretionary criteria are subordinated. (*Shaw v. Reno*, 509 U.S. 630 (1993))

Discretionary Criteria for Legislative Districts

1. **Following the lines of political units.** The Commission will consider the boundary lines of counties, cities, towns, school districts, Indian reservations, voting precincts, and other political units to the extent that they are reflected in the geographical database. If the lines do not follow lines in the geographical database, they can provide guidance.
2. **Following geographic boundaries.** Districts lines will be drawn as provided in the TIGER/Line files of the U.S. Bureau of the Census.
3. **Keeping communities of interest intact.** The Commission will consider keeping communities of interest intact. Communities of interest can be based on trade areas, geographic location, communication and transportation networks, media markets, Indian reservations, urban and rural interests, social, cultural, and economic interests, or occupations and lifestyles.

Operational Guidelines

* * *

3. The Commission will begin its redistricting in Glacier County (and adjacent Flathead and Lake Counties, as necessary) and to proceed in a clockwise motion throughout the state. The Commission will proceed along the Hi-Line, including Cascade County, to Eastern Montana. Following the completion of Eastern Montana, proceed west through Southcentral Montana, then north through the western third of the state. Flathead and Lake Counties will be contacted initially in the development of districts with Glacier and Pondera Counties that reflect concerns raised in the Old Person lawsuit, but the remainder of the districts in the counties will not be drawn until the final third of the state is considered next spring.

Nebraska

Constitution, Article III

Section 5. * * * [A]ny county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory.

Legislative Resolution No. 7, adopted by the Nebraska Legislature, 2001

* * *

3. District boundaries shall follow county lines whenever practicable and shall define districts that are compact and contiguous as these terms have been articulated by the United States Supreme Court. Should adherence to county lines cause a redistricting plan, or any aspect thereof, to be in violation of principles set forth by the United States Supreme Court in interpreting the United States Constitution, that requirement may be waived to the extent necessary to bring the plan or aspect of the plan into compliance with these principles.
4. Insofar as possible, and within the context of principles set forth by the United States Supreme Court, district boundaries shall define districts that are easily identifiable and understandable to voters and that preserve the cores of prior districts. When feasible, district boundary lines shall coincide with the boundaries of cities and villages. If a county, city, or village must be divided, the division shall be made along clearly recognizable boundaries, as described by census geography.
5. District boundaries shall not be established with the intention of favoring a political party or any other group or person.
6. In drawing district boundaries, no consideration shall be given to the political affiliations of registered voters, demographic information other than population figures, or the results of previous elections, except as may be required by the laws and Constitution of the United States.
7. District boundaries which would result in the unlawful dilution of the voting strength of any minority population shall not be established.
8. The general goal of the redistricting process shall be the creation of districts that are substantially equal in population. The specific criteria under which redistricting plans shall be judged with regard to the issue of population equality are described in Guideline 9.
9. The following criteria shall be specifically applicable to the public bodies for which the Legislature will create new district boundaries in 2001:

United States House of Representatives

a. * * *

- b. Population among districts shall be as nearly equal as practicable, that is, with an overall range of deviation at or approaching 0%.

- c. No plan will be considered which results in an overall range of deviation in excess of 1% or a relative deviation in excess of plus or minus 0.5%, based on the ideal district population. Any deviation from absolute equality of population must be necessary to the achievement of a legitimate state objective as that concept has been articulated by the United States Supreme Court. To the extent that such objectives are relied on, they shall be applied consistently, and shall include, but not be limited to, the creation of compact districts, the preservation of municipal boundaries, and the preservation of the cores of prior districts. Whenever there is presented to the Legislature more than one plan that will substantially vindicate the above objectives, preference will be given to the plan that provides the greatest degree of population equality.

Legislature

- a. * * *
- b. In establishing new legislative district boundaries, the Legislature shall create districts that are as nearly equal in population as may be. No plan will be considered which results in an overall range of deviation in excess of 10% or a relative deviation in excess of plus or minus 5%, based on the ideal district population.
- c. Any deviation in excess of the above must be justifiable as necessary for the realization of a “rational state policy” as that concept has been articulated by the United States Supreme Court.
- d. If the population of any county falls within the relative deviation set forth in these guidelines, the boundaries of that county shall define a legislative district.* * *

Nevada

Assembly Concurrent Resolution No. 1, Joint Standing Rules, adopted February 12, 2001

* * *

Rule No. 13.1. Equality of Representation.

1. In order to meet constitutional guidelines for deviations in population among state legislative districts, no plan, or proposed amendment thereto, will be considered that results in an overall range of deviation in excess of 10 percent, or a relative deviation in excess of plus or minus 5 percent from the ideal district population.
2. The population of each of the Nevada congressional districts must be as nearly equal as is practicable. Any population deviation among the congressional districts from the ideal district population must be necessary to achieve some legitimate state objective. Legitimate state objectives, as judicially determined, include making districts compact, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbent representatives. In order to meet constitutional guidelines for congressional districts, no plan, or proposed amendment thereto, will be considered that results in an overall range of deviation in excess of 1 percent, or a relative deviation in excess of plus or minus one-half percent from the ideal district population.
3. Equality of population in accordance with the standard for state legislative districts is the goal of redistricting for the State Board of Education and the Board of Regents.

* * *

Rule No. 13.3. Districts.

All district boundaries created by a redistricting plan must follow the census geography.

* * *

Rule No. 13.5. Compliance with the Voting Rights Act.

1. The redistricting committees will not consider a plan that discernibly violates section 2 of the Voting Rights Act, codified as 42 U.S.C. § 1973(a), which prohibits any state from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any United States citizen's right to vote on account of race, color or status as a member of a language minority group.
2. The redistricting committees will not consider a plan that is discernibly racially gerrymandered. Racial gerrymandering exists when:
 - a. race is the dominant and controlling rationale in drawing district lines; and
 - b. the Legislature subordinates traditional districting principles to racial considerations.

For the purposes of this subsection, "traditional districting principles" are those traditional redistricting principles that have been judicially recognized and include compactness of districts, contiguity of districts, preservation of political subdivisions, preservation of communities of interest, preservation of cores of prior districts, protection of incumbents and compliance with section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2).

3. For the purpose of analyzing the 2000 census data, the redistricting committees shall adopt the method set forth in the Office of Management and Budget (OMB) Bulletin No. 00-02 for aggregating and allocating the 63 categories of race data that will be reported to Nevada by the United States Census Bureau as part of the federal decennial census.

* * *

New Hampshire

Constitution, Part Second, House of Representatives

Article 9. Representatives Elected Every Second Year; Apportionment of Representatives. * * * In making such apportionment, no town, ward or place shall be divided nor the boundaries thereof altered.

* * *

Article 11. Small Towns; Representation by Districts. When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats, the town or ward shall have its own district of one or more representative seats. The apportionment shall not deny any other town or ward membership in a non-floterial representative district. When any town, ward,

or unincorporated place has fewer than the number of inhabitants necessary to entitle it to one representative, the legislature shall form those towns, wards, or unincorporated places into representative districts which contain a sufficient number of inhabitants to entitle each district so formed to one or more representatives for the entire district. In forming the districts, the boundaries of towns, wards, and unincorporated places shall be preserved and contiguous. The excess number of inhabitants of districts may be added to the excess number of inhabitants of other districts to form at-large or floterial districts conforming to acceptable deviations. * * *

Article 11-a. **Division of Town, Ward or Place; Representative Districts.** Notwithstanding Articles 9 and 11, a law providing for an apportionment to form representative districts under Articles 9 and 11 of Part Second may divide a town, ward or unincorporated place into two or more representative districts if such town, ward or place, by referendum requests such division.

Constitution, Part Second, Senate

Article 26. **Senatorial Districts, How Constituted.** And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. * * *

New Jersey

Constitution, Article IV

Section II

1. * * * Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.

* * *

3. * * * The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible * * *. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

New Mexico

New Mexico Statutes Annotated

§ 2-7C-3. Membership.

The house of representatives is composed of seventy members to be elected from districts that are contiguous and that are as compact as is practical and possible.

§ 2-8D-2. Membership.

The senate is composed of forty-two members to be elected from districts that are contiguous and that are as compact as is practical.

Guidelines for the Development of State and Congressional Redistricting Plans, adopted by the Legislative Council and used by the Redistricting Committee as required by Laws 2001, Chapter 220, Section 3, Subsection A, Paragraph (2)

* * *

1. Congressional districts shall be as equal in population as practicable.
2. State districts shall be substantially equal in population; no plans will be considered that include any proposed legislative * * * districts subject to legislative redistricting with a total population that deviates more than plus or minus five percent from the ideal.
3. * * *
4. Since the precinct is the basic building block of a voting district in New Mexico, proposed redistricting plans to be considered by the legislature shall not be comprised of districts that split precincts.
5. Plans must comport with the provisions of the Voting Rights Act of 1965, as amended, and federal constitutional standards. Plans that dilute a protected minority's voting strength are unacceptable. Race may be considered in developing redistricting plans but shall not be the predominant consideration. Traditional race-neutral districting principles (as reflected in paragraph seven) must not be subordinated to racial considerations.
6. All redistricting plans shall use only single-member districts.
7. Districts shall be drawn consistent with traditional districting principles. Districts shall be composed of contiguous precincts, and shall be reasonably compact. To the extent feasible, districts shall be drawn in an attempt to preserve communities of interest and shall take into consideration political and geographic boundaries. In addition, the legislature may seek to preserve the core of existing districts, and may consider the residence of incumbents.

New York

Constitution, Article III

Section 4. * * * [E]ach senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable * * * and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their

location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens. * * *

North Carolina

Constitution, Article II

Section 3. Senate districts: apportionment of Senators.

* * *

- (2) Each senate district shall at all times consist of contiguous territory;
- (3) No county shall be divided in the formation of a senate district * * *

Section 5. Representative districts; apportionment of Representatives.

* * *

- (2) Each representative district shall at all times consist of contiguous territory;
- (3) No county shall be divided in the formation of a representative district * * *

Redistricting Criteria for State House and Senate Districts, Stephenson v. Bartlett, No. 94PA02, 355 N.C. 354, 562 S.E.2d 377 (Apr. 30, 2002)

The Whole County Provision of the North Carolina Constitution must be harmonized with the one person, one vote requirement of the U.S. Constitution and the Voting Rights Act by applying the following criteria:

1. Draw districts required by the Voting Rights Act, complying to the extent possible with the Whole County Provision.
2. Make every district a single-member district, unless a multi-member district is necessary to advance a compelling governmental interest.
3. Keep the population of each district within plus or minus five percent of the ideal.
4. Take every county with the right population for a single-member district and make that county a single-member district.
5. Take every county with the right population for a multi-member district and divide that county internally into compact single-member districts, without involving other counties.
6. For a county not having the right population for any number of districts, group that county with the minimum number of other whole counties to create a cluster of counties that has the right population for a certain number of single-member districts. Then divide that cluster of counties into single-member districts, breaking county lines only to the minimum extent necessary. Within the clusters, "communities of interest should be considered in the formation of compact and contiguous districts."

North Dakota

Constitution, Article IV

Section 2. The legislative assembly shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. * * * The legislative assembly may combine two senatorial districts only when a single member senatorial district includes a federal facility or federal installation, containing over two-thirds of the population of a single member senatorial district, and may provide for the election of senators at large and representatives at large or from subdistricts from those districts.

North Dakota Statutes,

§ 54-03-01.5 Legislative redistricting requirements.

* * *

7. Except as provided in subsection 3, one senator and two representatives must be apportioned to each senatorial district. Representatives may be elected at large or from subdistricts.
8. Multimember senate districts providing for two senators and four representatives are authorized only when a proposed single-member senatorial district includes a federal facility or federal installation, containing over two-thirds of the population of the proposed single-member senatorial district.
9. Legislative districts and subdistricts must be compact and of contiguous territory.
10. Legislative districts must be as nearly equal in population as is practicable. Population deviation from district to district must be kept at a minimum. The total population variance of all districts, and subdistricts if created, from the average district population may not exceed recognized constitutional limitations.

Committee Guidelines, adopted 2001

Any plan considered must preserve existing district boundaries to the extent possible, preserve political subdivision boundaries to the extent possible, and provide for a population variance of under 10%.

Ohio

Constitution, Article XI

Section 3. Population of each house of representatives district.

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article.

Section 6. Creation of district boundaries; change at end of decennial period.

* * * District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed.

Section 7. Boundary lines of house of representatives districts.

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article.

Section 9. When population of county is fraction of ratio of representation.

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county.

Section 10. Creation and numbering of house of representatives districts.

The standards prescribed in sections 3, 7, 8, and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts.

Section 11. Senate districts.

Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article.

Oklahoma

Constitution, Article 5

Section 9A. Senatorial districts - Tenure. * * * In apportioning the State Senate, consideration shall be given to population, compactness, area, political units, historical precedents, economic and political interests, contiguous territory, and other major factors, to the extent feasible. * * *

Oregon

Constitution, Article IV

Section 7. **Senatorial districts; senatorial and representative subdistricts.** A senatorial district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating such senatorial districts. Senatorial or representative districts comprising not more than one county may be divided into subdistricts from time to time by law. Subdistricts shall be composed of contiguous territory within the district; and the ratios to population of senators or representatives, as the case may be, elected from the subdistricts, shall be substantially equal within the district.

[**Note:** The Oregon Supreme Court has ruled that election districts must be changed without regard to county lines in order to comply with the U.S. Constitution. *Hovet v. Myers*, 260 Ore. 152, 489 P.2d 684 (1971).]

Oregon Revised Statutes

§ 188.010. Criteria in apportionment for Legislative Assembly and Congress. The Legislative Assembly or the Secretary of State, whichever is applicable, shall consider the following criteria when apportioning the state into congressional and legislative districts:

- (1) Each district, as nearly as practicable, shall:
 - (a) Be contiguous;

- (b) Be of equal population;
 - (c) Utilize existing geographic or political boundaries;
 - (d) Not divide communities of common interest; and
 - (e) Be connected by transportation links.
- (2) No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person.
- (3) No district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.
- (4) Two state House of Representative districts shall be wholly included within a single state senatorial district.

Pennsylvania

Constitution, Article II

Section 16. **Legislative Districts.** [S]enatorial and * * * representative districts * * * shall be composed of compact and contiguous territory as nearly equal in population as practicable * * *. Unless absolutely necessary, no county, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Rhode Island

Constitution, Article VII

Section 1. **Composition.** * * * The house of representatives shall be constituted on the basis of population and the representative districts shall be as nearly equal in population and as compact in territory as possible. * * *

Constitution, Article VIII

Section 1. **Composition.** * * * The senate shall be constituted on the basis of population and the senatorial districts shall be as nearly equal in population and as compact in territory as possible.

South Carolina

Guidelines for Legislative and Congressional Redistricting, adopted by Senate Judiciary Committee's Subcommittee on Redistricting, April 29, 2003

I. EQUAL POPULATION

Equality of population of legislative and congressional districts insofar as is practicable is the goal of reapportionment and redistricting.

- A. Legislative districts will be drawn to achieve substantial equality of population among the various districts. Population deviation should be within plus or minus five percent (+ or - 5%) and within an overall range less than ten (10%) percent. *See, Gaffney v. Cummings, Conner v. Finch.*
- B. Congressional Districts. The apportionment clause of Article I, Section 2 of the United States Constitution requires that the population of each congressional district to be as nearly equal in population as practicable to the other congressional districts within the state. Therefore, a congressional redistricting plan should produce districts which are mathematically equal in population or which produce the lowest overall range practicable.

II. AVOIDANCE OF RACIAL GERRYMANDERING

All districts should comply with the decisions of the United States Supreme Court in *Shaw v. Reno*, *Miller v. Johnson*, *Shaw v. Hunt*, *Bush v. Vera*, *Hunt v. Cromartie*, and any forthcoming decisions of the U.S. Supreme Court relating to gerrymandering. Consideration should be given to whether current districts comply with these court decisions.

III. VOTING RIGHTS ACT

A redistricting plan for the General Assembly or Congress should not have either the purpose or the effect of diluting minority voting strength and should otherwise comply with the Voting Rights Act, the Fourteenth and Fifteenth Amendments to the U.S. Constitution, the decisions of the U.S. Supreme Court in *Reno v. Bossier Parish School Board*, and any forthcoming decisions of the U.S. Supreme Court concerning voting rights.

IV. CONTIGUITY

All legislative and congressional districts will be composed of contiguous geography. Contiguity by water is acceptable to link territory within a district provided that there is a reasonable opportunity to access all parts of the district and the linkage is designed to meet the other criteria stated herein. Point-to-point contiguity is acceptable so long as adjacent districts do not use the same vertex as points of transversal.

V. COMMUNITIES OF INTEREST

Where practical, legislative and congressional districts should attempt to preserve communities of interest.

VI. CONSTITUENT CONSISTENCY

Efforts will be made to preserve cores of existing districts.

VII. PRECINCT BOUNDARY LINES

District boundaries should adhere, to the extent practical, to voting precinct boundary lines, as represented by the Census Bureau's Voting Tabulation District (VTD) Lines, in order to minimize voter confusion and cost of election administration. Pending precinct boundary line realignments should be considered. If precincts must be split, every effort should be made to divide precincts along recognizable and demonstrable boundaries.

VIII. MUNICIPAL AND COUNTY BOUNDARY LINES

Municipal and county boundaries should be considered when drawing district boundaries.

IX. * * *

X. COMPACTNESS

Scrutiny of the compactness of districts has heightened under recent judicial decisions which have invalidated or criticized majority-minority districts that were the result of racial gerrymandering and were not narrowly tailored to satisfy a compelling state interest. In determining the relative compactness of a district, consideration should be given to overall geographical and demographic compactness.

Compactness also may be determined by an analysis of the function of the district. The district should be drawn to facilitate:

- A. Enhanced communication between a representative and his constituents;
- B. Enhanced opportunity for voters to know their representative and the other voters he represents; and
- C. A representative's reasonable access to constituents via roads and highways.

A functional analysis may be undertaken to ensure that the compactness also reflects:

- A. Utilization of vernacularly insular regions so as to allow for the representation of common interests; and
- B. Utilization of districts which facilitate a representative's capabilities to effectively and efficiently communicate with his constituents in cognizable media markets.

South Dakota

Constitution, Article III

Section 5. Legislative reapportionment. * * * House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census.

South Dakota Codified Laws

§ 2-2-32. Legislative policy in redistricting. The Legislature, in making the 2001 redistricting, determines, as a matter of policy, that the following principles are of primary significance:

1. Adherence to standards of population deviance as established by judicial precedent and to standards of population deviance as prescribed by S.D. Const., Art. III, § 5;
2. Protection of communities of interest by means of compact and contiguous districts;
3. Respect for geographical and political boundaries; and

4. Protection of minority voting rights consistent with the United States Constitution, the South Dakota Constitution, and federal statutes, as interpreted by the United States Supreme Court and other courts with jurisdiction.

Tennessee

Tennessee Code Annotated

§ 3-1-102. State senatorial districts.

* * *

(e) It is the legislative intent that all senate districts shall be contiguous and, toward that end, if any voting district or other geographical entity designated as a portion of a senate district is found to be noncontiguous with the larger portion of the senate district, it shall be constituted a portion of the senate district smallest in population to which it is contiguous.

* * *

(i) It is the intention of the general assembly in passing a plan apportioning the state senatorial districts to do so in a manner which complies with the constitutional mandates of the United States Constitution and the Constitution of Tennessee and applicable judicial decisions.

§ 3-1-103. State representative districts.

* * *

(b) It is the intention of the general assembly that:

(1) Each district be represented by a single member;

(2) Districts must be substantially equal in population in accordance with constitutional requirements for “one (1) person one (1) vote”;

(3) Geographic areas, boundaries and population counts used for redistricting shall be based on the 2000 federal decennial census;

(4) Districts must be contiguous and contiguity by water is sufficient and, toward that end, if any voting district or other geographical entity designated as a portion of a district is found to be noncontiguous with the larger portion of such district, it shall be constituted a portion of the district smallest in population to which it is contiguous;

(5) No more than thirty (30) counties may be split to attach to other counties or parts of counties to form multi-county districts; and

(6) The redistricting plan will comply with the Voting Rights Act and the fourteenth and fifteenth amendments to the United States Constitution.

Texas

Constitution, Article III

Section 25. Senatorial Districts. The State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator.

Section 26. Apportionment of Members of House of Representatives. The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

Utah

Redistricting Principles, adopted by the Redistricting Committee, April 26 and May 10, 2001

1. Congressional districts must be as nearly equal as practicable with a deviation not greater than +/- .5 %.
2. State legislative districts and state school board districts must have substantial equality of population among the various districts with a deviation not greater than +/- 4%.
3. Districts will be single member districts.
4. Plans will be drawn to create three Congressional Districts, four Congressional Districts, 29 State Senate Districts, 75 State House Districts, and 15 State School Board Districts.
5. In drawing districts, the official population enumeration of the 2000 decennial census will be used.
6. Districts will be contiguous and reasonably compact.

Vermont

Constitution, Chapter II

Section 13. Representatives; Number. * * * In establishing representative districts, which shall afford equality of representation, the General Assembly shall seek to maintain geographical compactness and contiguity and to adhere to boundaries of counties and other existing political subdivisions.

Section 18. Senators; Numbers; Qualifications. * * * In establishing senatorial districts, which shall afford equality of representation, the General Assembly shall seek to maintain geographical compactness and contiguity and to adhere to boundaries of counties and other existing political subdivisions.

*Vermont Statutes Annotated, Title 17, Chapter 34A***§ 1903. Periodic Reapportionment; Standards.**

(a) The house of representatives and the senate shall be reapportioned and redistricted on the basis of population during the biennial session after the taking of each decennial census of the United States, or after a census taken for the purpose of such reapportionment under the authority of this state.

(b) The standard for creating districts for the election of representatives to the general assembly shall be to form representative districts with minimum percentages of deviation from the apportionment standard for the house of representatives. The standard for creating districts for the election of senators on a county basis to the general assembly shall be to form senatorial districts with minimum percentages of deviation from the apportionment standard for the senate. The representative and senatorial districts shall be formed consistent with the following policies insofar as practicable:

- (1) preservation of existing political subdivision lines;
- (2) recognition and maintenance of patterns of geography, social interaction, trade, political ties and common interests;
- (3) use of compact and contiguous territory.

§ 1906b. Division of Two-member Representative Districts.

(a) An initial district entitled to two representatives under section 1893 of this title may be divided into single-member representative districts as provided in this section.

(b) As soon as practical after enactment of a final plan for initial districts under section 1906 of this title, the boards of civil authority of the town or towns which constitute 25 percent or more of the population of the initial district may call a meeting of the boards of civil authority of the town or towns of the initial district for the purpose of preparing a proposal for division of the district. Each board shall have one vote, provided that the proposal shall not provide for a representative district line to be drawn through a town if the board of civil authority of that town objects.

(c) In making a proposal under this section, the boards of civil authority shall consider:

- (1) preservation of existing political subdivision lines;
- (2) recognition and maintenance of patterns of geography, social interaction, trade, political ties and common interests;
- (3) use of compact and contiguous territory;
- (4) incumbencies.

* * *

(f) Representative districts proposed under this section shall become effective when approved by the general assembly before adjournment sine die. The general assembly shall approve representative districts proposed by the boards of civil authority if they are consistent with the standards set forth in this section.

§ 1906c. Division of Districts Having Three or More Representatives.

(a) An initial district entitled to three or more representatives under section 1893 of this title shall be divided into single- and two-member representative districts as provided in this section.

(b) As soon as practical after enactment of a final plan for initial districts under section 1906 of this title, the boards of civil authority of the town or towns within an initial district having three or more representatives shall meet and prepare a proposal for division of the district. Each board shall have one vote, provided that the proposal shall not provide for a representative district line to be drawn through a town if the board of civil authority of that town objects.

(c) In making a proposal under this section, the boards of civil authority shall consider

(1) preservation of existing political subdivision lines;

(2) recognition and maintenance of patterns of geography, social interaction, trade, political ties and common interests;

(3) use of compact and contiguous territory;

(4) incumbencies.

* * *

(f) Representative districts proposed under this section shall become effective when approved by the general assembly before adjournment sine die. The general assembly shall approve representative districts proposed by the boards of civil authority if they are consistent with the standards set forth in this section.

Virginia

Constitution, Article II

Section 6. Apportionment. * * * Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. * * *

Virginia Code

§ 24.2-305. Composition of election districts and precincts.

A. Each election district and precinct shall be composed of compact and contiguous territory and shall have clearly defined and clearly observable boundaries.

B. A “clearly observable boundary” shall include (i) any named road or street, (ii) any road or highway which is a part of the federal, state primary, or state secondary road system, (iii) any river, stream, or drainage feature shown as a polygon boundary on the TIGER/line files of the United States Bureau of the Census, or (iv) any other natural or constructed or erected permanent physical feature which is shown on an official map issued by the Virginia Department of Transportation, on a United States Geological Survey topographical map, or as a polygon boundary on the TIGER/line files of the United States Bureau of the Census. No property line or subdivision boundary shall be deemed to be a clearly observable boundary unless it is marked by a permanent physical feature that is shown on an official map issued by the Virginia Department of Transportation, on a United States Geological Survey topographical map, or as a polygon boundary on the TIGER/line files of the United States Bureau of the Census.

Committee Resolution No. 1, adopted by the Senate and House Committees on Privileges and Elections, April 3, 2001

* * *

I. Population Equality

The population of legislative districts shall be determined solely according to the enumeration established by the 2000 federal census. The population of each district shall be as nearly equal to the population of every other district as practicable. Population deviations in Senate districts should be within plus-or-minus two percent.

II. Voting Rights Act

Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965.

III. Contiguity and Compactness

Districts shall be comprised of contiguous territory including adjoining insular territory. Contiguity by water is sufficient. Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the recent case of *Jamerson v. Womack*, 244 Va. 506 (1992).

IV. Single- Member Districts

All districts shall be single-member districts.

V. Communities of Interest

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. It is inevitable that some interests will be advanced more than others by the choice of particular district configurations. The discernment, weighing, and balancing of the varied factors

that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people. Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest.

VI. Priority

All of the foregoing criteria shall be considered in the districting process, but population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria. Where the application of any of the foregoing criteria may cause a violation of applicable federal or state law, there may be such deviation from the criteria as is necessary, but no more than is necessary, to avoid such violation.

Committee Resolution No. 2, adopted by the Senate and House Committees on Privileges and Elections, April 3, 2001

The resolution is the same as Resolution No. 1 for legislative districts, but provides for population equality of congressional districts without an allowance for a plus or minus 2 percent deviation.

Washington

Constitution, Article II, Section 43

Section 43. **Redistricting.**

* * *

(5) Each district shall contain a population, excluding nonresident military personnel, as nearly equal as practicable to the population of any other district. To the extent reasonable, each district shall contain contiguous territory, shall be compact and convenient, and shall be separated from adjoining districts by natural geographic barriers, artificial barriers, or political subdivision boundaries. * * * The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.

* * *

Revised Code of Washington

§ 44.05.090. **Redistricting plan.** In the redistricting plan:

- (1) Districts shall have a population as nearly equal as is practicable, excluding nonresident military personnel, based on the population reported in the federal decennial census.
- (2) To the extent consistent with subsection (1) of this section the commission plan should, insofar as practical, accomplish the following:

(a) District lines should be drawn so as to coincide with the boundaries of local political subdivisions and areas recognized as communities of interest. The number of counties and municipalities divided among more than one district should be as small as possible;

(b) Districts should be composed of convenient, contiguous, and compact territory. Land areas may be deemed contiguous if they share a common land border or are connected by a ferry, highway, bridge, or tunnel. Areas separated by geographical boundaries or artificial barriers that prevent transportation within a district should not be deemed contiguous; and

(c) Whenever practicable, a precinct shall be wholly within a single legislative district.

* * *

(5) The commission shall exercise its powers to provide fair and effective representation and to encourage electoral competition. The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.

West Virginia

Constitution, Article I

Section 4. **Representatives to Congress.** For the election of representatives to Congress, the state shall be divided into districts * * * which * * * shall be formed of contiguous counties, and be compact. Each district shall contain, as nearly as may be, an equal number of population, to be determined according to the rule prescribed in the constitution of the United States.

Constitution, Article VI

Section 4. **Division of state into senatorial districts.** * * * The districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States.

Wisconsin

Constitution, Article IV

* * *

Section 3. **Apportionment.** At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.

* * *

Section 4. **Representatives to the assembly, how chosen.** The * * * districts to be bounded by county, precinct, town or ward lines, to consist of contiguous territory and be in as compact form as practicable.

Section 5. **Senators, how chosen.** The senators shall be elected by single districts of convenient contiguous territory, at the same time and in the same manner as members of the assembly are required to be chosen; and no assembly district shall be divided in the formation of a senate district. The senate districts shall be numbered in the regular series, and the senators shall be chosen alternately from the odd and even-numbered districts for the term of 4 years.

Wisconsin Statutes

§ 4.001. **Legislative redistricting; equal population.**

* * *

(3) To the very limited extent that precise population equality is unattainable, * * * a good faith effort to apportion the legislature giving due consideration to the need for contiguity and compactness of area, the maintenance of the integrity of political subdivisions and of communities of interest, and competitive legislative districts. Island territory (territory belonging to a city, town or village but not contiguous to the main part thereof) has been treated as a contiguous part of its municipality.

* * *

Wyoming

Constitution, Article 3

Section 49. **District representation.** Congressional districts may be altered from time to time as public convenience may require. When a congressional district shall be composed of two or more counties they shall be contiguous, and the districts as compact as may be. No county shall be divided in the formation of congressional districts.

Draft Criteria, adopted by Joint Corporations, Elections and Political Subdivisions Interim Committee, May 14, 2001

1. Election districts should be contiguous, compact, and reflect a community of interest.

* * *

3. To the greatest extent possible, in establishing election districts:

- a. County boundaries should be followed;
- b. The majority of population in each county should be in one district;
- c. Census blocks should be followed.

4. The plan should avoid diluting voting power of minorities in violation of the Voting Rights Act.

* * *

6. Consideration should be given to two contiguous house districts in each senate district.

7. Significant geographical features should be considered in establishing districts.

* * *

9. Consideration of residence of current legislators should be avoided.

APPENDIX F

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<i>Avery v. Midland County</i> , 390 U.S. 474 (1968).	145
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<i>Bd. of Estimate v. Morris</i> , 489 U.S. 688, 702 (1989)..	43, 44
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<i>Burns v. Richardson</i> , 384 U.S. 73 (1966).....	10, 116, 127, 138, 143
<i>Bush v. Vera</i> , 517 U.S. 952 (1996).....	4, 30, 64, 72, 74, 75, 77, 103, 105, 109, 112, 113, 134
<i>Buskey v. Oliver</i> , 565 F. Supp. 1473 (M.D. Ala. 1983).....	97
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<i>Carstens v. Lamm</i> , 543 F. Supp. 68, 85 (D. Colo. 1982).....	28
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<i>City of Lockhart v. United States</i> , 460 U.S. 125 (1983).....	90
<i>City of Mobile v. Bolden</i> , 446 U.S. 55 (1980).....	2, 55-57, 100, 101, 117, 127, 136, 139, 143
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<i>Colegrove v. Green</i> , 328 U.S. 549 (1946).....	22
<i>Connor v. Finch</i> , 431 U.S. 407 (1977).....	29, 33, 34, 41, 45, 147
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<i>Connor v. Williams</i> , 404 U.S. 549 (1972).....	143
<i>Cotlow v. Emison</i> , 502 U.S. 1022 (1992) (mem.).....	130
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<i>D.C. Court of Appeals v. Feldman</i> , 460 U.S. 462 (1983).....	132

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<i>Easley v. Cromartie</i> , 532 U.S. 234 (2001).....	4, 72, 75, 76, 103
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<i>Gorin v. Karpan</i> , 775 F. Supp. 1430 (D. Wyo. 1991).....	43
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<i>Martinez v. Bush</i> , No. 02-20244-CIV-JORDAN, 234 F. Supp.2d 1275 (S.D. Fla. 2002).....	122
<i>Marylanders for Fair Representation Inc. v. Schaefer</i> , 849 F. Supp. 1022 (D. Md. 1994).....	35, 36, 40, 129
<i>Mauldin v. Branch</i> , No. 2002-CA-00146, 886 So.2d 429 (Miss. 2003).	131
<i>McDaniel v. Sanchez</i> , 452 U.S. 130 (1981).	97
<i>McGovern v. Connolly</i> , 637 F. Supp. 111 (D. Mass 1986).	11
<i>McNeil v. Springfield</i> , 658 F. Supp. 1015 (C.D. Ill. 1987).	65, 66
<i>Mellow v. Mitchell</i> , 530 Pa. 44, 607 A.2d 204 (1992), <i>cert. denied sub nom. Loeper v. Mitchell</i> , 506 U.S. 828 (1992) (mem.).....	132
<i>Miller v. Johnson</i> , 515 U.S. 900 (1995).	4, 28, 63, 64, 72-75, 77, 103, 106, 109, 110, 113, 134
<i>Mississippi Republican Exec. Comm. v. Brooks</i> , 469 U.S. 1002 (1984).	68
<i>Montiel v. Davis</i> , No. Civ.A. 01-0447-BH-S, 215 F. Supp. 2d 1279 (S.D. Ala. 2002).....	35, 36
<i>Moore v. Itawamba County</i> , No. 05-60060, 431 F.3d 257 (5th Cir. 2005).....	145
<i>Nerch v. Mitchell</i> , No. 3:CV-92-0095 (M.D. Pa. Aug. 13, 1992).....	68, 129, 132
<i>Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder</i> , No. 08-322, 557 U.S. ____ (2009)	104

<i>Parsons Steel Inc. v. First Ala. Bank</i> , 474 U.S. 518 (1986).....	132
<i>Pender County v. Bartlett</i> , No. 103A06, 649 S.E.2d 364 (N.C. 2007), cert. granted sub nom. <i>Bartlett v. Strickland</i> , No. 07-689 (U.S. Mar. 17, 2008).....	5
<i>Pope v. Blue</i> , 809 F. Supp. 392 (W.D. N.C. 1992), aff'd 506 U.S. 801 (1992).....	121
<i>Presley v. Etowah County Comm'n</i> , 502 U.S. 491 (1992).....	85, 86, 103
<i>Quilter v. Voinovich</i> , 857 F. Supp. 579 (N.D. Ohio 1994).....	40
<i>Regensburger v. City of Bowling Green</i> , No. 99-3928, 278 F.3d 588 (6th Cir. 2002).....	146
<i>Reno v. Bossier Parish Sch. Bd. (Bossier Parish I)</i> , 520 U.S. 471 (1997).....	87, 88, 91, 92, 97
<i>Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)</i> , 528 U.S. 320 (2000).....	91, 92, 104
<i>Republican Party of Virginia v. Wilder</i> , 774 F. Supp. 400 (W.D. Va. 1991).....	121
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	1, 25, 30, 31, 39, 43, 46, 138, 143, 145
<i>Ridge v. Verity</i> , 715 F. Supp. 1308 (W.D. Pa. 1989).....	11
<i>Riley v. Kennedy</i> , No. 07-77, ___ U.S. ___, 128 S.Ct. 1970 (2008).....	87, 104
<i>Rodriguez v. Pataki</i> , No. 02 Civ. 0618, 308 F. Supp. 2d 346 (S.D.N.Y. 2004).....	35, 36
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982).....	139, 144
<i>Romero v. City of Pomona</i> , 665 F. Supp. 853, 866 (C.D. Cal. 1987).....	65, 98, 99
<i>Rooker v. Fidelity Trust Co.</i> , 263 U.S. 413 (1923).....	132
<i>Rybicki v. State Board of Elections (Rybicki II)</i> , 574 F. Supp. 1147 (N.D. Ill. 1983).....	55, 58
<i>Rybicki v. State Bd. of Elections (Rybicki I)</i> , 574 F. Supp. 1082 (N.D. Ill. 1982).....	58
<i>Schaefer v. Thomson</i> , 240 F. Supp. 247 (D. Wyo. 1964).....	44, 46
<i>Scott v. Germano</i> , 381 U.S. 407 (per curiam).....	129
<i>Session v. Perry</i> , No. 2:03-CV-354, 298 F. Supp.2d 451 (2004), vacated and remanded sub nom. <i>Jackson v. Perry</i> , 543 U.S. 941 (2004) (mem.).....	111, 122
<i>Shaw v. Hunt (Shaw II)</i> , 517 U.S. 899 (1996).....	4, 63, 64, 72, 74-77, 106, 113
<i>Shaw v. Reno (Shaw I)</i> , 509 U.S. 630 (1993).....	3, 4, 63, 64, 71-74, 77, 102, 105, 106, 109, 112
<i>Smith v. Clark</i> , No. 3:01-CV-855WS, 189 F. Supp.2d. 503 (S.D. Miss. 2002).....	131

<i>South Carolina v. Katzenbach</i> , 383 U.S. 301, 313 (1966).....	78, 103
<i>State ex rel. Stephan v. Graves</i> , 796 F. Supp. 468 (D. Kan. 1992).....	28, 129
<i>Stone v. Hechler</i> , 782 F. Supp. 1116 (W.D. W.Va. 1992).....	28, 109
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986). . . . 3, 55, 56, 58-66, 69, 76, 98, 99, 101, 110, 111, 139, 140, 144, 147	
<i>Travis v. King</i> , 552 F. Supp. 554 at 563-573 (D. Hawaii 1982).....	10
<i>Turner v. Arkansas</i> , 784 F. Supp. 585 (E.D. Ark. 1991), <i>aff'd</i> , 504 U.S. 952 (1992) (mem.).....	28
<i>United Jewish Organizations v. Carey</i> , 430 U.S. 144 (1977).....	68, 110
<i>United States v. Hays</i> , 515 U.S. 737 (1995).....	72, 102
<i>United States v. Marengo County Comm'n</i> , 731 F.2d 1546 (11th Cir.1984).....	54, 58, 99
<i>Upham v. Seamon</i> , 456 U.S. 37 (1982).....	134
<i>Utah v. Evans</i> , 536 U.S. 452 (2002).....	13
<i>Vera v. Bush</i> , 933 F. Supp. 1341 (S.D. Tex. 1996); 980 F. Supp. 251 (S.D. Tex. 1997); 980 F. Supp. 254 (S.D. Tex. 1997).....	134
<i>Vieth v. Jubelirer</i> , 541 U.S. 267 (2004).....	115, 122, 127
<i>Vieth v. Pennsylvania</i> , No. 1:CV-01-2439, 195 F. Supp. 2d 672 (M.D. Pa. 2002), <i>appeal dismissed as moot sub nom. Schweiker v. Vieth</i> , 537 U.S. 801 (2002) (mem.).....	28
<i>Voinovich v. Quilter</i> , 507 U.S. 146 (1993).....	35, 40, 46, 54, 60, 61, 63, 69, 102
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	1, 25, 26, 45
<i>Whitcomb v. Chavis</i> , 403 U.S. 124 (1971).....	42, 119, 134, 136, 139, 143
<i>White v. Regester</i> , 412 U.S. 755 (1973).....	2, 32, 33, 35, 36, 38, 56, 101, 138, 143, 147
<i>White v. Weiser</i> , 412 U.S. 783 (1973).....	25, 26, 127, 134
<i>Wilson v. Eu</i> , 823 P.2d 545, 607-09 (Cal. 1990).....	28
<i>Winter v. Brooks</i> , 461 U.S. 921 (1983)(mem.).....	97
<i>Wisconsin v. City of New York</i> , 517 U.S. 1 (1996).....	12
<i>Wise v. Liscomb</i> , 437 U.S. 535 (1978).....	112

<i>WMCA Inc. v. Lomenzo</i> , 377 U.S. 633 at 641, 653 (1964).....	10
<i>Young v. Klutznick</i> , 652 F.2d 617 (6th Cir. 1981), <i>cert. denied sub nom. Young v. Baldrige</i> , 455 U.S. 939 (1982)	12
<i>Zimmer v. McKeithen</i> , 485 F.2d 1297 (5th Cir. 1973) (<i>en banc</i>), <i>aff'd per curiam sub nom. East Carroll Parish Sch. Bd. v. Marshall</i> , 424 U.S. 636 (1976).....	57, 141, 147

GLOSSARY

Alternative Population Base—A population count other than the official census data that is used for redistricting.

Apportionment—The process of assigning seats in a legislative body among established districts.

At-large—When one or several candidates run for an office, and they are elected by the whole area of a local political subdivision, they are being elected at-large.

Census—Enumeration of the population as mandated by the U.S. Constitution.

Census blocks—the smallest geographic area defined for decennial census tabulations. States have input into the boundaries through the first phase of the Redistricting Data Program—the Block Boundary Suggestion Project. The Census Bureau provides redistricting data at the block level, which is the lowest level of census geography.

Census block group—A cluster of census blocks having the same first digit of their 4 digit code within a census tract. Data are tabulated by block groups, which are usually locally defined.

Census tract—Small, geographic statistical subdivision within counties usually defined by local participants for data collection and analysis.

Commission—A statutory or constitutional body charged with researching or implementing policy. Redistricting commissions have been used to draw districts for legislatures and Congress.

Communities of interest—Geographical areas, such as neighborhoods of a city or regions of a state, where the residents have common political interests that do not necessarily coincide with the boundaries of a political subdivision, such as a city or county.

Compactness—Having the minimum distance between all the parts of a constituency (a circle, square or a hexagon is the most compact district).

Contiguity—All parts of a district being connected at some point with the rest of the district.

Cracking—A term used when the electoral strength of a particular group is divided by a redistricting plan.

Deviation—The measure of how much a district or plan varies from the ideal.

District—The boundaries that define the constituency of an elected official.

Gerrymander—A district intentionally drawn to advantage one group or party over another, especially a district with a bizarre shape.

GIS—Geographic Information System. Computer software used for creating and analyzing maps and data.

Ideal population—The total state population divided by the number of seats in a legislative body.

Majority-minority districts—Term used by courts for seats where a racial or language minority constitutes a majority of the population.

Metes and bounds—A detailed description of district boundaries using specific geographic features.

Multimember district—A district that elects two or more members to a legislative body.

Natural boundaries—District boundaries that are natural geographic features, such as bodies of water.

One person, one vote—Constitutional standard established by the U.S. Supreme Court that all legislative districts should be approximately equal in population.

Overall range—The difference in population between the largest and smallest districts in a districting plan in either absolute or percentage terms.

Packing—A term used when one group is consolidated as a super-majority in a small number of districts, thus reducing its electoral influence in surrounding districts.

Partisan gerrymandering—The deliberate drawing of district boundaries to secure an advantage for one political party.

PL 94-171—Federal law enacted in 1975 requiring the U. S. Census Bureau to provide the states with data for use in redistricting as well as mandating the program where the states define the blocks for collecting data.

Plurality—A winning total in an election involving more than two candidates, where the winner received less than a majority of the votes cast.

Racial Gerrymandering—The deliberate drawing of district boundaries to secure an advantage for one race.

Reapportionment—The allocation of seats in a legislative body (such as Congress) among established districts (such as states), where the district boundaries do not change but the number of members per district does.

Redistricting—The drawing of new political district boundaries.

Sampling—Technique or method that measures part of a population to determine the full number.

Section 2 of the Voting Rights Act—Part of the federal law that protects racial and language minorities from discrimination by a state, or other political subdivision, in voting practices.

Section 5 of the Voting Rights Act—Part of the federal law that requires certain states and localities to pre-clear all election law changes with the U.S. Department of Justice or the federal district court for the District of Columbia before those laws take effect.

Single-member district—District electing only one representative.

Standard deviation—A statistical formula measuring variance from a norm.

Tabulation—The totaling and reporting of the census data.

TIGER—Topologically Integrated Geographic Encoding and Referencing. The system and digital database developed at the U.S. Census Bureau to support computer maps used by the census.

VAP—Voting Age Population. The number of people over 18 years of age.

VTD—Voting Tabulation District. Census term for geographic area, such as an election precinct, where election information is collected.



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