How to Draw Redistricting Plans
That Will Stand Up in Court

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III. Don’t Discriminate Against Racial or Language Minorities

A. Section 2 of the Voting Rights Act

1. A National Standard

Assuming that you are prepared to meet equal population requirements, you will also want to make sure you do not discriminate against minorities.

In a democracy, “power to the people” means the power to vote. Section 2 of the Voting Rights Act of 1965 (codified as amended at 42 U.S.C. § 19731), attempts to secure this political

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1 § 1973 Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(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
power for racial and language minorities by prohibiting states and political subdivisions from
imposing or applying election laws that deny or abridge the right to vote on account of race or color
or because a person is a member of a language minority group. A "language minority group" is
defined as "American Indian, Asian American, Alaskan Natives or of Spanish heritage."  

Section 2 applies throughout the United States. It has been used to attack reapportionment
and redistricting plans on the ground that they discriminated against Blacks, Hispanics, or American
Indians and abridged their right to vote by diluting the voting strength of their population in the state.

2. Data on Race and Language Minorities

In order 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. Persons of Hispanic or Latino origin might be of any race.
Persons 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. Double that for Hispanic or Latino origin and double it again for those
under and over 18. There are 263 potential categories of population count for each block!

In order to reduce the categories of racial data to a manageable number, and to provide
guidance to states and local governments that must submit their redistricting plans for preclearance

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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.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it
is shown that the political processes leading to nomination or election in the State or political subdivision are not
equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its
members have less opportunity than other members of the electorate to participate in the political process and to
elect representatives of their choice. The extent to which members of a protected class have been elected to office in
the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this
section establishes a right to have members of a protected class elected in numbers equal to their proportion in the
population.

§ 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.

§ 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.

before they may take effect, the U.S. Department of Justice says that, in most of the usual cases, the Department will analyze only eight categories of race data.\(^3\)

Non-Hispanic White  
Non-Hispanic Black plus Non-Hispanic Black and White  
Non-Hispanic Asian plus Non-Hispanic Asian and White  
Non-Hispanic American Indian/Alaska Native plus Non-Hispanic American Indian/Alaska Native and White  
Non-Hispanic Pacific Islander plus Non-Hispanic Pacific Islander and White  
Non-Hispanic Some Other Race plus Non-Hispanic Some Other Race and White  
Non-Hispanic Other multiple-race (where more than one minority race is listed)  
Hispanic

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

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

In most areas of the country, you will only need to be concerned about three: Whites, Blacks, and Hispanics.

3. **No Discriminatory Effect**

Purity of intent will not save your plan from attack under § 2. The test is whether your plan will have the effect of diluting minority voting strength, not whether is was enacted with an intent to discriminate.

It is true that in 1980, in *City of Mobile v. Bolden*, 446 U.S. 55, the U.S. Supreme Court interpreted § 2 as applying only to actions intended to discriminate. Black residents of Mobile, Alabama, had charged that the city’s practice of electing commissioners at large diluted minority voting strength. They failed to prove the at-large plan was adopted with an intent to discriminate against Blacks. The Supreme Court refused to strike it down.


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A violation of [§ 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [§ 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.


4. The Three Gingles Preconditions

In order to assist courts in evaluating challenges to redistricting plans, the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), imposed three preconditions that a plaintiff must prove before a court must proceed to a detailed analysis of a plan:

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; and

3) that, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority’s preferred candidate.

478 U.S. at 50-51.

*Gingles* was the first case in which the Supreme Court considered the 1982 amendments to § 2. It was a challenge to legislative redistricting plans in North Carolina. At issue were one multimember Senate district, one single-member Senate district, and five multimember House districts. Justice Brennan’s majority opinion upheld the constitutionality of § 2, as amended.

The Court has since held that the three preconditions also apply to § 2 challenges to single-member districts, *Gore v. Emison*, 507 U.S. 25, 40-41 (1993).

In order to establish the first precondition, the minority group must be sufficiently large to constitute a majority of the voting-age population in the proposed district. *Bartlett v. Strickland*, No. 07-689, 556 US 1 (2009). If not, the jurisdiction cannot be held liable for violating § 2.
5. "The Totality of the Circumstances"

Once these three preconditions are satisfied, Justice Brennan said that a court must consider several additional “objective factors” in determining the “totality of the circumstances” surrounding an alleged violation of § 2. They include the following:

1) the extent of the history of official discrimination that touched the right of members of the minority group to register, to vote, or otherwise participate in the democratic process;

2) the extent to which voting in elections 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 that may enhance the opportunity for discrimination;

4) whether members of the minority group have been denied access to the candidate slating process, if there is one;

5) the extent to which the members of the minority group bear the effects of discrimination in areas like education, employment, and health, which hinder effective participation in the political process;

6) whether political campaigns have been characterized by overt or subtle racial appeals;

7) the extent to which members of the minority group have been elected to public office;

8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the members of the minority group; and

9) whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.

478 U.S. at 36-37.

In Gingles, the Court threw out all of the challenged multimember districts, except one where Black candidates had sometimes managed to get elected.

6. Draw Districts the Minority Has a Fair Chance to Win

If you have a minority population that could elect a representative if given an ideal district, and the minority population has been politically cohesive, but bloc voting by Whites has prevented the minority’s preferred candidates from being elected in the past, you may have to create a district that the minority has a fair chance to win. To do that, they will need an effective voting majority in the district. See Johnson v. De Grandy, 512 U.S. 997 (1994). How much of a majority is that?
a. "A Realistic Opportunity to Elect"

Once the 50-percent threshold has been crossed to establish liability for failing to draw a minority district, the inquiry shifts to the share of the population required to provide the minority with "a realistic opportunity to elect officials of their choice..." Kirskey v. Board of Supervisors, 402 F. Supp. 658, 676 (S.D. Miss. 1975), aff'd 528 F. 2d 536 (5th Cir. 1976), rev'd, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977). It requires a "searching practical evaluation of the past and present reality," Gingles, 478 U.S. at 45 (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 28, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205), to determine, in the real world, what it takes to elect their chosen candidate. It may be a super-majority, or it may be less than a simple majority, depending on the circumstances.

(1) More Than a Simple Majority

A simple majority of the total population, or even of the voting-age population, is usually not enough.

In 1977, the Supreme Court upheld a determination by the Justice Department that a 65 percent non-White population majority was required to achieve a non-White majority of eligible voters in certain legislative districts in New York City. United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 164 (1977).

In 1984, the Court of Appeals for the Seventh Circuit, in the case of Ketchum v. Byrne, 740 F.2d 1398, endorsed the use of a 65 percent Black population majority to achieve an effective voting majority, in the absence of empirical evidence that some other figure was more appropriate.

Ketchum involved the redistricting of city council wards in the city of Chicago after the 1980 census. The Court of Appeals found that "minority groups generally have a younger population and, consequently, a larger proportion of individuals who are ineligible to vote," and that therefore, voting-age population was a more appropriate measure of their voting strength than was total population. Further, because the voting-age population of Blacks usually has lower rates of voter registration and voter turnout, the district court should have considered the use of a supermajority, such as 65 percent of total population or 60 percent of voting-age population when attempting to draw districts the Blacks could win. The Court of Appeals noted that:

[J]udicial experience can provide a reliable guide to action where empirical data is ambiguous or not determinative and that a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence.

... This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out ... .

Id. at 1415. Over the years, many courts have continued to require a supermajority of the voting-age population. See, e.g., Bone Shirt v. Hazeltine, 461 F.3d 1011, 1023 (8th Cir. 2006).
But the Court of Appeals in *Ketchum* also noted that “The 65% figure . . . should be reconsidered regularly to reflect new information and new statistical data,” *id.* at 1416. In redistricting following the 1990 census, several courts found that, in view of rising rates of voter registration and voter participation among minority groups, a minority voting-age population of slightly more than 50 percent was sufficient to provide an effective voting majority.

(2) **Too Many May be Packing**

The Seventh Circuit in *Ketchum* warned that “provision of majorities exceeding 65%-70% may result in packing.” *Id.* at 1418. But the Court of Appeals for the First Circuit upheld a redistricting plan for the city of Boston where, of two districts where Blacks were a majority, one district had a Black population of 82.1 percent. *Latino Political Action Committee v. City of Boston*, 784 F.2d 409 (1st Cir. 1986). The Court found that this packing of Black voters did not discriminate against Blacks because there was only a moderate degree of racial polarization. As the Court said, “[T]he less cohesive the bloc, the more “packing” needed to assure . . . a Black representative (though, of course, the less polarized the voting, the less the need to seek that assurance.)” *Id.* at 414. The Black population was so distributed that, even if fewer Blacks were put into these two districts, there were not enough Blacks to create a third district with an effective Black majority. *Id.*

(3) **Less Than a Simple Majority**


b. **Ten Years of Election History**

There is no fixed rule that applies to all cases, and each case must consider the particular set of circumstances prevailing at the time in the jurisdiction in question. When voter registration and turnout rates are known, actual historical data are used; a 60-percent rule of thumb is not appropriate.

In determining the majority needed to elect a candidate, courts analyze the results of past elections, usually over the last decade and preferably in the same jurisdiction. At the beginning of a decade, new boundary lines are drawn. A decision on their validity must often be made before any elections have been run in the new district.

(1) **Most Probative – Endogenous Elections**

The past elections that are most probative for predicting who will win a future contest are elections for the same office by the same electorate. For a seat in the state legislature, those would be legislative elections in a district with the same or similar boundaries. Those are called "endogenous" elections. Six different Circuit Courts of Appeal have determined that endogenous
elections are the most probative and relevant contests when assessing racially polarized voting. See Bone Shirt v. Hazeltine, 461 F.3d 1011, 1021, 1027 (8th Cir. 2006); Old Person v. Cooney, 230 F.3d 1113, 1125 (9th Cir. 2000); Solomon v. Liberty Cnty. Comm’rs, 221 F.3d 1218, 1227 (11th Cir. 2000); Sanchez v. Colorado, 97 F.3d 1303, 1324-25 (10th Cir. 1996); Rollins v. Fort Bend Ind. Sch. Dist., 89 F.3d 1205, 1221 (5th Cir. 1996); NAACP v. City of Niagara Falls, 65 F.3d 1002, 1015 n.16 (2nd Cir. 1995).

(2) Less Probative – Exogenous Elections

Elections for other offices and by other electorates are “exogenous” elections. See, e.g., Bone Shirt v. Hazeltine, 461 F.3d 1011, slip op. at 10 n.8 (8th Cir. 2006); Jeffers v. Clinton, 730 F. Supp. 196, 208 (E.D. Ark. 1989). When a legislative district is at issue, statewide, federal, and local elections are exogenous elections. Exogenous elections tend to be less probative when assessing racially polarized voting. See, e.g., NAACP v. Fordice, 252 F.3d 361, 370 (5th Cir. 2001); Johnson v. Hamrick, 196 F.3d 1216, 1222 (11th Cir. 1999); Goosby v. Town Bd. of Hempstead, 180 F.3d 476, 497 (2nd Cir. 1999), cert. denied, 528 U.S. 1138 (2000). Because they are for a different office by a different electorate, they have a different dynamic and are a less reliable predictor of how the voters for a legislative seat will behave. The different dynamic is that the issues in national, statewide, and local elections tend to be different from the issues in legislative elections, the resources of the candidates are different, and the methods of campaigning are different. The expensive, media-intensive campaigns of candidates for president have little parallel in the low-budget, low-visibility campaigns of candidates for a seat in the state legislature. In addition, there is down-ballot voter falloff — once voters have made up their mind about the candidates, many go to the polls and vote only for president, not for offices farther down the ballot.

(3) Most Probative – Biracial Contests

The contests that are most probative for determining whether voting is racially polarized are contests that include both a minority and a White candidate. Rural West Tenn. African American Affairs Council v. Sundquist, 209 F.3d 835, 840-41 (6th Cir. 2000); Jenkins v. Manning, 116 F.3d 685, 692, 694-95 (3rd Cir. 1997); Vecinos de Barrio Uno v. City of Holyoke, 72 F.3d 973, 988 n. 8 (1st Cir. 1995); Nipper v. Smith, 39 F.3d 1494, 1540 (11th Cir. 1994) (en banc); Westwego Citizens for Better Gov’t v. City of Westwego, 872 F.2d 1201, 1208 n. 7 (5th Cir.1989); United States v. City of Euclid, 580 F. Supp.2d 584, 596 n.11 (N.D. Ohio 2008); Black Political Task Force v. Galvin, 300 F. Supp.2d 291, 305 (D. Mass. 2004); Smith v. Clinton, 687 F. Supp. 1310, 1316-17 (E.D. Ark. 1988). The fact that minority voters vote for a White candidate when there is no minority candidate does not predict that they will vote for a White candidate when they have a choice to vote for a minority candidate.

(4) Three Analytical Techniques

There are three statistical techniques that courts most frequently use to analyze election results under the Voting Right Act: homogenous precinct analysis (“HPA”), bivariate ecological regression analysis (“BERA”), and ecological inference (“EI”).
The U.S. Supreme Court has considered homogenous precinct analysis and bivariate ecological regression analysis to be the “standard in the literature for the analysis of racially polarized voting.” *Thornburg v. Gingles*, 478 U.S. 30, 52-53n.20 (1986). One or the other, and often both, have been used in almost every voting rights case since *Gingles*. See, e.g., *Bone Shirt v. Hazeltine*, 461 F.3d 1011, slip op. at 9 (8th Cir. 2006) (relying on BERA and HPA); *Old Person v. Cooney*, 230 F.3d 1113, 1123 (9th Cir. 2000) (relying on BERA); *Rural West Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835, 839 (6th Cir. 2000) (considering BERA and HPA); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1386 (8th Cir. 1995) (relying on regression analysis).

To refuse to consider homogenous precinct analysis and bivariate ecological regression analysis in a § 2 Voting Rights Act case can be reversible error. See *Sanchez v. Colorado*, 97 F.3d 1303, 1321 (10th Cir. 1996) (district court rejected plaintiffs’ HPA and BERA and erroneously relied on multivariate analysis); *Teague v. Attala County, Miss.*, 92 F.3d 283, 290 (5th Cir. 1996); *Houston v. Lafayette County, Miss.*, 56 F.3d 6 06, 611 (5th Cir. 1995).

Professor Gary King’s ecological inference technique was developed after *Thornburg v. Gingles*. Ecological inference has been used in a number of district court cases to supplement evidence derived from HPA and BERA. See, e.g., *United States v. City of Euclid*, 580 F. Supp.2d 584, 601-02 (N.D. Ohio 2008); *Bone Shirt v. Hazeltine*, 336 F. Supp.2d 976, 1002-03 (2004).

c. Damned if You Don’t, Damned if You Do

If you face a charge of a § 2 violation, you had better be prepared with empirical data to show what is “reasonable and fair” under “the totality of the circumstances,” because your plan may be invalidated for putting either too few or too many members of a minority group into a given district.

While political party members have spent the last decade packing themselves, racial and language minority groups have spent the last decade cracking themselves, moving from the central cities to the suburbs, diluting their votes within the majority White population. See, e.g., Richard Fry, *The Rapid Growth and Changing Complexion of Suburban Public Schools*, Pew Hispanic Center (Mar. 31, 2009). Drawing majority-minority districts after the 2010 census may have been harder than it was before.

B. Section 5 of the Voting Rights Act

1. In “Covered Jurisdictions,” Plans Must be Precleared

While § 2 of the Voting Rights Act applies throughout the United States, § 5, (codified as amended at 42 U.S.C. § 1973c), applies only to certain covered jurisdictions, which are listed in an appendix to the Code of Federal Regulations, 28 C.F.R. Part 51. If you’re covered, you know it, because all of your election law changes since 1965, and not just your redistricting plans, have had to be precleared, before they take effect, by either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.
The preclearance requirement has been challenged repeatedly and upheld. See, e.g., *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*, No. 08-322, 557 U.S. ___ (June 22, 2009); *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In 2009, the Supreme Court expressed serious doubt that § 5’s “current burdens [were] justified by current needs,” NAMUDNO slip op. at 6-11, but avoided the constitutional issue by permitting the utility district to escape those burdens by “bailing out” of the preclearance requirement, slip op. at 11-17. (Having won the right to bail out of § 5, NAMUDNO voluntarily dissolved on February 4, 2010.)

The most recent challenge is *Shelby County v. Holder*, No. 12-96, heard by the U.S. Supreme Court in February 2013. A decision is expected by June 2013.

2. Do Not Retrogress

Section 5 preclearance of a redistricting plan will be denied if the Justice Department or the Court concludes that the plan makes the members of a racial or language minority worse off than they were before, that is, if it causes the minority to retrogress. One measure of whether they will be worse off than before is whether they are likely to be able to elect fewer minority representatives than before.


*Beer* was a challenge to the 1971 redistricting of the city council seats for the city of New Orleans. Since 1954, two of the seven council members had been elected at large; five others had been elected from single-member wards last redrawn in 1961. Even though Blacks were 45 percent of the population and 35 percent of the registered voters in the city as a whole, Blacks were not a majority of the registered voters in any of the wards, and were a majority of the population in only one ward. No ward had ever elected a council member who was Black. Under the 1971 redistricting plan, one ward was created where Blacks were a majority of both the population and of the registered voters, and one ward was created where Blacks were a majority of the population but a minority of the registered voters. The Supreme Court held that the plan was entitled to preclearance since it enhanced, rather than diminished, Blacks’ electoral power.

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Supreme Court opined that retrogression is determined by evaluating the plan as a whole. It said a state has a choice whether to adopt a plan with a certain number of “safe” majority-minority districts or a plan with fewer safe districts but more “coalitional districts” (where the minority may elect a representative of their choice by forming coalitions with other racial and ethnic groups) or more “influence districts” (where the minority may play a substantial, if not decisive, role in determining who is elected). 539 U.S. at 479-83.

Justice O’Connor further instructed that, “In 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.” 539 U.S. at 480. She said that whether minority incumbents benefit by and support the
plan is relevant to whether the plan is retrogressive. 539 U.S. at 483-84. This further instruction was rejected by Congress in 2006, when it stated explicitly that the purpose of § 5 was "to protect the ability of [racial and language minorities] to elect their preferred candidates of choice." Act of July 27, 2006, Pub.L. No. 109-246, sec. 5(d), 120 Stat. 581 (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.

To defend against a charge that your plan will make members of a racial or language minority group worse off than they were before, you will want to have at least a ten-year history of the success of the minority at electing representatives of their choice.

3. **Do Not Intend to Discriminate**


In 1987, the Justice Department announced that, notwithstanding the retrogression test employed by the courts when considering preclearance under § 5, the Justice Department would apply the stricter standards of § 2 when deciding whether to preclear a plan under § 5. Supplemental Information, 52 Fed. Reg. 487 (1987). This practice was discredited by the Supreme Court in 1997, see *Reno v. Bossier Parish School Bd. (Bossier Parish I)*, 520 U.S. 471 (1997), and repealed by the Justice Department in 1998. See 63 Fed. Reg. 24108, 24109 (May 1, 1998).

The Bossier Parish (Louisiana) School Board had redrawn its 12 single-member districts following the 1990 census using the same plan already precleared for use by its governing body. In doing so, it rejected a plan proposed by the NAACP that would have created two majority-Black districts. The Justice Department refused to grant preclearance on the ground that the NAACP plan demonstrated that Black residents could have been given more opportunity to elect candidates of their choice and that therefore their voting strength was diluted in violation of § 2. In *Bossier Parish I* the Supreme Court rejected this argument, saying that preclearance under § 5 may not be denied solely on the basis that a covered jurisdiction’s new voting “standard, practice, or procedure” violates § 2. The Court pointed out that sections 2 and 5 were designed to combat two different evils, and that § 5 was only directed at effects that are retrogressive.

When the case returned to the Supreme Court, *Bossier Parish II*, 528 U.S. 320, 328-300 (2000), the Court ruled that a discriminatory purpose only encompasses an intent to retrogress, not any other intent to discriminate.

4. **You Need Not Maximize the Number of Minority Districts**

Notwithstanding anything you might have been told by the Justice Department in the 1990s, you are not required to maximize the number of majority-minority districts.

In the 1990s round of redistricting, the natural desire of some minority populations to be grouped together in districts they could win coincided with the desire of some plan drafters to pack them. Since African Americans and Hispanics have tended to vote Democratic, Republican plan drafters were more than willing to accommodate their desire to have districts drawn for them. When new redistricting plans were drawn in preparation for the 1991 and 1992 elections, the Justice Department was controlled by Republicans. As states like North Carolina, Georgia, Louisiana, and Texas presented their plans to the Justice Department for approval, the Justice Department insisted that they create additional majority-minority districts wherever the minority populations could be found to create them. This insistence was not limited by any concern that the districts be "geographically compact." The states' plans were first denied preclearance and then, after majority-minority districts were added, the plans were precleared. The plans were all struck down by the courts. *Shaw v. Hunt*, 517 U.S. 899 (1996); *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd sub nom. *Miller v. Johnson*, 515 U.S. 900 (1995); *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), aff'd sub nom. *Bush v. Vera*, 517 U.S. 952 (1996).

The Justice Department's policy of pressuring states to maximize the number of majority-minority districts was not based on a correct reading of the Voting Rights Act.

Section 2 included a proviso, added through the efforts of Senator Dole in 1982, that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (b). In other words, § 2 did not mandate proportional representation. So, how could it be construed by the Justice Department to require that a minority group be given the maximum number of elected representatives?

In *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Supreme Court found that it could not be so construed. The Florida Legislature had drawn a House plan that created nine districts in Dade County (Miami) where Hispanics had an effective voting majority. Miguel De Grandy and the Justice Department attacked the plan in federal court, alleging that the Hispanic population in Dade County was sufficient to create 11 House districts where Hispanics would have an effective voting majority. The district court agreed, imposing its own plan (based on one submitted by De Grandy) that created 11 Hispanic districts. The Supreme Court reversed, saying that maximizing the number of majority-minority districts was not required. As Justice Souter said in his opinion for the Court, "Failure to maximize cannot be the measure of § 2." 512 U.S. at 1017 (slip op. at 20). Indeed, even a failure to achieve proportionality does not, by itself, constitute a violation of § 2. 512 U.S. at 1009-12 (slip op. at 11-14).

The Court refused to draw a bright line giving plan drafters a safe harbor if they created minority districts in proportion to the minority population. That, the Court said, would ignore the clear command of the statute that the question of whether minority voters have been given an equal
opportunity to elect representatives of their choice must be decided based on “the totality of the circumstances,” rather than on any single test. It would encourage drafters to draw majority-minority districts to achieve proportionality even when they were not otherwise necessary and would foreclose consideration of possible fragmentation of minority populations among other districts where they were not given a majority. 512 U.S. at 1017-21 (slip op. at 20-24).

In the Georgia congressional redistricting case, Miller v. Johnson, 515 U.S.900 (1995), the Supreme Court scolded the Justice Department for having pursued its policy of maximizing the number of majority-minority districts. As the Court said:

Although the Government now disavows having had that policy . . . and seems to concede its impropriety . . . the District Court’s well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia’s first two plans . . . . In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

515 U.S. at 924-25.

C. Equal Protection Clause of the 14th Amendment

When drawing a minority district to avoid a violation of § 2 or § 5 of the Voting Rights Act, you must take care not to create a racial gerrymander that runs afoul of the Equal Protection Clause of the 14th Amendment.

1. You May Consider Race in Drawing Districts

Race-based redistricting is not always unconstitutional. As the Supreme Court recognized in Shaw v. Reno, 509 U.S. 630 (1993):

[R]edistricting differs from other kinds of state decisionmaking in that the legislature is always 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 race discrimination . . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

509 U.S. at 646 (slip op. at 14).

2. Avoid Drawing a Racial Gerrymander

But, when a state creates a majority-minority district without regard to “traditional districting principles,” the district will be subject to strict scrutiny and probably struck down. Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996). If you want your majority-minority districts to stand up in court, you would best avoid drawing a racial gerrymander.

a. Beware of Bizarre Shapes

The first step toward avoiding drawing a racial gerrymander is to beware of bizarre shapes.

North Carolina Congressional District 12 - 1992

The 12th Congressional District in North Carolina, as put into place for the 1992 election, was one of the most egregious racial gerrymanders ever drawn. The “I-85” district, stretching 160 miles across the state, for much of its length no wider than the freeway, but reaching out to pick up pockets of African Americans all along the way. It was first attacked as a partisan gerrymander. That attack failed. Pope v. Blue, 809 F. Supp. 392 (W.D. N.C. 1992), aff’d mem. 506 U.S. 801 (1992).

Next, it was attacked as a racial gerrymander. That attack failed in the district court, Shaw v. Barr, 809 F. Supp. 392 (W.D. N.C. 1992), but the legal theory on which it was based was endorsed by the Supreme Court in Shaw v. Reno, 509 U.S. 630 (1993).

As Justice O’Connor said, “[R]eapportionment is one area in which appearances do matter.” 509 U.S. at 647 (slip op. at 15).
A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

509 U.S. at 647-48 (slip op. at 15-16).

The Court said that a redistricting plan that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny under the Equal Protection Clause given to other state laws that classify citizens by race. 509 U.S. at 644 (slip op. at 12).

In Bush v. Vera, Justice O’Connor further observed that:

[B]izarre shape and noncompactness cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. . . . [C]utting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of identity and thus intensifies the emphasis on race.


b. Draw Districts that are Reasonably Compact

To avoid districts with bizarre shapes, you will want to draw districts that are compact. How compact must they be? Reasonably compact. As Justice O’Connor said in Bush v. Vera, 517 U.S. 952 (1996):

A § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs’ experts in endless “beauty contests.”

517 U.S. at 977.

To give you some idea of what the lower federal courts have considered to be “reasonably compact,” there follows a series of “before and after” pictures of congressional districts first used in the 1992 election and then struck down, and the districts approved by the federal courts to replace them. They come from the states of Texas, Louisiana, Florida, and North Carolina.
Texas

**Congressional District 30**

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**Congressional District 18**

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**Congressional District 29**

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Louisiana

Congressional District 4

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Florida

Congressional District 3

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Compactness is not just a geometrical concept; it is also a political concept. Where the Texas Legislature created a Latino-majority district that ran 300 miles from McAllen on the Rio Grande to Austin in Central Texas, the Court found that the Latinos in the Rio Grande Valley and those in Central Texas were “disparate communities of interest” and thus not a compact population, so the district that encompassed them was not compact. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 432-33 (2006).