National Conference of State Legislatures

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Redistricting Law 2000
The National Conference of State Legislatures serves the legislators and staffs of the nation's 50 states, its commonwealths, and territories. NCSL is a bipartisan organization with three objectives:

- To improve the quality and effectiveness of state legislatures,
- To foster interstate communication and cooperation,
- To ensure states a strong cohesive voice in the federal system.

The Conference operates from offices in Denver, Colorado, and Washington, D.C.
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since the 1990 census and solicitation of an author who would use the summaries to
update the text of each of the chapters from Reapportionment Law: the 1990s. The 50 state
contacts completed their work in May 1998. Their names may be found in the NCSL
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Any errors or omissions are the responsibility of the respective authors.
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" of redistricting and refused to order the legislatures to carry out their duty. In 1962, however, in the seminal case of Baker v. Carr, 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." 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." 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."

While the courts were striking down redistricting plans for inequality of population, Congress enacted the Voting Rights Act of 1965 to remedy the inequality of opportunity

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2. 369 U.S. 186 (1962).
4. 376 U.S. 1, 8 (1964).
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." Section 5 required a covered jurisdiction 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 before it could take effect. The Justice Department began to use this new authority to require that redistricting plans be precleared.

In the 1970s, in *Gaffney v. Cummings* and *White v. Regester*, 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 Pub. L. 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. 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*, 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*, 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*, saying that a plan would not be found to violate the 14th Amendment or Section 2

of the Voting Rights Act unless minority 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,\textsuperscript{15} regardless of the intent of the plan’s drafters.

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

That the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;

That it is politically cohesive, that is, it usually votes for the same candidates; and

That, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority’s preferred candidate.\textsuperscript{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.”\textsuperscript{18}

What did that mean, “less opportunity?” In North Carolina, where \textit{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 districts where Blacks were in the majority. To the rest of the country, and to the state legislatures and commissions who were going to be drawing 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,”\textsuperscript{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


\textsuperscript{16} 478 U.S. 30.

\textsuperscript{17} 478 U.S. at 50-51.

\textsuperscript{18} 42 U.S.C. 1973 (b).

\textsuperscript{19} 478 U.S. at 50-51.
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 of the districts took on bizarre shapes that caused them to be labeled “racial gerrymanders.”

The racial gerrymanders were attacked in federal court for denying White voters their right to equal protection of the laws under the Fourteenth Amendment. The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy in Georgia 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. Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed “traditional districting principles.”

The states redrew the districts once again. As 1998 drew to a close, North Carolina’s congressional plan was before the U. S. Supreme Court for the fourth time.

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 2000 census. It includes entirely new sections in chapter 4 on “Racial Gerrymandering” and “Traditional Districting Principles,” and a new table 5, “1990s Districting Principles Used by Each State.” The text of these state principles is set forth in a new appendix G. Chapter 7, “Federalism in Redistricting,” also is new, as are appendices E and F, which describe state commissions that draw legislative and congressional plans, respectively.

Readers should note that this book is restricted to federal legal requirements. It 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 appendix B. Its application to the election of state judges is discussed in appendix C.

The reader's attention is called to the earlier publication in this series, *Redistricting Case Summaries from the 1990s*, a state-by-state summary of all the 1990s cases in both state and federal courts relating to legislative and congressional redistricting.

This book, the case summaries, and other task force publications can be located online at the NCSL web site, http://www.ncsl.org/ by searching for "redistricting." 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. The bibliography includes hyperlinks to redistricting web sites in the United States, Canada, the United Kingdom and Australia. It is a resource to assist democratic legislatures in carrying out their constitutional responsibility worldwide.
2. **The Census**

**Introduction**

The information produced by the year 2000 census, the 22nd 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 practical and legal issues that will affect the 2000 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 also are covered. It includes an outline of how the 2000 census will be conducted and reported. Finally, it touches on the use of statistical bases other than the decennial census in redistricting.

Two major issues that dominated census developments during the 1990s are covered below: changes in the census questions and reports to reflect multi-racial population categories, and the possible use of sampling techniques to refine census population counts and improve accuracy.

**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 Fourteenth 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, etc. The secretary must complete the census and report the total population, by states, 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.26

When the Congress convenes in 2001, the president must transmit to that body a statement of the apportionment of the 435 representatives’ 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.27

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, 2001, 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 level decennial redistricting efforts as well as for the redrawing of congressional districts within each state.28 Figure 1 explains the three-phase process by which the Census Bureau plans to gather and distribute this redistricting data by the April 1 deadline.

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26 13 U.S.C. Section 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.

27 2 U.S.C. Section 2a and 2b (1996). The current method of apportioning seats was adopted in 1941 and 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 nn-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.

28 13 U.S.C. Section 141 (c).
Figure 1. Census 2000 Redistricting Data Program
(Public Law 94-171)

This program has three Phases:

**Phase 1 (called the Block Boundary Suggestion Project, or “BBSP”)**

**Key Census date: April 1995—Census Director invites state officials to join Phase 1 of Census 2000 Redistricting Data Program.**

Purpose: Allow states to “suggest” features on census maps (or electronic files) that they wish the bureau to maintain in establishing boundaries for the “census blocks” for which we will provide population totals.

States that participated in this voluntary program suggested features like streams, ridge lines, overhead power lines, etc., so that they would correspond as closely as possible with the current or projected boundaries of their election precincts, wards, polling areas (which we refer to generically as “voting tally districts” (VTDs) or “voting districts”).

**BBSP: States submit suggested features on census maps/electronic files.**

**Time Line: 1995-1998.**

**BBSP Verification:** Census Bureau returns completed maps to states so they can verify that their suggested features have been accurately recorded or learn why, some features are not technically acceptable for census operations.

**Time Line: 1997-late 1998.**

**Phase 2 (called the Voting District Project or “VTDP”)**

Purpose: Census Bureau returns to the states—on a flow basis—census maps and electronic files showing all features (e.g., roads, rivers, ridge lines) to be used in creating census blocks for tabulating population totals for redistricting.

**Time Line: December 1998-June 1999.**

States will have several months to outline their election precincts (i.e., VTDs) using the features shown on these maps and returning the maps/files to the bureau for incorporation into the geographic data base that will be used to take the census.

**VTDP Verification:** On a flow basis, the Census Bureau will return revised maps and files showing the election precincts delineated by the state for officials to verify that the precinct (VTD) boundaries have been accurately added by the census staff. Each state will have several weeks to complete its review and notify the bureau of any discrepancies.

**Time Line Flow By State: September 1999-January 2000.**

**Key Census Date: April 1, 2000—Census Day.**
Phase 3 Delivering the Data

Purpose: Under the provisions of Public Law 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 Census 2000 population totals for counties, American Indian areas, 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) that meet the bureau’s technical criteria. These Census 2000 Public Law 94-171 Redistricting Data will include population totals by race, Hispanic origin, and voting age.

These public law data will be accompanied by census maps showing blocks, census tracts, counties, towns, cities (as of their January 1, 2000 corporate limits), county subdivisions, and voting districts for participating states. (NOTE: some states also may have defined their current legislative districts and totals would be included for these areas as well.) Comparable geographic TIGER/Line® files also will be provided to these designated state officials under Public Law 94-171.

Time Line: January 2001-March 2001*

* 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 2001 legislative sessions.

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Source: Census Bureau, 1998.

Statistical Sampling

Controversy over the use of statistical sampling in determining the census count presents the principal federal legislative issue affecting the 2000 census and its use in reapportionment and redistricting.

There are two references to sampling in Title 13 that 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 controversy over sampling led to the passage of the Decennial Census Improvement Act of 1991, which called for studies by the National Academy of Sciences on ways to achieve the most accurate census, including the possible use of sampling techniques.\textsuperscript{29} Based on these studies, the Bureau of the Census developed its plan for the 2000 census. The plan includes sampling procedures.

In late 1997, Congress declared that “the use of statistical sampling or statistical adjustment in conjunction with an actual enumeration to carry out the census with respect to any segment of the population poses the risk of an inaccurate, invalid, and unconstitutional census.” It authorized “any person aggrieved by the use of any statistical method in violation of the Constitution or any ... [other] law ... in connection with the 2000 or any later decennial census, to determine the population for purposes of the apportionment or redistricting of members of Congress” to obtain declaratory, injunctive or other appropriate relief against the use of the method. Congress also specified that “the number of persons enumerated without using statistical methods must be publicly available for all levels of census geography which are being released by the Bureau of the Census for...the data contained in the 2000 decennial census Public Law 94-171 data file released for use in redistricting” as well as other specified data.\textsuperscript{30}

The speaker of the House of Representatives brought suit under this 1997 authorization. The case is discussed below.

**Case Law And Legal Issues**

**Adjusting The Census; Sampling**

The undercount. The census is not, and cannot be, 100 percent accurate. According to the Census Bureau, the 1990 census was the first census less accurate than its predecessor, even though it was better designed and executed. The undercount rate of 1.6 percent was 50 percent greater than the 1980 undercount. The undercount is not uniform and the census misses a disproportionate number of racial and ethnic minorities. Undercount figures for 1990 reported by the bureau include 4.4 percent of African Americans, 5 percent of Hispanics, 12.2 percent of American Indians living on reservations, and 0.7 percent of non-Hispanic whites.\textsuperscript{31}

The 1990 Census—Wisconsin v. City of New York. Litigation before the 1990 census focused on the undercounting of population and the disproportionate effect of the


\textsuperscript{30} Pub. L. No. 105-119, Title II, sections 209 and 210 (a) to (j) noted at 13 U.S.C. Section 141 (1998).

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 that 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’s 1991 decision in Wisconsin v. City of New York in 1996. The Supreme Court ruled that the secretary’s decision was valid and that it bore “a reasonable relationship” to the task required by the Constitution. The Court cited the broad discretion lodged by the Constitution in the government 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.

The Court left open the issue of whether sampling or adjusted census figures were forbidden by the Constitution’s reference to an “actual enumeration.”

The 2000 Census—U.S. House of Representatives v. U.S. Department of Commerce. In this case, the House of Representatives sought to prohibit the use of sampling techniques under the authorization passed by the Congress in 1997. The Department of Commerce defended the use of sampling techniques to improve the accuracy of the 2000 census, a reversal of its position in the Wisconsin case, and was joined by intervenor-defendants such as the City of Los Angeles group.

On August 24, 1998, a three-judge special panel ruled unanimously in favor of the House of Representatives and permanently enjoined the Department of Commerce from using statistical sampling to determine the population for purposes of apportioning representatives in Congress among the states. The court held that the provisions of Title 13, the Census Act, Sections 141 and 195, prohibited the use of sampling in determining apportionment counts. The court’s order specifically enjoined the department and defendants “from using any form of statistical sampling, including their program for nonresponse follow-up and Integrated Coverage Measurement, to determine the population for purposes of congressional apportionment.” The court did not reach the constitutional issue of whether the

requirement for an “actual enumeration” in Article I prohibits the use of sampling techniques.

The defendants appealed the decision. The Supreme Court heard oral arguments on the appeal on November 30, 1998.

A second, similar case was heard by the Supreme Court at the same time. The federal district court in *Glavin v. Clinton*\(^\text{34}\) reached the same conclusion as the court in the House of Representative case.

As of December 1, 1998, the Bureau of the Census was proceeding to prepare for either a traditional enumeration or an enumeration combined with sampling, pending the outcome of the litigation and further action by the Congress.

**Counting The Overseas Population**

The Constitution requires that the apportionment of seats in the House of Representatives be determined by an “actual enumeration” of persons “in each State,” conducted every 10 years.\(^\text{35}\) 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 Constitution, was arbitrary and capricious in violation of the Administrative Procedures Act. The Massachusetts federal district court agreed,\(^\text{36}\) but the Supreme Court reversed.\(^\text{37}\)

In 1992, in *Franklin v. Massachusetts*,\(^\text{38}\) the Supreme Court found that the secretary’s decision was not subject to the Administrative Procedures Act, because it was not a “final agency action.” Rather, it formed the basis for the secretary’s report to the president on the population of each state, which the president was free to adopt or revise as he saw fit.

The decision to allocate overseas federal employees to their home state based on their usual residence was consistent with Census Bureau practice since the first census of trying to assign each person to the person’s home state, even though he or she might be temporarily absent on the day of the census. Assuming that the overseas employees have retained ties to

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\(^\text{35}\) Art. I, Sec. 2, cl. 3; Fourteenth Amend., Sec. 2.


\(^\text{38}\) *Id.*

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their home states, the Court found that the secretary’s method of allocation actually promotes equality of representation.\textsuperscript{39}

\textbf{2000 Census Procedures And Data Collection}

\textit{Racial Data}

In compliance with the October 1997 decision by the U.S. Office of Management and Budget, the Census 2000 questions (and other federal surveys) will permit individuals to choose more than one of several race categories (White, African American or Black, American Indian or Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, Other Race). This new standard is in response to requests by individuals who are multi-racial and by parents of multi-racial children who wish to reflect that fact in federal surveys. This change also recognizes the growing number of multi-racial individuals in the United States. The new standard requires federal agencies to include a separate question so people of any race can indicate whether they identify as being of Hispanic/Latino origin.

The result of this change will provide more information as part of the Census 2000 Public Law 94-171 redistricting data reports. The prototype data from the 1998 Dress Rehearsal Census will include both “single race” totals for those who choose only one race and “all-inclusive” totals for those who mark more than one of the basic race groups.

\textit{Building The Census Address List}

Apart from sampling issues, efforts to improve the census involve the distribution by mail of the forms and the basic address list for the country. After the 1990 census, local and tribal government officials expressed concern about the completeness of the 1990 census and their belief that they had address information available that would make the census address list more accurate. In 1994, Congress passed the Census Address List Improvement Act\textsuperscript{40} to deal with this concern. This law directed that the Census Bureau provide an opportunity for every government to review the census address list for accuracy and completeness before it is used to deliver Census 2000 questionnaires. That same law also required that this review process adhere to the confidentiality provision under which the Census Bureau operates as specified in Title 13, U.S. Code.

Census 2000 will be conducted by mail-out/mail-back procedures in most areas. The initial step in building the census mailing list of residential addresses (master address list or MAF) in areas with city-style street addresses was to combine addresses from the U.S. Postal Service’s delivery sequence file with the addresses on the Census Bureau’s 1990 census address file.

\textsuperscript{39} 505 U.S. at 806.

\textsuperscript{40} Pub. L. No. 103-430 (1994).
In areas that have predominately non-city style addresses (e.g., rural route and box number), the Census Bureau creates its master address list by hiring local staff to travel each such area, locate each housing unit, record its physical location, and “spot” the location on a census map. This process allows the bureau to incorporate these “listed” addresses and map information into the master address file.

The Census Bureau has invited local and tribal governments to review census maps and compare address information they maintain to the Census Bureau’s address list and to make additions, corrections or deletions to the Census Bureau’s address list and identify missing units. This program, Local Update of Census Addresses (LUCA), will take place between spring 1998 and spring 1999 on a flow basis for urban and rural areas.

In areas that have predominantly city-style addresses, bureau field staff, in 1999, will canvass every road and street where someone may live to add addresses for dwellings that are not present in the master address file and to update address information that is not correct.

Figure 2 explains how the Census Bureau decides where each person should be counted.

**Figure 2. Census Residence Concepts**

<table>
<thead>
<tr>
<th>Situation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Person</strong></td>
<td>Lives in this household, but is in a general or veterans affairs hospital on Census Day, including newborn babies who have not yet been brought home. <strong>COUNT PERSON AT:</strong> This household, unless in a psychiatric or chronic disease hospital ward, or a hospital or ward for the mentally retarded, the physically handicapped, or drug/alcohol abuse patients. If so, this person should be counted in the hospital.</td>
</tr>
<tr>
<td><strong>Person</strong></td>
<td>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 home port in the United States. <strong>COUNT PERSON AT:</strong> The residence where he or she spends most of his/her time; i.e. the person’s “usual home elsewhere” (UHE). If he or she does not claim a UHE, count him/her at the military installation or at the home port of the vessel.</td>
</tr>
<tr>
<td><strong>Person</strong></td>
<td>College students living away from home. <strong>COUNT PERSON AT:</strong> These students are to be counted at their place of residence at school.</td>
</tr>
</tbody>
</table>
**Situation:** For congressional apportionment purposes, overseas U.S. military and civilian employees of the federal government working abroad are allocated to 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.

**Situation:** People without shelter ("homeless") that are enumerated in the decennial census are assigned to the block where they are counted.

**Source:** Census Bureau, 1998.

**Data Collection And Processing Centers**

Between fall 1997 and spring 1998, the Census Bureau opened 12 regional census centers (RCCs) as temporary sites near the 12 permanent regional offices, to provide additional space to manage the large Census 2000 work load. These RCCs support the address list development activities and the reviews by tribal and local governments.

In late spring 1998, the Census Bureau selected three sites—Baltimore County, Md., Pomona, Calif., and Phoenix, Ariz., for three of its four data capture centers. The fourth center is located in the Census Bureau's permanent processing facility in Jeffersonville, Ind. These data capture centers are where the completed census forms will be received and scanned into the computer. They will house imaging equipment, data keying devices and other systems for converting responses to census questions into computer-readable form.

In fall 1999, the Census Bureau plans to open more than 480 temporary local census offices to manage and control the many operations to collect data from households that do not mail back the census forms. These offices will recruit and train a peak work force of approximately 260,000.

**Delivering The Census Forms**

In March 2000 advance letters announcing the census, questionnaire packages and reminder cards will be delivered by the U.S. Postal Service in areas that have city-style addresses. In areas that do not have city-style addresses, temporary field workers will leave questionnaires at each dwelling. Census Day is April 1, 2000, and respondents will be urged in publicity and by instructions on the questionnaire to mail the form back by that date.

The Census Bureau will provide additional ways to be counted by advertising how one can provide their answers to 1-800 census operators, or by obtaining an unaddressed census form at walk-in community assistance centers, tribal offices, etc. Census forms will be translated and available in other languages, such as Spanish, Japanese and others.

**Sampling: Nonresponding Households And Nonresponse Sampling**

As discussed above, the Supreme Court will decide in its 1998-1999 term whether the Census Bureau may employ sampling techniques in conducting Census 2000. This section
describes the bureau’s plan, which has not yet been approved, to reach households that do not respond to the census.

The Census Bureau will rely mainly on mail responses to the census questionnaires. Based on experience in focus groups and the response rates in other surveys, the Census Bureau fears that, despite its best efforts, 34 million occupied households will not respond by mail in 2000. For those that do not respond by mail, the bureau has proposed that a sample be selected for nonresponse followup.

As part of the nonresponse followup, the Bureau also has proposed to use sampling to conduct a followup of housing units the U.S. Postal Service identifies as “vacant, undeliverable-as-addressed” (UAA). The Census Bureau designed both sampling operations to provide a less expensive and more efficient way of collecting information on vacant and nonresponding housing units than multiple return visits to all nonresponding households.

Direct sampling of nonresponding housing units will be conducted to achieve a final response rate of 90 percent or better in each census tract. A systematic sample of housing units will be selected to ensure that the sample is evenly distributed across all nonresponding addresses in the census tract. The sample will be selected immediately after the cut-off for mail returns, using a variable sampling rate that depends on the initial mail-back response to the census.

To obtain information from 90 percent of the housing units in a census tract, tracts with lower initial mail-back response rates will have a larger proportion of housing units sampled. Table 1 shows sampling rates for various initial response rates.

<table>
<thead>
<tr>
<th>Initial Response Rate</th>
<th>Sampling Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>60%</td>
<td>3-in-4</td>
</tr>
<tr>
<td>70%</td>
<td>2-in-3</td>
</tr>
<tr>
<td>80%</td>
<td>1-in-2</td>
</tr>
<tr>
<td>85% or higher</td>
<td>1-in-3</td>
</tr>
</tbody>
</table>

Source: Census Bureau, 1998.
The initial response rate used to set the sampling rate for each census tract is shown in table 2.

**Table 2. Initial Response Rate**

<table>
<thead>
<tr>
<th>Initial Response Rate =</th>
<th>Respondents + UAA vacants</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total Addresses</td>
</tr>
</tbody>
</table>

Where:

- **Respondents** = The number of self-responding housing units in the census tract,
- **UAA vacant** = The number of undeliverable as addressed vacant units identified by the U.S. Postal Service in the census tract, and
- **Total Addresses** = The number of addresses mailed or delivered a questionnaire.

**Source:** Census Bureau, 1998.

**Quality Control Check**

As of December 1998, approval of the bureau’s plan for the integrated coverage measurement (ICM) quality check also was pending the Supreme Court’s ruling. The ICM is an intensive telephone or face-to-face interview of about 750,000 housing units in selected blocks across the country. It is designed to enable the Census Bureau to correct the census count, obtained from the procedures described above, for the differential undercount of some segments of the population and the overcount of the other segments. ICM results will be combined with results of the initial phase of Census 2000 to yield census population counts that are reported for use in redistricting.

**The Census And 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 data base 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. Given Hawaii’s special military and tourist populations, the Court allowed the use of an alternative population base after finding that

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National Conference of State Legislatures
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. Klahr* 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."\(^{42}\) One court has specifically ruled that a plan based on registered voters is unconstitutional.\(^ {43}\)

In *Kirkpatrick v. Preisler*,\(^ {44}\) 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.\(^ {45}\)

Some states have conducted their own censuses, and courts have upheld use of those state population counts in redistricting.\(^ {46}\) However, the 2000 census is sure to shape redistricting efforts across the country in the next few years.

**Conclusion**

It is too early to write a conclusion to this chapter on the Census 2000. The best advice to those who are planning for redistricting in the year 2001 is to stay tuned and in touch with the Census Bureau and NCSL as developments proceed.

**Multi-racial Data**

There will be new developments in 1999. Under the auspices of the Office of Management and Budget, a panel of representatives from statistical agencies is developing guidelines to

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\(^{42}\) 403 U.S. 108 at 116 - 117 (1971).

\(^{43}\) 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.


be issued in early 1999 that will be used in tabulating and publishing these new racial and ethnic data. Because of its need to conduct the 1998 Dress Rehearsal Census, the Census Bureau will be the first agency to produce data using this new standard. In the first quarter of 1999, the Census Bureau plans to issue a “test” version of the Public Law 94-171 Redistricting Data, including 20 tabulations that encompass population totals, and both “single-race” tallies (for those who selected only one race category) and “all-inclusive” tallies (for those who picked two or more races). These data will be cross-tabulated by voting age and by Hispanic/Non-Hispanic origin. Those planning for redistricting should review the test data. States covered by Section 5 of the Voting Rights Act will want to be alert to comments by the Department of Justice on the information it will require in preclearance submissions for redistricting plans.

Sampling
The sampling issue remains undecided now and may or may not be resolved by the Supreme Court decision in the pending House of Representatives case. Those planning for redistricting will want to follow developments in the Court and Congress through 1999 up to the release of the Public Law 94-171 redistricting data. One issue of interest is whether sampling may be used to produce census reports used for fund distributions or redistricting even if it is not used to apportion the House of Representatives among the states.
3. **Equal Population**

**Introduction**

The U.S. Supreme Court's 1962 decision in *Baker v. Carr*\(^{47}\) was a sharp departure from that Court's long-standing policy of judicial nonintervention in redistricting cases.\(^{48}\) 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. The purpose of this chapter is to discuss 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,\(^{49}\)

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\(^{47}\) 369 U.S. 186 (1962).

\(^{48}\) Cf. *Cologrove v. Green*, 328 U.S. 549 (1946). 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 in the post-*Baker v. Carr* period), 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).

\(^{49}\) 369 U.S. 186, 197-198.
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*, in which the Court held that unit voting systems are unconstitutional *per se*. That decision included the now familiar assertion by Justice Douglas that “[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.”

*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


51 *Id.* at 381.
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" is the more commonly used measure and 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 may be expressed in absolute or relative terms. The "range" is a statement 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."  

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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 3 shows the various measures in mathematical form.

<table>
<thead>
<tr>
<th>Table 3. Statistical Terminology for Districting</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>IDEAL DISTRICT POPULATION</strong> = State Population</td>
</tr>
<tr>
<td>Number of Districts</td>
</tr>
<tr>
<td><strong>INDIVIDUAL DISTRICTS</strong></td>
</tr>
<tr>
<td><strong>ABSOLUTE DEVIATION</strong> = District Population -</td>
</tr>
<tr>
<td>Ideal Population</td>
</tr>
<tr>
<td><strong>RELATIVE DEVIATION</strong> = Absolute Deviation</td>
</tr>
<tr>
<td>Ideal Population</td>
</tr>
<tr>
<td><strong>ALL DISTRICTS</strong></td>
</tr>
<tr>
<td><strong>MEAN DEVIATION</strong> = Sum of All Deviations</td>
</tr>
<tr>
<td>Number of Districts</td>
</tr>
<tr>
<td><strong>RANGE</strong> = Largest Positive Deviation and</td>
</tr>
<tr>
<td>Largest Negative Deviation</td>
</tr>
<tr>
<td><strong>OVERALL RANGE</strong> = Largest Positive Deviation +</td>
</tr>
<tr>
<td>Largest Negative Deviation (Ignoring “+” or “-” signs)</td>
</tr>
</tbody>
</table>

*Can Be “Absolute” or “Relative”*

**Source:** NCSL, 1999.

**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,*53 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,*54 *White v.*

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Weise\textsuperscript{55} and \textit{Karcher v. Daggett}.\textsuperscript{56} By contrast, the Supreme Court held in \textit{Reynolds v. Sims}\textsuperscript{57} that it is the Equal Protection Clause of the Fourteenth Amendment\textsuperscript{58} that requires states to construct legislative districts that are substantially equal in population. The degree of mathematical equality required by the Supreme Court has varied between congressional districts and state legislative districts.

\textbf{The Standard For Drawing Congressional Districts—Strict Equality}

In \textit{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.\textsuperscript{59}

In April 1969, the Supreme Court decided \textit{Kirkpatrick v. Preisler},\textsuperscript{60} 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 \textit{Wesberry v. Sanders}. The \textit{Kirkpatrick} opinion specifically rejected the suggestion that there is a point at which population differences among districts becomes \textit{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.\textsuperscript{61} 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.\textsuperscript{62} (The Court did not flatly rule out the latter consideration, but it said such projections must be well documented and uniformly applied.)

\textsuperscript{55} 412 U.S. 783 (1973).
\textsuperscript{56} 462 U.S. 725 (1983).
\textsuperscript{57} 377 U.S. 533 (1964).
\textsuperscript{58} "No state shall...deny to any person within its jurisdiction the equal protection of the laws."
\textsuperscript{59} 376 U.S. 1 (1964).
\textsuperscript{60} 394 U.S. 526 (1969).
\textsuperscript{61} Id. at 530-531.
\textsuperscript{62} 394 U.S. at 533-536.
In *White v. Weiser*, a 1973 case involving Texas congressional districts, the U.S. Supreme Court ruled that, although the overall range among Texas's 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.

Ten years later, in *Karcher v. Daggett*, 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.”

The congressional redistricting plan drawn by the New Jersey Legislature had an overall range of 3,674 people, or .6984 percent. 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, 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.

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.”

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

63 412 U.S. 783.
64 *Id.* at 790-791.
66 *Id.* at 734.
67 462 U.S. at 728.
68 462 U.S. at 728-729.
69 462 U.S. at 739.
70 462 U.S. at 740.
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.\(^\text{71}\)

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 found that New Jersey had failed to justify the deviations in the other districts, and affirmed the lower court’s rejection of the plan.\(^\text{72}\)

In 1997, *Abrams v. Johnson*\(^\text{73}\) involved a challenge to a congressional plan on the basis of violation of the guarantee of one person, one vote. This challenge was to a plan drawn by

\(^{71}\) 462 U.S. at 740-741.

\(^{72}\) 462 U.S. 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 0.34 percent). *See also 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, 115 S. Ct. 1637 (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 that were the other plans); *Anne Arundel County Republican Cent. Comm. v. State Admin. 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 *Tumer 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 that the mathematical distinction. *Id.* at 645 (citing *Carstens v. Lamm*, 543 F. Supp. 68, 85 (D. Colo. 1982))).

\(^{73}\) 117 S. Ct. 1925 (1997).
the federal district court on remand after Miller v. Johnson\textsuperscript{74} was decided, affirming that Georgia’s Eleventh District was unconstitutional because race was a predominant factor in drawing the district.\textsuperscript{75} A subsequent amended complaint also challenged the Second District on the same grounds and the trial court found that district also to be unconstitutional on the same grounds. 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 minority-majority districts to be adopted.\textsuperscript{76} 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.\textsuperscript{77} No other plan submitted or considered by the court that was otherwise judged to be a constitutional plan had a lower overall range.\textsuperscript{78} 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”\textsuperscript{79} in congressional plans and the holdings in Chapman v. Meier\textsuperscript{80} and Connor v. Finch\textsuperscript{81} 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.”\textsuperscript{82} 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.\textsuperscript{83}

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,

\textsuperscript{74} 115 S. Ct. 2475 (1995).
\textsuperscript{75} Id. at 2488.
\textsuperscript{76} 117 S. Ct. 1925, 1931-1932.
\textsuperscript{77} 117 S. Ct. at 1939.
\textsuperscript{78} 117 S. Ct. at 1939-1940.
\textsuperscript{79} 117 S. Ct. at 1939 (citing Karcher v. Daggett, 462 U.S. 725, 732 (1983)).
\textsuperscript{80} 420 U.S. 1 (1975).
\textsuperscript{81} 431 U.S. 407 (1977).
\textsuperscript{82} 117 S. Ct. 1925, 1939 (citing Chapman, 420 U.S. at 26 and Connor, 431 U.S. at 419 -420).
\textsuperscript{83} 117 S. Ct. at 1940.
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."84 The second important finding is the acknowledgment by the court:

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.85

The Standard For Drawing Legislative Plans

Reynolds v. Sims86 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,"87 but nevertheless states that "the overriding objective must be substantial equality of population among the various districts."88 The

84 Id.
85 Id. On remand (Bush v. Vera, 116 S. Ct. 1941 (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.
87 Id. at 569.
88 377 U.S. at 579.
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."\textsuperscript{89}

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

\begin{quote}
[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 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.\textsuperscript{90}
\end{quote}

\textit{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 \textit{Mahan v. Howell},\textsuperscript{91} a rather complicated challenge to Virginia’s legislative districting plan. \textit{Mahan} involved issues of the constitutionality of multimember districts and the treatment of certain naval personnel “home-ported” in Norfolk, Virginia, 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 \textit{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:

\begin{flushright}
\textsuperscript{89} 377 U.S. at 578.
\textsuperscript{90} Id.
\textsuperscript{91} 410 U.S. 315.
\end{flushright}
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.\footnote{Id. at 322.}

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.”\footnote{410 U.S. at 325-329.} Chief Justice Burger and justices Stewart, White and Blackmun joined the majority opinion; Justice Powell took no part.

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.\footnote{410 U.S. at 340-343.} 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.\footnote{410 U.S. at 336.} (The differing conclusions as to the overall range of the Virginia plan stem from alternative ways of treating the effect of florential districts included in the plan.)\footnote{A “florential” district encompasses within its boundaries two or more other districts each electing 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.}

\textit{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 \textit{Gaffney v. Cummings},\footnote{412 U.S. 735.} a Connecticut case, and \textit{White v. Regester},\footnote{412 U.S. 755.} a Texas
case. Each of these cases also arose from a state-drawn legislative districting plan that had been challenged and 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,\(^99\) 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.\(^100\) _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.\(^101\) 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 5.)

The majority opinion in each of these cases was written by Justice White for himself, Chief Justice Burger, and justices Steward, 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 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 reappointments be struck down absent adequate state justification.\(^102\)

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.\(^103\) 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 Fourteenth Amendment, absent special justification, the court

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\(^99\) 412 U.S. 735, 737.

\(^100\) 412 U.S. 735, 752.

\(^101\) 412 U.S. 755, 761.

\(^102\) 412 U.S. 735, 743.

\(^103\) 412 U.S. 735, 751-752.
was in error."\textsuperscript{104} 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."\textsuperscript{105}

Justices Brennan, Douglas and Marshall, dissenting in both \textit{Gaffney} and \textit{White} with a single opinion, asserted that the majority opinions in the two cases had, in effect, established a 10 percent \textit{de minimis} rule for state legislative districting, with states not required even to try to justify "total deviations" (overall ranges) of that or a lesser degree.\textsuperscript{106} Dicta in later Supreme Court decisions in \textit{Chapman v. Meier},\textsuperscript{107} \textit{Connor v. Finch},\textsuperscript{108} and \textit{Brown v. Thomson}\textsuperscript{109} have confirmed that assertion.

\textit{Chapman v. Meier},\textsuperscript{110} decided January 27, 1975, 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 \textit{Gaffney} and \textit{White}, and that a "total population variance" (overall range) of 16.4 percent was subject to court scrutiny but was found justified in \textit{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 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.\textsuperscript{111}

In \textit{Connor v. Finch},\textsuperscript{112} 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

\textsuperscript{104} 412 U.S. 755, 763.
\textsuperscript{105} 412 U.S. 755, 764.
\textsuperscript{106} 412 U.S. 755, 776-777.
\textsuperscript{107} 420 U.S. 1 (1975).
\textsuperscript{109} 462 U.S. 835 (1983).
\textsuperscript{110} 420 U.S. 1 (1975).
\textsuperscript{111} 1 d. at 21-26.
\textsuperscript{112} 431 U.S. 407.
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.\textsuperscript{113} 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.)\textsuperscript{114}

The only legislative reapportionment case involving population equality arising from the 1980 census and decided by the U.S. Supreme Court was \textit{Brown v. Thomson}.\textsuperscript{115} 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.\textsuperscript{116}

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 Fourteenth Amendment so as to require justification by the state.\textsuperscript{117}

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, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits."\textsuperscript{118}

\textsuperscript{113} \textit{Id.} at 418, 420.

\textsuperscript{114} 431 U.S. at 430-433.

\textsuperscript{115} 462 U.S. 835 (1983).

\textsuperscript{116} 462 U.S. at 837-43.

\textsuperscript{117} 462 U.S. at 842.

\textsuperscript{118} 462 U.S. at 842-843 (quoting \textit{Mahan v. Howell}, 410 U.S. 315, 328 (1973)).
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.”

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.

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. 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. The Supreme Court said in the White case that it could not “glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9 percent....” And it indicated in Gaffney that a showing by the plaintiff that an alternative plan with a lower “variation

119 462 U.S. at 845-846.
120 462 U.S. at 843-846. But see how empty of precedential value the case may be, infra, pp. 34-37.
121 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.

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(overall range) could be devised is not in itself sufficient to require a federal court to invalidate a plan adopted by a state legislature.\textsuperscript{124}

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 \textit{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,\textsuperscript{125} the respective mean deviations were only 1.9 percent and .45 percent.\textsuperscript{126} Similarly, the \textit{White} opinion contrasts the 9.9 percent "total variance" of the Texas House districting plan with its mean deviation of 1.8 percent.\textsuperscript{127}

Finally, 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 may also impose stricter population standards of equality in their redistricting law.\textsuperscript{128}

\textit{"Rational State Policies" That Justify Exceeding The 10 Percent Standard}

If a state enacts or adopts a plan with an overall population range of more than 10 percent in either house and the plan is challenged in federal court, the state will have the burden of showing both that the more than 10 percent overall range is necessary to implement a "rational state policy"\textsuperscript{129} 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?

\textbf{Affording representation to political subdivisions.} The majority opinion in \textit{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"\textsuperscript{130} in legislative districting.

\textsuperscript{124} 412 U.S. 735, 750-751.
\textsuperscript{125} 412 U.S. 735, 737.
\textsuperscript{126} 412 U.S. 735, 750.
\textsuperscript{127} 412 U.S. 755, 764.
\textsuperscript{128} Iowa has required that no senatorial district's population may 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 may exceed that of any other by more than 1 percent; average deviations from the ideal population for House and Senate districts may not 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. Section 42.4, Iowa Code 1987.
\textsuperscript{130} \textit{Id.}
That opinion continued: "Considerations of area alone provide an insufficient justification for deviations from the equal-population principle."\(^{131}\) 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.\(^{132}\)

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. 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.\(^{133}\)

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."\(^{134}\)

In *Brown v. Thomson*,\(^{135}\) 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

\(^{131}\) 377 U.S. at 580.

\(^{132}\) 377 U.S. at 580-581.

\(^{133}\) 410 U.S. 315, 325-326.

\(^{134}\) 410 U.S. at 328.

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.\textsuperscript{136}

In 1994, the district court in \textit{Quilter v. Voinovich}\textsuperscript{137} relied on \textit{Mahan v. Howell} and \textit{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 \textit{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 that the deviations resulting from the plan were not constitutionally excessive.\textsuperscript{138} 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.\textsuperscript{139}

Affording representation to political subdivisions was, as of 1998, 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 \textit{Chapman v. Meier, Connor v. Finch} and \textit{Langsdon v. Millsaps}.\textsuperscript{140}

In its unanimous decision in \textit{Chapman} the Court found: "It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines."\textsuperscript{141} The opinion also noted that it would have been possible to follow such a policy in North Dakota and


\textsuperscript{137} 857 F. Supp. 579 (N.D. Ohio 1994). This decision resulted from the Supreme Court's decision in \textit{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 \textit{infra} n. 124 and accompanying text.

\textsuperscript{138} 857 F. Supp. at 584, 586 and 587. See also \textit{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.

\textsuperscript{139} 857 F. Supp. at 586.


\textsuperscript{141} 420 U.S. 1, 25 (1975).
still achieve a significantly lower overall range.\(^{142}\) Similarly, in a concurring opinion in \textit{Connor}, Justice Blackmun wrote:

\begin{quote}
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.\(^{143}\)
\end{quote}

In \textit{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.\(^{144}\) 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.\(^{145}\) 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.\(^{146}\)

\textit{Mahan v. Howell}\(^{147}\) and \textit{Brown v. Thomson}\(^{148}\) 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 \textit{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 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.\(^{149}\) 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

\(^{142}\) \textit{Id.}.


\(^{144}\) 836 F. Supp 447, 448.

\(^{145}\) 836 F. Supp. at 448, 450.

\(^{146}\) 836 F. Supp. at 451-52.

\(^{147}\) 410 U.S. 315 (1973).


\(^{149}\) \textit{Id.} at 846.
district; the house then would consist of 63 representatives. In that event, the overall range would be reduced to 66 percent and the average deviation to 13 percent. 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 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."

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.

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

[How extraordinarily narrow [the Court's holding] is, and how empty of likely precedential value.... It 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.... Plaintiffs 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."

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150 462 U.S. at 840.
151 462 U.S. at 847.
153 Id.
154 462 U.S. at 850.
155 462 U.S. 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."\textsuperscript{156}

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.\textsuperscript{157}

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

\textsuperscript{156} Board of Estimate v. Morris, 489 U.S. 688, 702 (1989). This statement was reiterated in Gorin v. Katjian, 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.

\textsuperscript{157} 377 U.S. 533, 581 (1964).
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.\footnote{158}

In Brown v. Thomson, the Wyoming Legislature was apportioning 64 representatives among 23 counties. The Court noted with approval Schaefer v. Thomson,\footnote{159} 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.\footnote{160} 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.”\footnote{161}

In Board of Estimate v. Morris,\footnote{162} 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 city-wide 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.”\footnote{163}

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. The apportionment of 435 seats in the federal House of Representatives among the 50 states results in an overall range of 76.2 percent.\footnote{164}

\footnote{158} 403 U.S. 182, 185 (1971).
\footnote{160} 462 U.S. 835, 837 (1983).
\footnote{161} 462 U.S. at 845, n. 7.
\footnote{162} 489 U.S. 688 (1989).
\footnote{163} 489 U.S. at 703.
\footnote{164} Wyoming has the smallest population district, 453,588, and Montana has the largest, 799,065. 1990 Census of Population and, Summary Tape Files 1/3, Congressional Districts of the 103\textsuperscript{rd} Congress on CD-ROM, 1993, Washington, D.C.
The Supreme Court has maintained the status quo regarding population equity arising from the 1990 census in legislative redistricting cases. In Voinovich v. Quilter,\textsuperscript{165} 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."\textsuperscript{166}

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.\textsuperscript{167}

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

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 may 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

\textsuperscript{165} 507 U.S. 146 (1993).

\textsuperscript{166} Id. at 162.

\textsuperscript{167} 507 U.S. 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 1990s by lower courts. See Holloway v. Hechler, 817 F. Supp. 617, 629 (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. v. Weprin, 796 F. Supp. 662, 669 (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").
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.\textsuperscript{168}

Since \textit{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.

\textit{Legislative Plans Drawn By A Court}

An interesting feature of \textit{Chapman v. Meier} and \textit{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.

...\textsuperscript{169}

[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 \textit{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.\textsuperscript{169}

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."\textsuperscript{170}

\textbf{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


\textsuperscript{170} 420 U.S. 1,27, n. 19 (citations omitted).
state be as nearly equal in population as practicable.\textsuperscript{171} There are no \textit{de minimis} variations, which could practicably be avoided, without justification.\textsuperscript{172} Justification might include making districts compact, respecting municipal boundaries, preserving the cores of prior districts, or avoiding contests between incumbent representatives.\textsuperscript{173} However, the state must show with some specificity that a particular objective required the specific deviations in its plan.\textsuperscript{174} The Court has held that, under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, both houses of a state legislature must have districts that are substantially equal in population.\textsuperscript{175} However, the Court has distinguished between congressional plans and legislative plans, saying that a legislative apportionment plan is not \textit{prima facie} invalid because of population inequality as long as its overall range is less than 10 percent.\textsuperscript{176} 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,\textsuperscript{177} or to avoid splitting political subdivisions.\textsuperscript{178} However, this may be possible only where the number of representatives is apportioned among a substantially smaller number of political subdivisions.\textsuperscript{179}

Table 4 shows the degree of population equality attained by redistricting plans based on the 1990 census.

\textsuperscript{171} Wesberry v. Sanders, 376 U.S. 1 (1964).
\textsuperscript{172} Karcher v. Daggett, 462 U.S. 725, 734 (1983).
\textsuperscript{173} 462 U.S. at 740-741.
\textsuperscript{174} \textit{Id.} See also Abrams v. Johnson, 117 S. Ct. 1925, 1940 (1997).
\textsuperscript{175} Reynolds v. Sims, 377 U.S. 533 (1964).
<table>
<thead>
<tr>
<th>State</th>
<th>Congressional</th>
<th></th>
<th>State House</th>
<th></th>
<th>State Senate</th>
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<tr>
<td></td>
<td>Ideal District Size</td>
<td>Percent Overall Range</td>
<td>Ideal District Size</td>
<td>Percent Overall Range</td>
<td>Ideal District Size</td>
<td>Percent Overall Range</td>
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<tr>
<td>Alabama</td>
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<td>0.00%</td>
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<td>115,445</td>
<td>9.22%</td>
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<td>Alaska</td>
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<td>13,751</td>
<td>15.50</td>
<td>27,502</td>
<td>11.70</td>
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<td>Arizona</td>
<td>610,871</td>
<td>0.00</td>
<td>122,174</td>
<td>9.85</td>
<td>122,174</td>
<td>9.85</td>
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<td>Arkansas</td>
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<td>California</td>
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<td>372,991</td>
<td>1.80</td>
<td>745,981</td>
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<td>50,683</td>
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<td>94,126</td>
<td>4.90</td>
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<td>8.78</td>
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<td>Delaware</td>
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<td>9.58</td>
<td>31,722</td>
<td>10.18</td>
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<td>Florida</td>
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<td>9.88</td>
<td>28,764</td>
<td>9.88</td>
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<td>27,768</td>
<td>1.97</td>
<td>55,535</td>
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<td>9.91</td>
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<td>9.97</td>
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<td>Maine</td>
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<td>8,132</td>
<td>43.74</td>
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<td>Maryland</td>
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<td>33,911</td>
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<td>9.94</td>
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<td>Massachusetts</td>
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<td>37,603</td>
<td>9.93</td>
<td>150,410</td>
<td>4.75</td>
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<td>Michigan</td>
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<td>84,503</td>
<td>16.13</td>
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<td>15.81</td>
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<td>Minnesota</td>
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<td>65,300</td>
<td>3.42</td>
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<td>49,485</td>
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<td>8.96</td>
<td>150,502</td>
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<td>Montana</td>
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<td>N/A-unicameral</td>
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<td>193,255</td>
<td>4.60</td>
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<td>13,037</td>
<td>8.71</td>
<td>13,037</td>
<td>8.71</td>
</tr>
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</table>

Table 4. 1990s District Population Equality

National Conference of State Legislatures
<table>
<thead>
<tr>
<th>State</th>
<th>Congressional</th>
<th></th>
<th>State House</th>
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<th>State Senate</th>
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<tr>
<td></td>
<td>Ideal District</td>
<td>Percent</td>
<td>Ideal District</td>
<td>Percent Overall</td>
<td>Ideal District</td>
<td>Percent Overall</td>
</tr>
<tr>
<td></td>
<td>Size</td>
<td>Overall</td>
<td>Size</td>
<td>Range</td>
<td>Size</td>
<td>Range</td>
</tr>
<tr>
<td>Ohio</td>
<td>570,901</td>
<td>0.00</td>
<td>109,563</td>
<td>13.60</td>
<td>109,563</td>
<td>13.60</td>
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<tr>
<td>Oklahoma</td>
<td>524,264</td>
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<td>31,144</td>
<td>6.13</td>
<td>65,533</td>
<td>3.93</td>
</tr>
<tr>
<td>Oregon</td>
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<td>0.00</td>
<td>47,372</td>
<td>1.89</td>
<td>94,744</td>
<td>1.69</td>
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<tr>
<td>Pennsylvania</td>
<td>565,793</td>
<td>0.01</td>
<td>58,530</td>
<td>4.94</td>
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<td>14.66</td>
<td>20,059</td>
<td>13.00</td>
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<td>South Carolina</td>
<td>581,117</td>
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<td>28,119</td>
<td>5.20</td>
<td>75,798</td>
<td>1.00</td>
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<td>South Dakota</td>
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<td>19,886</td>
<td>9.47</td>
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<td>Tennessee</td>
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<td>0.02</td>
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<td>9.96</td>
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<td>13.92</td>
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<tr>
<td>Texas</td>
<td>566,217</td>
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<td>113,243</td>
<td>9.99</td>
<td>547,952</td>
<td>9.98</td>
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<tr>
<td>Utah</td>
<td>574,283</td>
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<td>7.60</td>
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<tr>
<td>Vermont</td>
<td>562,758</td>
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<td>17.62</td>
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<tr>
<td>Virginia</td>
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<td>9.67</td>
<td>154,684</td>
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<tr>
<td>Washington</td>
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<td>99,320</td>
<td>0.00</td>
<td>99,320</td>
<td>0.00</td>
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<tr>
<td>West Virginia</td>
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<td>17,935</td>
<td>9.96</td>
<td>105,499</td>
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<td>Wisconsin</td>
<td>543,530</td>
<td>0.00</td>
<td>49,412</td>
<td>0.92</td>
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<td>Wyoming</td>
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<td>7,560</td>
<td>9.97</td>
<td>15,120</td>
<td>9.60</td>
</tr>
</tbody>
</table>

Source: NCSL, 1996.

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 a range.
4. Racial and Ethnic Discrimination

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."\(^{180}\) "Other rights even the most basic are illusory if the right to vote is undermined."\(^{181}\) Unfortunately, for a large number of American citizens the right to vote remained illusory until, almost a century after the ratification of the Fifteenth Amendment,\(^{182}\) Congress passed the Voting Rights Act of 1965.\(^{183}\) The act primarily protected the right to vote as guaranteed by the Fifteenth Amendment. It was also designed to enforce the Fourteenth Amendment and Article 1, Section 4 of the Constitution.\(^{184}\)

The Voting Rights Act is one of the most successful civil rights statutes ever passed by Congress. The act accomplished what the Fifteenth 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 Fifteenth Amendment and applies to all jurisdictions. It prohibits any state or political subdivision from imposing a "voting qualification or prerequisite to voting

\(^{180}\) Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

\(^{181}\) Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

\(^{182}\) "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, Sec. 1.


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.\textsuperscript{185}

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.\textsuperscript{186}

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

The act has been amended three times since 1965. The 1970 amendments instituted a nationwide, five-year ban on the use of tests and devices as prerequisites to voting.\textsuperscript{187} In 1975, the ban on tests was made permanent and the coverage of the act was broadened to include members of language minority groups.\textsuperscript{188} 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 the act.\textsuperscript{189}

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."\textsuperscript{190}


\textsuperscript{190} 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 Fourteenth Amendment.\footnote{191} The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy in Georgia,\footnote{192} 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.\footnote{193} Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed “traditional districting principles.”\footnote{194}

The states redrew the districts once again. As 1998 drew to a close, North Carolina’s congressional plan was before the U.S. Supreme Court for the fourth time.\footnote{195}

This chapter provides an explanation of how this happened and 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 2000 census.

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.\footnote{196} The 1982 amendments codified a totality of the circumstances standard to be used to determine whether a challenged practice results in an abridgment of the right to vote. Currently, a violation of Section 2 is established if:

Based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of... a racial, color, or language minority class]... in that its members have less opportunity than other


\footnote{192} Miller v. Johnson, 115 S. Ct. 2475, 2492-93, slip op. at 22 (1995).

\footnote{193} Shaw v. Reno (Shaw II), 509 U.S. 630 (1993).


\footnote{196} 42 U.S.C. Sec. 1973 (a) (1982).
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.\textsuperscript{197}

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 may be lessened by placing it in a larger multimember or at-large district where the majority may 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 \textit{per se} unconstitutional. 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.\textsuperscript{198} In examining the “totality of the circumstances,” courts may look to districting lines for independent indicators of discriminatory intent.\textsuperscript{199}

**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.\textsuperscript{200} Packing often is accomplished by drawing district lines to follow racially segregated housing patterns. In \textit{Rybicki v. State Board of Elections (Rybicki II)},\textsuperscript{201} the court held that over time any rigid adherence to well-defined lines of racial division may result in packing and vote dilution. Although the court did not find that it was wrong \textit{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.\textsuperscript{202}

**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

\textsuperscript{197} 42 U.S.C. Sec. 1973 (b) (1982).

\textsuperscript{198} United States \textit{v. Marengo County Comm.}, 731 F.2d 1546, 1565 (11th Cir.1984).

\textsuperscript{199} \textit{id.} at 1574.


\textsuperscript{201} 574 F. Supp. 1147 (N.D. Ill. 1983).

\textsuperscript{202} \textit{id.} at 1155.
minority voters in the majority district. In what became the seminal case, the district court in *Gingles v. Edmisten*\textsuperscript{203} 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 utilized 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.\textsuperscript{204} Additionally, the court held that the plan’s single-member districts unlawfully diluted Black voting strength by fracturing concentrations of Black voters.\textsuperscript{205}

**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*,\textsuperscript{206} 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*.\textsuperscript{207} 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, their 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 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*,\textsuperscript{208} Black residents had charged that Mobile’s practice of electing commissioners at large diluted minority voting strength, thus violating the Fourteenth and Fifteenth Amendments and Section 2 of the


\textsuperscript{204} Id. at 374.

\textsuperscript{205} Id. at 374-375.

\textsuperscript{206} 446 U.S. 55 (1980).

\textsuperscript{207} 478 U.S. 30 (1986).

\textsuperscript{208} 446 U.S. 55 (1980).
Voting Rights Act. The plurality opinion stated that "racially discriminatory motivation is a necessary ingredient of a Fifteenth amendment violation."\textsuperscript{209} 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 Fifteenth Amendment itself.\textsuperscript{210}

Congressional response to \textit{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.\textsuperscript{211} 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.\textsuperscript{212} The House of Representatives stated that the results test was to parallel the "effects" test of the remedial Section 5.\textsuperscript{213} To avoid the establishment of a race-based entitlement to representation, the House added a disclaimer against proportionality.\textsuperscript{214} 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 \textit{White v. Regester},\textsuperscript{215} a 1973 case involving multimember state legislative districts in Texas, as the standard:

\begin{quote}
\textit{§} 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 \textit{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-\textit{Bolden} vote dilution case, \textit{White v. Regester}.\textsuperscript{216}
\end{quote}

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National Conference of State Legislatures
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\textsuperscript{209} 446 U.S. at 62.  \\
\textsuperscript{210} 446 U.S. at 60-61.  \\
\textsuperscript{212} \textit{Id.} at 48.  \\
\textsuperscript{213} \textit{Id.} at 29.  \\
\textsuperscript{214} \textit{Id.} at 48.  \\
\textsuperscript{215} 412 U.S. 755 (1973).  \\
\textsuperscript{216} S.Rep. No. 417, 97\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess. 2 (1982).
\end{flushleft}
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 inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."^{217}

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*,^{218} 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.^219

**Thornburg v. Gingles.** Between 1982 and 1986, numerous lower court decisions upheld the constitutionality of the amendments.^220 Many cases dealt with the use of multimember

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217 Id. at 16.


districts where the courts held that multimember districts were not per se a violation of Section 2.\textsuperscript{221}

The Supreme Court first interpreted the 1982 amendments to Section 2 in Thornburg v. Gingles.\textsuperscript{222} 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 Fourteenth and Fifteenth 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."\textsuperscript{223}

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.'\textsuperscript{224} The factors to be considered in determining the "totality of circumstances" surrounding an alleged Section 2 violation include the extent to which members of the protected class have been elected; the extent of the history of official discrimination touching on the minority group participation in the democratic process; racially polarized voting; 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; denial of access to the candidate slating process for members of the class; 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; whether political campaigns have been characterized by racial appeals; whether there is a significant lack of responsiveness by elected officials to the particular needs of the group; and whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.\textsuperscript{225} In a footnote to the plurality opinion, Justice Brennan indicated that two of the

\textsuperscript{221} United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir. 1984); Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984); Ketchum v. Bymes, 740 F.2d 1398(7th Cir. 1984).

\textsuperscript{222} 478 U.S. 30 (1986).


\textsuperscript{224} Id. at 44, quoting S.Rep. No. 417, 97th Cong., 2nd Sess. 28.

\textsuperscript{225} 478 U.S. at 36-37.
objective factors used to evaluate vote dilution claims—racial polarization and the electoral success of Black candidates—are essential to minority vote dilution claims.\footnote{226}

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.\footnote{227}

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.\footnote{228}

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.\footnote{229} 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 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.”\footnote{230}

\textbf{Post-Gingles judicial interpretations.} \textit{Growe v. Emison.}\footnote{231} In the 1990s, the U.S. Supreme Court expounded on the \textit{Gingles} tests. In \textit{Growe v. Emison}, the Supreme Court specifically ruled that the \textit{Gingles} preconditions for a vote dilution claim apply to single-member districts as well as to multimember or at-large districts.\footnote{232} The Court had previously held

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\begin{itemize}
\item \footnote{226} 478 U.S. at 48, n. 15.
\item \footnote{227} 478 U.S. at 50-51.
\item \footnote{228} 478 U.S. at 80.
\item \footnote{229} 478 U.S. at 77.
\item \footnote{230} 478 U.S. at 107.
\item \footnote{231} 507 U.S. 25 (1993).
\item \footnote{232} For the procedural history of \textit{Growe}, see chapter 7.
\end{itemize}
that multimember districts and at-large districts pose greater threats to minority-voter participation than single-member districts. 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. 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." The Growe 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.

The Growe opinion also is important because it clarified the proper population to examine for Section 2 claims. In Growe, the district court relied upon percentages of total population and required a "super-majority minority Senate District." The Supreme Court, in footnote 4 of its opinion, apparently gave preference to voting age population. Because Section 2 concerns the ability of a group to elect representatives of its choice, voting age population appears to offer a more precise measurement.

Voinovich v. Quilter. In Voinovich v. Quilter, decided a week after Growe, 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 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 they believed justified their creation. The district court concluded that the board had not proven a violation of Section 2 and ordered that the

233 Gingles, 478 U.S. at 47.
234 507 U.S. 25, 40.
235 Id.
236 507 U.S. 25, 39 n. 4.
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 district 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 may not 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 Grove 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.

Johnson v. De Grandy.\textsuperscript{238} A year after the Grove and Voinovich decisions, the Supreme Court again struck down changes required by a district court. In Johnson v. De Grandy, 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.

\textsuperscript{238} 114 S. Ct. 2647 (1994).
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.”

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.

**Shaw v. Reno and related cases.** Although not brought as a Section 2 case, the decision in Shaw v. Reno⁴⁰ ("Shaw I") affected later Section 2 cases. In Shaw I, the Supreme Court held that under the Fourteenth 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.⁴¹ 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,⁴² the Supreme Court found that the bizarre shape of a Georgia congressional district was not the controlling factor. The Court held that, if race was the predominant, overriding factor, the districts would be subject to the strict scrutiny standard. In order to meet the strict scrutiny test, a redistricting plan must be narrowly tailored to serve a compelling state interest.

Two later decisions of the Supreme Court assumed, without deciding, that complying with Section 2 is a compelling state interest. First, in Shaw v. Hunt,⁴³ the Supreme Court again

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239 114 S. Ct. at 2660.


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." 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. Thus, the bizarre shape of congressional district 12 in North Carolina could not be justified by the need to avoid liability under Section 2.

Later, in Bush v. Vera, 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 are 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.'" Thus, the courts struck down Texas' attempt to create three new majority-minority districts.

Shaw, Miller and Bush 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. 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 primarily 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.

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244 Id. at 1905-06.
The most commonly employed statistical techniques for measuring racially polarized voting are homogeneous precinct (or extreme case) analysis and bivariate regression analysis. 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. Among the disadvantages cited for exclusive reliance on homogeneous precinct analysis are its dependence on small, potentially unrepresentative 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.

Bivariate regression analysis. Bivariate regression analysis often is used to complement the results of a homogeneous precinct analysis. 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.


250 478 U.S. at 53 n. 20.


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

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

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

The *Gingles* Court avoided establishing any mathematical formula for determining when legally significant 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.\textsuperscript{256}

The Court made clear that each challenged district must be individually evaluated for racially polarized voting, and that it is improper to rely solely on aggregated statistical information from all challenged districts to show racial polarization in any particular district.\textsuperscript{257} 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.\textsuperscript{258} The number of elections that must be studied varies, depending primarily upon how many elections in the challenged district fielded minority candidates.\textsuperscript{259} 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.\textsuperscript{260}

**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” and “influence districts.”

**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.

\textsuperscript{256} 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*, 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).

\textsuperscript{257} 478 U.S. at 59 n. 28.

\textsuperscript{258} 478 U.S. at 57.

\textsuperscript{259} 478 U.S. at 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.

In *Thornburg v. Gingles*, the U.S. Supreme Court held that, in order to succeed on a vote dilution claim under Section 2, plaintiffs must establish that a minority group is sufficiently large and geographically compact to constitute a majority in a single member district. The courts, however, are divided about what “characteristic of minority populations (e.g., age, citizenship) ought to be the touchstone for proving a dilution claim.”

Some courts have held that a minority group must be able to constitute a majority of a district’s voting age population. Other courts have held that a minority group must constitute a majority of eligible voters, i.e., voting-age citizens in a district. Still other courts have held that *Gingles* requires only that a minority group constitute barely more than 50 percent of the total population of a district.

**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. 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.

A district in which minority voters usually 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 usually 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

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263 See *McNeil v. Springfield Park*, 851 F.2d 937, 945 (7th Cir. 1988) (“Because only minorities of voting age can vote... [the electoral outcome], it is logical to assume that the Court intended the majority requirement to mean a voting age majority.”).

264 See *Romero v. City of Pomona*, 665 F. Supp. 853, 854 (C.D. Cal. 1987) (“only those individuals eligible to vote can be counted in determining whether a minority group can constitute a voting majority in a ... district.”).


been demonstrated, § 2 simply does not speak to the matter.268 If minority voters were able to elect candidates of their choice from a district, minority plaintiffs would be unable to establish legally significant White bloc voting that usually defeats the minority’s preferred candidate.269

On the other hand, a majority-minority district is not necessarily an effective minority district.270 Thus, the failure of a minority group to constitute a majority in a district does not necessarily preclude a vote dilution claim, nor does the failure of a jurisdiction to create a geographically compact majority-minority district where reasonably possible necessarily give rise to a vote dilution claim. The critical elements in establishing a Section 2 results claim are whether it is possible to create an effective minority district and whether minority voters have had success in electing candidates of their choice.

**Influence Districts**

An influence district is a district in which the minority community, although not sufficiently large to elect a candidate of its choice without some support by white voters, is able to join with sufficient numbers of White voters to influence the outcome of an election and elect a candidate who will be responsive to the interests and concerns of the minority community.

In *Armour v. Ohio*,271 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

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269 *Gingles*, 478 U.S. at 50-51.


plaintiffs could elect a candidate of their choice, although not necessarily of their race, in a reconfigured district.\textsuperscript{272}

The Supreme Court has declined several invitations to determine whether the Voting Rights Act permits influence claims.\textsuperscript{273} In addition, several lower courts have held that influence claims do not present a cognizable Section 2 claim.\textsuperscript{274}

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.\textsuperscript{275}

Although there is no general agreement on what size the minority community needs to be to have influence in a district, there are several approaches that courts have addressed.

Maximizing influence in a single district. Under this theory, the goal is to maximize the minority community’s influence in a single district by incorporating as many minority members as possible in a district. To succeed on this claim, minority plaintiffs would need to establish that they lack any influence in the existing districts and that consolidating the minority community would increase their influence. If the minority community already had the ability to influence the outcome of the election in a district, increasing the minority population would not increase minority influence and may, in fact, have the effect of diluting minority influence by reducing the number of districts in which minority voters exhibit influence.\textsuperscript{276}

Influence districts in lieu of majority-minority districts. In Rural West Tennessee African American Affairs Council Inc. v. McWherter, the Court, in rejecting a Section 2 challenge to Tennessee’s state legislative districts, held that creating an additional majority-minority district would likely have the effect of reducing the overall influence of the minority community.

Black voters in the influence districts have not necessarily been deprived of the opportunity to vote for candidates of their choice, even if they do not have the opportunity to elect what some would consider a perfect

\textsuperscript{272} Id. at 1060.


\textsuperscript{274} Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991); DeBaca v. County of San Diego, 794 F. Supp. 990 (S.D. Cal. 1992), aff’d sub nom. 5 F.3d 535 (9th Cir. 1993).


candidate, i.e., a candidate of their race. Furthermore, the plaintiffs have not demonstrated that replacing two of the influence districts with one majority minority district would reduce vote dilution. To the contrary, it appears as though black voters might have more influence on the legislative process with two strong influence districts than they would with one additional majority minority district.277

Creating effective districts. An effective minority district that is less than a majority of a minority population could be considered a minority influence district, since the minority community would be unable to elect their preferred candidate without white votes.278

Racial Gerrymandering

Introduction

"[R]acial gerrymander—the deliberate and arbitrary distortion of district boundaries... for [racial] purposes."279 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 Fifteenth 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, Alabama, was redefined “from a square to an uncouth twenty-eight-sided figure” to exclude only blacks from the city.280

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 North Carolina, Georgia and Louisiana—believed that 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


280 Shaw I, 509 U.S. at 640 (internal quotation marks omitted).
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 Fourteenth Amendment. The first of the suits to reach the Supreme Court was Shaw v. Reno,281 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.”282

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 Fourteenth Amendment. In order to balance these competing constitutional guarantees, the Court had held that “the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.”283 Such “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,284 United States v. Hays,285 Miller v. Johnson,286 Bush v. Vera,287 Shaw v. Hunt (Shaw II),288 and Lawyer v. Department of Justice.289 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

282 509 U.S. at 633.
283 509 U.S. at 643.
284 509 U.S. at 630.
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. Hays290 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 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. 291

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." 292

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. 293

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. 294

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 291 115 S. Ct. at ___, slip op. at 6 (footnotes, citation and internal quotation marks omitted).
294 509 U.S. at 646.
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."295

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."296 "[R]ace must be 'the predominant factor motivating the legislature's [redistricting] decision.'"297

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."298 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

297 116 S. Ct. at 1952.
same close scrutiny that we give other state laws that classify citizens by race." 299 "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." 300

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." 301 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 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.... 302

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,

300 115 S. Ct. at 2488.
302 116 S. Ct. at 1953.
the court, applying strict scrutiny, must determine if the state has a compelling state 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."303 "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.'"304

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.'"305

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 States,306 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

304 116 S. Ct. at 1903.
preclearance mandates the Justice Department issues.\textsuperscript{307} "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.\textsuperscript{308}

**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."\textsuperscript{309}

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."\textsuperscript{310}

**Traditional Districting Principles**

**Generally**

As the preceding discussion shows, race cannot be the primary consideration in forming districts "without regard for traditional districting principles."\textsuperscript{311} "[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."\textsuperscript{312} 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."\textsuperscript{313} "[W]e begin with general findings and evidence regarding the redistricting plan's respect for traditional districting principles...."\textsuperscript{314}
What are “traditional districting principles” and why are they important? This section will answer 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” is only five years old, appearing first in Shaw v. Reno,315 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 section, 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:”

- Compactness316
- Contiguity317
- Preservation of counties and other political subdivisions318
- Preservation of communities of interest319

• Preservation of cores of prior districts\textsuperscript{320}
• Protection of incumbents\textsuperscript{321}
• Compliance with Section 2 of the Voting Rights Act\textsuperscript{322}

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.

\textit{Geographical and natural}—these are the objective principles, including, first and foremost, compactness, followed by contiguity and preservation of counties and political subdivisions.

\textit{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.

Table 5 provides a summary of the districting principles used by each state during the 1990s round of redistricting. The text of the principles is shown in appendix G.

### Table 5. 1990s Districting Principles Used by Each State
(in addition to population equality)

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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 "preservation of politically competitive districts" (Colorado).


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. 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 the list of recognized traditional districting principles to

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323 509 U.S. 630, 647.
four. 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.

Geographical and natural. Compactness is by far the oldest and most important traditional race-neutral districting principle, but what is it? In Shaw 1, the Court said that “reapportionment is one area in which appearances do matter.” The Court in Bush v. Vera used an “eyeball approach” to evaluate compactness. 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.

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. Justice Stevens in Karcher v. Daggett wrote an almost prescient concurrence focusing on the importance of compactness. Karcher was a political gerrymandering case decided in 1983, a decade before racial gerrymandering was addressed by the Supreme Court. In his concurrence, Justice Stevens 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.” Drastic departures from compactness are a signal that something may be amiss.

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

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324 Miller, 115 S. Ct. at 2489-90.
325 Id.
326 509 U.S. at 647.
331 Id. at 758.
speaks to relationships that are facilitated by shared interests and by membership in a political community including a county or a city.\textsuperscript{332}

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."\textsuperscript{333} It helped of course, that "[n]o bizarre boundaries were created" and that "effort to comply with the Voting Rights Act emphasized geographical compactness."\textsuperscript{334}

\textbf{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 \textit{Wise v. Liscomb}, said that preserving the cores of prior districts was a legitimate goal that might justify population variances.\textsuperscript{335} In a 1997 case, \textit{Abrams v. Johnson},\textsuperscript{336} 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 had had 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 as well as more difficult to measure.

\textit{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.\textsuperscript{337}

\begin{itemize}
\item \textsuperscript{333} 856 F. Supp. at 1415.
\item \textsuperscript{334} 856 F. Supp. at 1413.
\item \textsuperscript{335} 437 U.S. 535 (1978).
\item \textsuperscript{336} 117 S. Ct. 1925 (1997).
\item \textsuperscript{337} \textit{Id}; see also, \textit{Johnson v. DeGrandy}, 114 S. Ct. 2647, 2655 (1994) (Compliance with Section 2 of the Voting Rights Act does not require the creation of noncompact districts).
\end{itemize}
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 communities of interest and protecting incumbents are not sufficient insulation against a claim of racial gerrymandering when compactness and regularity have been ignored.\textsuperscript{338}

\textbf{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 may be a race-neutral districting principle.\textsuperscript{339} It is clear, however, that compliance with the Justice Department’s preclearance objections and avoidance of litigation are not permissible districting principles.

\textbf{The Foundation Of A Defensible Plan}

Identifying and using traditional race-neutral districting principles that have been used by the particular state in the past is key to defeating claims of racial gerrymandering. 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.”\textsuperscript{340} A state also cannot invoke incumbency protection when race was used as a means of determining which voters an incumbent wants.\textsuperscript{341} 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.”\textsuperscript{342}

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 section is a necessary first step.


\textsuperscript{339} Miller, 115 S. Ct. 2488, 2490-91.

\textsuperscript{340} Shaw II, 116 S. Ct. 1894, 1901.

\textsuperscript{341} Bush, 116 S. Ct. 1941, 1956.

\textsuperscript{342} Id. at 1953-54.
Section 5 of The Voting Rights Act: Preclearance Requirements

Historical Background

When the Voting Rights Act was adopted in 1965, Section 5 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.”343 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.”344

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 voting registration.345 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.”346

Although Section 5 is a temporary provision of the Voting Rights Act, it has been extended each time Congress has amended the Act. Under the 1982 amendments, Section 5 will automatically expire in 2007 unless extended by Congress.

Statutory 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

344 383 U.S. at 314.
345 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. B. Grofman, L. Handley and R. Neimi, Minority Representation and the Quest for Voting Equality, p. 23 (1992).
346 Katzenbach, 383 U.S. at 306.
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 may be implemented.\textsuperscript{347} According to Section 4(b) of the original act, a jurisdiction was subject to Section 5 if it met the following test: 1) the jurisdiction maintained a test or device as a precondition for registering or voting as of November, 1964, and 2) less than 50 percent of the voting age population was registered to vote on November 1, 1964, or less than 50 percent of the voting age population voted in the November 1964 presidential election.\textsuperscript{348} If a state as a whole did not meet these criteria, the standard was applied to individual counties within the state, so that in some instances entire states were "covered" and in other cases only certain counties within a state were "covered."\textsuperscript{349}

In 1970, Congress extended the preclearance requirements for an additional five years. The 1970 amendments also expanded coverage to those states or political subdivisions that, as of November 7, 1968, were using one of the specified tests or devices and in which less than half of the voting age population was either registered to vote or had actually voted in the 1968 presidential election.\textsuperscript{350}

In 1975, Congress extended the preclearance requirements for an additional seven years (through the 1980 redistricting cycle). The 1975 amendments added to the list of tests and devices the conduct of registration and elections in only the English language in those states or political subdivisions where more than 5 percent of the voting age population belonged to a single language minority group (including Alaskan natives, Native Americans, Asian Americans and people of Spanish heritage).\textsuperscript{351} 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.\textsuperscript{352} Finally, the coverage formula was extended to include jurisdictions that maintained any test or device and had less than half of their voting age population either registered on November 1, 1972, or casting votes in the 1972


\textsuperscript{348} The original jurisdictions subject to preclearance were Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia and parts of North Carolina.

\textsuperscript{349} This coverage formula was devised by Congress to target southern States that had a history of racial discrimination in the election process. See Grofman, Handley and Niemi, supra. pp. 16-17.

\textsuperscript{350} 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.


presidential election.\textsuperscript{353} In all, 16 states or parts of states now are covered by Section 5 preclearance requirements, as shown in table 6.

The 1982 amendments extended the preclearance requirement for an additional 25 years, but otherwise did not make any substantive changes to Section 5.

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

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).

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\textsuperscript{353} 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.
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Source: Appendix to 28 C.F.R. Part 51 (1997)

Scope Of Coverage

In Allen v. State Board of Elections, 354 the U.S. Supreme Court rejected the argument that Section 5 is limited to those state enactments that prescribe who may register to vote and does not cover state rules relating to other aspects of the electoral process, including qualification of candidates or state decisions as to which offices shall be elective. The Court, instead, broadly interpreted the scope of Section 5 to include all actions necessary to make a vote effective. According to the Court:

We must reject a narrow construction that appellees would give to Section 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens the right to vote because of their race.... The legislative history on the whole supports the

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view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.\(^{355}\) 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.\(^{356}\)

Following *Allen* and until 1992, the Court agreed in every case with the U.S. attorney general’s construction of the coverage of Section 5.\(^{357}\) However, in *Presley v. Etowah County Commission*, the Court rejected the Department of Justice’s interpretation that Section 5 covered transfers of decision making power involving elected officials that potentially could discriminate against minority voters.

*Presley* involved two consolidated cases from Etowah and Russell counties. In both counties the responsibilities of elected officials had been changed.\(^{358}\) 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.\(^{359}\) As a result of the consent decree, the county elected its first African American to the county commission.\(^{360}\) However, in 1987 the four holdover commission members, over the opposition of the two newly elected commissioners, adopted a common fund resolution.\(^{361}\) The common fund resolution provided that individual commissioners would no longer have individual control over the allocation of funds in their district. Instead, the funds were placed in a common fund and the commission as a whole would determine how the funds were allocated.\(^{362}\) The common fund resolution was never submitted for preclearance.

In 1979, following the indictment of a county commissioner on charges of corruption in county road operations, Russell County passed a resolution—the “unit system”—delegating control over road maintenance to the county engineer, an official appointed by the entire

\(^{355}\) *Allen*, 393 U.S. at 565-566.

\(^{356}\) *Id.*


\(^{358}\) In Etowah County, after the election of an African American county councilman, and in Russell County before the election of an African American county councilman.

\(^{359}\) 502 U.S. at 495-96.

\(^{360}\) 502 U.S. at 496.

\(^{361}\) 502 U.S. at 497.

\(^{362}\) *Id.*

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board. In 1985, following a consent decree, the county elected its first two African American commissioners. The unit system was never submitted for preclearance.

In Presley, the appellees 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. The U.S. Department of Justice filed a brief in support of the appellees.

A majority of the Court, in an opinion by Justice Kennedy, rejected the appellees’ argument that the common fund resolution and unit system were subject to preclearance. The Court, although affirming its earlier decision in Allen, 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 “voting qualification, or prerequisite to voting, or standard, practice or procedure with respect to voting.”

Substantive Standards For Preclearance

To obtain preclearance, a jurisdiction has the burden of establishing that any voting change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color” or membership in a language minority group. A jurisdiction may seek either judicial or administrative preclearance of a voting change. If, however, the Department of Justice interposes an objection to a submitted electoral change, the jurisdiction still may seek judicial preclearance. Due to the cost and time involved in obtaining judicial preclearance, most jurisdictions have sought preclearance from the Department of Justice.

Judicial preclearance. To obtain preclearance from the U.S. District Court for the District of Columbia, a jurisdiction must file a declaratory judgment action. Upon the filing of the action, the jurisdiction has the burden of proving that the proposed electoral change “does not have the purpose and will not have the effect of denying or abridging the right to vote

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363 502 U.S. at 498.
364 502 U.S. at 510.
on account of race or color or membership in a language minority group. The Department of Justice serves as the opposing party in the declaratory judgment action.

In *Beer v. United States*, the U.S. Supreme Court held, in applying the effect test of Section 5, that a jurisdiction seeking judicial preclearance of a redistricting plan is entitled to a declaratory judgment if the electoral change does not lead to a retrogression in minority voting strength. 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.” Retrogression, at least with respect to redistricting plans, is measured by comparing the new plan with the old plan as it existed immediately before adoption of the new plan.

*Beer* concerned the apportionment of city council districts in New Orleans. According to the 1970 census, African Americans comprised 45 percent of the population of New Orleans. Two of seven council members had been elected at large since 1954; the five remaining members had been elected from single-member wards that had last been redrawn in 1961. In one district, African Americans constituted a majority of the population but only about half of the registered voters. In the other four wards, White voters clearly outnumbered African American voters. No ward had ever elected an African American. After the 1971 city council redistricting, one ward had a majority African American population and majority African American voter majority, one had a majority African American population and White voter majority, and the other three had White population and White voter majorities.

Following the Department of Justice’s denial of preclearance, the city filed a declaratory judgment action. The Court initially noted that the 1970 council redistricting plan for New Orleans increased the number of African American majority districts from one to two and granted the city a declaratory judgment. Therefore, 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... that such an ameliorative new legislative apportionment cannot violate Section 5.

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368 *Beer*, 425 U.S. at 141.
369 *Ketchum v. Byrnes*, 740 F.2d 1398,1417 (7th Cir. 1984).
unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.\textsuperscript{370}

The retrogression standard was reaffirmed and its application broadened by the Supreme Court in \textit{City of Lockhart v. United States}.\textsuperscript{371} In \textit{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."\textsuperscript{372} Therefore, the Court held that "[s]ince the new plan did not increase the degree of discrimination against blacks, it was entitled to Section 5 preclearance."\textsuperscript{373}

Justice Thurgood Marshall, dissenting in \textit{Lockhart}, argued that "[b]y holding that Section 5 forbids only electoral changes that increase discrimination, the Court reduces Section 5 to a means of maintaining the status quo."\textsuperscript{374} According to Justice Marshall, the Court's view would permit "the adoption of a discriminatory electoral scheme, so long as the scheme is not more discriminatory than its predecessor" and "is inconsistent with both the language and the purpose" of Section 5.\textsuperscript{375}

As interpreted by the Supreme Court, if an electoral change is not retrogressive, a jurisdiction can satisfy its burden that the electoral change does not have a discriminatory effect. However, a plan that is not retrogressive still may not be entitled to preclearance if a jurisdiction cannot prove an absence of discriminatory purpose.\textsuperscript{376} The factors necessary for the Justice Department to find a discriminatory purpose are unclear, as noted in the discussion of \textit{Reno v. Bossier Parish School Board} on page 93.

\textbf{Administrative preclearance.} The Department of Justice has promulgated guidelines concerning the preclearance process.\textsuperscript{377} The regulations establish the procedures for the submission of an electoral change to the Department of Justice, the required contents of a submission, and the relevant standards.

\textsuperscript{370} \textit{Beer}, 425 U.S. at 141.
\textsuperscript{371} 460 U.S. 125 (1983).
\textsuperscript{372} 460 U.S. at 135.
\textsuperscript{373} 460 U.S. at 134.
\textsuperscript{374} 460 U.S. at 137 (Marshall, J. dissenting).
\textsuperscript{375} \textit{Id}.
\textsuperscript{377} The most recent regulations were issued in 1988 and updated in 1998. These regulations can be found at Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 CFR Part 51 (1997).
In light of the Supreme Court’s decision in *Bossier Parish School Bd.* questioning the validity of the regulations, the Department of Justice repealed the part of the Section 5 preclearance standards that required a plan also to comply with Section 2 of the Voting Rights Act. The new regulations did not differ significantly from the previous guidelines, except as required by *Bossier Parish*. Future guidelines may recognize the use of the Internet with respect to a submission. We will therefore review the existing guidelines.

**Examples of electoral changes subject to preclearance.** The guidelines provide that changes affecting voting that are subject to Section 5 include, but are not limited to:

- Any change in qualifications or eligibility for voting;
- Any change concerning registration, balloting and the counting of votes and any change concerning publicity for or assistance in registration or voting;
- Any change involving the use of a language other than English in any aspect of the electoral process;
- Any change in the boundaries of voting precincts or in the location of polling places;
- Any change in the constituency of an official or the boundaries of a voting unit (through redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections);
- Any changes 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);
- Any change affecting the eligibility of people to become or remain candidates, to remain holders of elective offices;
- Any change in the eligibility and qualification procedures for independent candidates;
- 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);
- Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum; and

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• 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 5.379

Contents of submission. The Department of Justice requests that any “changes affecting voting be submitted as soon as possible after they become final.” The guidelines specify certain required contents of a submission. The guidelines also detail certain supplemental material that a jurisdiction should provide.

Required contents of a submission include:

• A copy of the proposed and existing law;
• An explanation of the difference between the prior and proposed situations with respect to voting;
• The name, title, address and telephone number of the person making the submission;
• The identification of the person or body responsible for making the change and the mode of decision;
• 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;
• The date of adoption and the date the change is to take effect;
• A statement that the change has not yet been enforced or administered or an explanation of why the statement cannot be made;
• A statement of the reasons for the change and the anticipated effect of the change on members of racial or language minority groups;
• Any past or present litigation involving the change;
• 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;
• Other information that the attorney general determines is required for an evaluation of the purpose or effect of the change.

381 28 C.F.R. 51.27 (1997).
For redistricting plans and annexations, the Department of Justice also requires the following information.

- 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.

- 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.

- 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.

- 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 ten years will normally be sufficient.

- 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.

- Evidence that the submission has been made available to the public and that the public has been informed about the availability of the submission.

- Minority group contacts, including name, address, telephone number and organizational affiliation, if any.\(^{384}\)

The Department of Justice encourages interested individuals to comment on submitted plans.\(^{385}\) 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.\(^{386}\) Note, however, it is the policy of the Department of Justice not to introduce the comments and identity of individuals who

\(^{384}\) 28 C.F.R. 51.28 (1997).


\(^{386}\) 28 C.F.R. 51.29(d) (1997).
request confidentiality as evidence in litigation over the plan, unless the individual waives their prior request for confidentiality or such disclosure is required by the court.

Administrative Procedure

The Department of Justice, through the attorney general, has 60 days in which to interpose an objection to a preclearance submission. The Department of Justice may 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. A change, either approved or not objected to, may be implemented by the submitting jurisdiction. Without preclearance, proposed changes may not be implemented.

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 may seek a declaratory judgment in the U.S. District Court for the District of Columbia, or it may 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.

The Department of Justice may deny preclearance if the submitted plan has a discriminatory effect or purpose. According to the regulations:

[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.

The regulations set out certain factors the Department of Justice will consider in determining whether a plan has a discriminatory purpose or effect.

In addition to denying preclearance if the submitting authority fails to prove that the proposed change does not have a discriminatory purpose or effect, the regulations had provided that the Department of Justice could deny preclearance if it concluded that the

387 28 C.F.R. 51.9 (1997). However, a jurisdiction may request expedited consideration. 28 C.F.R. 51.34(a).
390 28 C.F.R. 51.54(a) (1997).
submitted electoral change clearly violated Section 2 of the Voting Rights Act. The Department of Justice repealed the Section 2 preclearance language in May 1998 by repealing 28 C.F. R. 51.55 (b) pursuant to the Supreme Court's ruling in Bossier Parish.

By permitting the Department of Justice to deny preclearance on the basis of a clear violation of Section 2, the regulations imposed an additional burden for a jurisdiction to obtain preclearance. The authority of the Department of Justice to deny preclearance on the basis of Section 2 was challenged in Reno v. Bossier Parish School Board.

In Bossier Parish, a majority of the Supreme Court held that the Department of Justice had exceeded its authority under Section 5 by requiring a jurisdiction to prove that the electoral change did not clearly violate Section 2. The Court held that preclearance cannot be denied because the electoral change violates Section 2. In addition, the Court declined to decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." According to the Court:

§ 5, we have held, is designed to combat only those effects that are retrogressive.... To adopt appellants' position, we would have to call into question more than 20 years of precedent interpreting § 5.... This we decline to do. Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the absence of discriminatory purpose and effect.... To require a jurisdiction to litigate whether its proposed redistricting plan also had a dilutive "result" before it can implement the plan—even if the Attorney General bears the burden of proving that "result"—is to increase further the serious federalism costs already implicated by § 5.

As a result of the Supreme Court's decision in Bossier Parish, the Department of Justice may interpose an objection to an electoral change only if the plan is either retrogressive or evidences a discriminatory purpose. However, the factors that are necessary to determine discriminatory purposes are unclear.

The Court in Bossier Parish directed the lower courts to follow the framework set out in Arlington Heights v. Metropolitan Housing Development Corp. and its progeny. The Court explained that:

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394 117 S. Ct. at 1501.
395 117 S. Ct. at 1498.
The "important starting point" for assessing discriminatory intent under Arlington Heights is "the impact of the official action, whether it 'bears more heavily on one race than another....'" In a § 5 case, "impact" might include a plan's retrogressive effect and... its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially... [any] contemporary statements by members of the decision making body."\(^\text{397}\)

**Effect Of Preclearance On Section 2 Litigation**

Preclearance of an electoral change does not preclude a subsequent Section 2 challenge to the electoral change.\(^\text{398}\) In a number of cases, an electoral change that had been precleared under Section 5 has been held to violate Section 2.\(^\text{399}\)

**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."\(^\text{400}\) A jurisdiction may bail out if it can demonstrate that, during the preceding 10-year period, it has complied with the Voting Rights Act and has undertaken efforts to ensure participation by minorities.\(^\text{401}\) This provision is rarely utilized.\(^\text{402}\)

**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 partially addressed in Gingles.

\(^{397}\) 117 S. Ct. at 1503.

\(^{398}\) "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, 117 S. Ct. at 1501.


\(^{401}\) 42 U.S.C. Sec. 1973b (a)(1).

\(^{402}\) 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, Virginia, has bailed out.
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 v. Midland Independent School District*, 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.\(^\text{403}\) The court then examined whether the two groups were politically cohesive under the second prong of Thornburg’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.\(^\text{404}\) 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.\(^\text{405}\) Although Romero used the second prong of the Thornburg 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.\(^\text{406}\) The assertion by the lower court in *Gingles v. Edmisten* that “no aggregation of less than 50% 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*.\(^\text{407}\) 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 a voting-majority district.

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

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\(^{404}\) Id. at 606-607.


\(^{407}\) 590 F. Supp. at 381 n. 3.

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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. 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 Thornburg, 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." 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.

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. 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. 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."

5. How Do Sections 2 and 5 Interrelate? Finally, an important, yet unresolved question relates to the interrelationship between Section 5 and Section 2 of the act. Enforcement of the Voting Rights Act has enfranchised minority voters and has

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

409 478 U.S. at 63.


411 478 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.


413 Gingles, 478 U.S. at 68.
eliminated many discriminatory electoral and districting schemes. Section 5 applies only to covered jurisdictions.\textsuperscript{414} 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 added the “results” test. This test enables a plaintiff to prove a Section 2 violation if he 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.\textsuperscript{415}

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. Courts have held that, as long as a proposed change does not have a discriminatory purpose or lead to a retrogressive effect in minority voting strength, a declaratory judgment will be granted.\textsuperscript{416}

The holdings in \textit{Lockhart} and \textit{Beer}, combined with the 1982 amendments to Section 2, may lead to an anomalous result. Thus, because “Section 5 preclearance will not immunize any change from later challenge by the United States under amended Section 2,” it is conceivable that a change validly precleared under Section 5 still may violate the “results test of Section 2.”\textsuperscript{417} In such a case, even though a covered jurisdiction could implement a proposed change, a party could successfully challenge the change under Section 2.\textsuperscript{418}

The Department of Justice has considered this scenario and believes that it is significantly more likely to occur now than it was in the past, given the Supreme Court’s ruling in \textit{Bossier Parish} and the consequent repeal of the guideline that allowed denial of preclearance in light of a clear violation of Section 2. Although many of the same factors that would lead to a finding of a Section 2 results violation also are relevant to preclearance determinations, the weight accorded to some of the

\textsuperscript{414} See table 6, Covered Jurisdictions, on p. 82
\textsuperscript{418} \textit{See Major v. Trean}, 574 F. Supp. 325 (E.D. La. 1983).
factors and the overall analysis are significantly different in the context of Sections 2 and 5.

The Supreme Court has held that reapportionment plans prepared and adopted by a federal court that remedy voting rights violations are exempt from Section 5 review.419 However, 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."420 Even court-drawn plans, which are exempt from Section 5 review, still must meet Section 2 requirements.421

6. Will Influence Districts Receive Greater Consideration in Future Redistricting Cases? Because the Supreme Court has stated that maximization is not required, influence districts may receive renewed interest. If other traditional districting principles were considered while drawing an influence district, race might not be found to predominate.

5. **Multimember Districts**

**Introduction**

As of 1998, 13 states still had multimember districts in at least one of their legislative bodies, as shown in table 7. 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 Fourteenth Amendment (the Equal Protection Clause) or the Fifteenth 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.” However, as a result of the Supreme Court’s holdings in *City of Mobile v. Bolden* and *Thomburg v. Gingles*, 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 Fourteenth 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.

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Table 7. Multimember Districts in Each State

<table>
<thead>
<tr>
<th>State</th>
<th>State Senates</th>
<th>State Houses</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Number of</td>
<td>Largest</td>
</tr>
<tr>
<td></td>
<td>Districts</td>
<td>Seats in a</td>
</tr>
<tr>
<td></td>
<td>1980s 90s</td>
<td>District</td>
</tr>
<tr>
<td>State</td>
<td>1980s 90s</td>
<td>1980s 90s</td>
</tr>
<tr>
<td>Alaska</td>
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<td>6 0</td>
</tr>
<tr>
<td>Arizona</td>
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<td>30 30</td>
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<tr>
<td>Arkansas</td>
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<td>10 2</td>
</tr>
<tr>
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<td>15 0</td>
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<tr>
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<td>33 35</td>
<td>6 0</td>
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<tr>
<td>Indiana</td>
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<td>16 0</td>
</tr>
<tr>
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<tr>
<td>Nevada</td>
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<td>7 5</td>
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<tr>
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<td>40 40</td>
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<td>13 8</td>
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<tr>
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<td>2 0</td>
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<td>35 35</td>
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<tr>
<td>South Dakota</td>
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<td>10 10</td>
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<tr>
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<td>17 17</td>
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<tr>
<td>West Virginia</td>
<td>18 30</td>
<td>5 0</td>
</tr>
</tbody>
</table>


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 effort 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.\textsuperscript{425} In 1964, in \textit{Reynold v. Sims},\textsuperscript{426} the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that seats in both houses of a bicameral state legislature must be apportioned on a population basis.\textsuperscript{427} 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 \textquotedblleft[o]ne body could be composed of single-member districts while the other could have at least some multimember districts.\textquotedblright\textsuperscript{428} In 1965, the Supreme Court cited this dictum in \textit{Fortson v. Dorsey}, when it rejected the notion that the equal protection standard necessarily requires the formation of single-member districts.\textsuperscript{429} The Court in \textit{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 \textit{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 \textquotedblleft[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.\textquotedblright\textsuperscript{430}

\textbf{Application Of The Equal Protection Clause}

In 1973, the Court in \textit{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

\textsuperscript{425} 377 U.S. 533, 577 (1964).
\textsuperscript{426} 377 U.S. 533 (1964).
\textsuperscript{427} Id. at 577.
\textsuperscript{428} Id.
\textsuperscript{429} 379 U.S. 433, 436 (1965).
\textsuperscript{430} 384 U.S. 73, 88 (1966).
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.\textsuperscript{431}

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 \textit{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.”\textsuperscript{432} In its 1980 decision in \textit{City of Mobile v. Bolden},\textsuperscript{433} the Supreme Court, citing \textit{Whitcomb v. Chavis}, refused to find a violation of the Equal Protection Clause of the Fourteenth Amendment,\textsuperscript{434} the Fifteenth Amendment (the right of citizen’s to vote),\textsuperscript{435} or Section 2 of the Voting Rights Act because the Court found that the plaintiffs failed to show a discriminatory purpose.\textsuperscript{436}

In \textit{Rogers v. Lodge}\textsuperscript{437} the Supreme Court reaffirmed its holding in \textit{Bolden} and upheld, for the first time since \textit{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 \textit{Rogers v. Lodge}, the 1982 amendments to the Voting Rights Act were signed into law.

\textsuperscript{432} 403 U.S. 124, 149 (1971).
\textsuperscript{433} 446 U.S. 55 (1980).
\textsuperscript{434} \textit{Id.} at 66.
\textsuperscript{435} 446 U.S. at 65.
\textsuperscript{436} 446 U.S. at 61.
\textsuperscript{437} 458 U.S. 613 (1982).
The Supreme Court first construed the 1982 amendments to the Voting Rights Act in *Thornburg v. Gingles*. In that decision, the Court explained that:

The amendment [Sec. 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."

Therefore, the Supreme Court applied the new standard set forth in Section 2 (discriminatory results) to the case, rather than proceed under the more difficult constitutional standard (discriminatory purpose and discriminatory results).

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. 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 out their ability to elect their preferred candidates. 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.

(An in-depth discussion of the holdings in *Thornburg* and related cases can be found in chapter 4).

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439 Id. at 35 (citations omitted).
440 478 U.S. at 48.
441 478 U.S. at 48.
442 478 U.S. at 50-51.
Challenges By Political Parties

In 1986, the Supreme Court held that political gerrymandering cases are properly justiciable under the Equal Protection Clause of the Fourteenth Amendment. 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. (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. 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 States district court should refrain from imposing them upon a State." 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 may utilize 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.

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

444 Id. at 127.
446 420 U.S. 1, 18-19 (1975).
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." However, Congress has not repealed legislation enacted in 1929 providing to the contrary that:

(c) 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.

Addressing the inconsistency between the statutes enacted in 1929 and 1967, a U.S. District Court (in a decision affirmed by the United States 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. 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. 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).

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.

448 2 U.S.C. §2c.
449 2 U.S.C. §2a(c).
451 Id.
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 Fourteenth 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 8 summarizes multimember district cases.
Table 8. Multimember District Cases

   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.

   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.

   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.”

   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.”

   The Supreme Court affirmed its preference for single-member districts in court-ordered reapportionment plans.

   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.”

   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.”

   The Supreme Court ruled that a discriminatory purpose, as well as a discriminatory result, was necessary for an Equal Protection Clause violation.

The Supreme Court reaffirmed its ruling requiring a discriminatory purpose, but also upheld a lower court ruling of unconstitutional multimember districting.


The Supreme Court applied the new Voting Rights Act language for racial multimember district violation, which necessitated only looking to discriminatory results.

6. PARTISAN GERRYMANDERING

Introduction

Partisan (or political) gerrymandering is the drawing of electoral district lines in a manner that discriminates against a political party. Partisan gerrymandering challenges to redistricting plans, like racial bias challenges, allege violation of the Equal Protection Clause. Until the Supreme Court's 1986 decision in *Davis v. Bandemer* the judiciary treated this age-old practice much like the skeleton in the family closet—always there yet never directly addressed in polite company. The Supreme Court occasionally decided a case on other grounds, with a concurring or dissenting justice expounding on the gerrymander, as in *Karcher v. Daggett* and *Kirkpatrick v. Preisler.* Or, the Court considered the facts of a gerrymander apparently without recognizing that, if the gerrymander were a political question, and therefore not proper for the Court to determine ("nonjusticiable"), the Court would not need to consider the facts at all (e.g., *Burns v. Richardson* and *Gaffney v. Cummings*).

So it should not be surprising that in *Davis v. Bandemer* the Supreme Court went only so far as to declare partisan gerrymandering justiciable. *Bandemer* created a standard for finding an unacceptable partisan gerrymander that the plurality admitted was "difficult of application." That difficulty resulted in relatively little litigation in this area during the 1990s that shed new light on the issue. The standard created in *Bandemer* requires proof of

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456 478 U.S. 109, 142.
both discriminatory intent and effect. The latter is found when the redistricting "consistently degrade[s] a voter's or a group of voters' influence on the political process as a whole."457

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. Dorsey458 and Burns v. Richardson,459 raised the question of invidious discrimination in reapportionment schemes that would impermissibly "minimize or cancel out the voting strength of racial or political elements"460 [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."461

In Gaffney v. Cummings462 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."463 The Supreme Court's response to the assertion that the plan was invidiously discriminatory because of a "political fairness principle" was that:

[Judicial 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

457 478 U.S. 109, 132 (plurality opinion).
460 384 U.S. at 89.
463 Id. at 738.
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.\footnote{464}

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

By the early 1980s, principles established in the long history of redistricting cases were being considered in the context of partisan gerrymandering. The Bandemer\footnote{465} trial court panel held that partisan gerrymandering had taken place and that the Indiana Republican legislators had impermissibly discriminated against the Indiana Democrats in the drawing of legislative district lines. A 1983 congressional district equal population case, Karcher v. Daggett,\footnote{466} 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.\footnote{467}

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.”\footnote{468} 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.”\footnote{469}

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\footnote{464}{412 U.S. at 754.}
\footnote{465}{603 F. Supp. 1479 (S.D. Ind. 1984).}
\footnote{466}{462 U.S. 725 (1983).}
\footnote{467}{446 U.S. 55 (1980).}
\footnote{468}{603 F. Supp. 1479, 1492-1495 (1984).}
\footnote{469}{603 F. Supp. at 1495.}


_Davis v. Bandemer_

When _Bandemer_ reached the Supreme Court,\(^{470}\) the Court (in a 6-3 vote) said for the first time “we find... political gerrymandering to be justiciable,”\(^{471}\) 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.”\(^ {472}\) 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”\(^ {473}\) (although the plurality cautioned in a footnote that intent still had to be proven).

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.”\(^ {474}\) (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....”\(^ {475}\)

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\(^{471}\) Id. at 113.

\(^{472}\) 478 U.S. at 127.

\(^{473}\) 478 U.S. at 129.

\(^{474}\) 478 U.S. at 132.

\(^{475}\) 478 U.S. at 132.
Although agreeing with the lower court that the claim was a statewide one, 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.\(^{477}\) (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. Such 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.”\(^{478}\)

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

\(^{476}\) 478 U.S. at 127.

\(^{477}\) 478 U.S. at 132-133.

\(^{478}\) 478 U.S. at 136.
own party or from the processes by which candidates are nominated and elected. For 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.479

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]”480 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....”481 The Supreme Court has not since expounded on *Bandemer*, so interpretations of the law on partisan gerrymandering consist of relatively few lower court decisions.

**Post-Bandemer**

As might have been expected from a careful reading of the threshold established by the Court in *Bandemer*, demonstration of discriminatory effect has proven to be illusive. The first case to wrestle with the *Bandemer* decision was *Badham v. Eu*482 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.”483 However, consistent with the high standard established in *Bandemer*, the court then applied

479 478 U.S. at 137.
480 478 U.S. at 131.
481 478 U.S. at 134.
483 Id. at 669.
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." 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...." 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...."

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.

Other district courts have applied Bandemer in the same manner as the court in Badham. In Republican Party of Virginia v. Wilder, 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.

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484 694 F. Supp. at 670.
485 Id.
486 694 F. Supp. at 672.
In *Pope v. Blue*⁴⁸⁸ and *Fund for Accurate and Informed Representation Inc. ("FAIR") v. Weprin*,⁴⁸⁹ 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.”⁴⁹⁰ 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.⁴⁹¹

**Conclusion**

Partisan gerrymandering is a justiciable issue and may be held unconstitutional if it has a sufficiently discriminatory effect. However, what circumstances warrant a finding of unconstitutionality remains to be seen. Courts have said that, in themselves, minimizing contests between incumbents, drawing lines to create proportional representation of the political parties in a legislative body, and pairing minority party incumbents in the same district are not sufficient. Table 9 presents the leading cases on partisan gerrymandering.

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⁴⁹⁰ 809 F. Supp. at 397.

⁴⁹¹ 796 F. Supp. at 669.
Table 9. Partisan Gerrymandering Cases


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.”


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 which does not otherwise pass constitutional muster.”


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.)


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.”


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.


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.


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.

**Source:** NCSL, 1999.
7. **Federalism in Redistricting**

**Introduction**

Race was the dominant issue for the U.S. Supreme Court when it dealt with redistricting in the 1990s. But there was a second kind of race that also was important: the race between the state and federal courts.

After the 1990 census, 20 states had suits in state courts concerning redistricting plans; 28 states had suits in federal court. Eleven states had suits in both state and federal courts on *the same plan*. New York had cases in four different federal courts and three different state courts. How should all this parallel litigation be coordinated?

**The Race Between State And Federal Courts**

In a 1965 case, *Scott v. Germano*, 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, but others did not.

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492 381 U.S. 407 (per curiam).


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.\textsuperscript{495} The U.S. Supreme Court summarily vacated the injunction a month later.\textsuperscript{496} 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.\textsuperscript{497} The federal court’s order regarding the legislative plan was stayed pending appeal,\textsuperscript{498} but the congressional plan was allowed to go into effect for the 1992 election. After the election, the Supreme Court reversed.

In \textit{Crowe v. Emison},\textsuperscript{499} 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.”\textsuperscript{500} 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.\textsuperscript{501}

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.\textsuperscript{502} 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.\textsuperscript{503} 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.\textsuperscript{504} 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.


\textsuperscript{496} \textit{Cotlow v. Emison}, 502 U.S. 1022 (1992) (mem.).


\textsuperscript{498} \textit{Crowe v. Emison}, No. 91-1420 (Mar. 11, 1992) (Blackmun, J., in chambers).

\textsuperscript{499} 507 U.S. 25 (1993).

\textsuperscript{500} 507 U.S. at 34.

\textsuperscript{501} 507 U.S. at 35.

\textsuperscript{502} 507 U.S. at 37.

\textsuperscript{503} 507 U.S. at 34.

\textsuperscript{504} \textit{ld.}
Federal Court Review Of State Court Decisions

Once a state court has completed its work, the Full Faith and Credit Act\textsuperscript{505} requires a federal court to give the state court's judgment the same effect as it would have in the state's own courts.\textsuperscript{506} A federal district court may not 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.\textsuperscript{507} This principle is now known as the "Rooker-Feldman doctrine."\textsuperscript{508}

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 may proceed is illustrated by the parallel litigation over Pennsylvania's congressional districts. In Nerch v. Mitchell,\textsuperscript{509} plaintiffs filed three suits in federal district court that paralleled a suit in state court, Mellow v. Mitchell,\textsuperscript{510} 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 persons violated

\textsuperscript{505} 28 U.S.C. § 1738.

\textsuperscript{506} Parsons Steel Inc. v. First Ala. Bank, 474 U.S. 518, 525 (1986).


\textsuperscript{508} See also Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281 (1970).


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the Equal Protection Clause of the Fourteenth 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 Fifteenth 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 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. But 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,\(^{511}\) 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,”\(^{512}\) 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.\(^{513}\) 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.\(^{514}\)

**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, Georgia\(^{515}\) and Texas,\(^{516}\) the federal district court that had struck down a congressional plan as a racial gerrymander allowed the legislature an opportunity to correct

\(^{511}\) 512 U.S. 997, slip op. at 6 (1994).

\(^{512}\) 597 So.2d at 285-286.

\(^{513}\) 512 U.S. 997, slip op. at 6-7.

\(^{514}\) 512 U.S. 997, slip op. at 8.


the plan at its next session. Only when the Georgia\textsuperscript{517} and Texas\textsuperscript{518} legislatures had 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 Court\textsuperscript{519} and eventually reversed on the merits without comment on the conduct of the district court in so hastily imposing a remedy.\textsuperscript{520}

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 may impose its own remedy. Even then, however, the federal court must follow discernible state redistricting policy to the fullest extent possible.\textsuperscript{521} The federal court must adopt a plan that remedies the violations but incorporates as much of the state's redistricting law as possible.\textsuperscript{522}

**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,\textsuperscript{523} in *Lawyer v. Department 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.\textsuperscript{524}

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 pre-clear 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


\textsuperscript{519} Wetherell v. DeGrandy, 505 U.S. 1232 (1992) (mem.).


\textsuperscript{524} 117 S. Ct. 2186 (1997).
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.\footnote{117 S. Ct. 2186, slip op. at 8-11.}

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.\footnote{117 S. Ct. 2186, slip op. at 7.}

**Conclusion**

Now that it is clear that the federal courts must defer to redistricting proceedings in a state court, legislatures will want to be prepared to defend their plans in state court. 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.
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

No specific date by which the Legislature must redistrict.
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, 2002.

Connecticut

The legislature must adopt a plan by September 15, 2001. 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 state by November 30, 2001.

Delaware

The legislature must adopt a plan by June 30, 2001.

Florida

The legislative deadline is indeterminate (see, Article III, § 16, and Article III, § 3(b), Florida Constitution). The deadline for qualifying for state office, however, is July 15-19, 2002 (see, § 99.061(1), F.S.). If the Legislature fails to meet the deadline, the Florida Supreme Court redistricts.

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, 2001. If the legislature fails to meet the deadline, an eight-member commission must be formed by July 10, 2001, and must file a report with the secretary of state by August 10, 2001. If the commission does not adopt a plan by that date, the state supreme court selects two people by September 1, 2001, one of whom is chosen (at random) to be the commission tie-breaker. By October 5, 2001, the nine-member commission must file its report.

Indiana

The congressional deadline is April 29, 2001 (end of first regular session). If that date is not met, the Redistricting Commission adopts an interim plan. The legislature must adopt a plan by April 29, 2001. 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 September 1, 2001. Apportionment shall become law by September 15, 2001. If the legislature fails to meet the deadline, the state supreme court must adopt a plan before December 31, 2001.

Kansas

The Legislature must adopt a plan before sine die adjournment of the 2002 legislative session.

Kentucky

The legislature must adopt a plan by May 2003.

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, shall reapportion both houses.
Maine

An advisory commission submits a plan to the Legislature no later than 90 calendar days after the convening of the 2003 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

The governor has reapportionment authority. He 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

If a pending state constitutional amendment is approved by voters at the November 2000 state election, new legislative districts will need to be in effect for the 2002 state elections. In practice, that means districts must be drawn by February 2002, when nomination petition forms must be available to legislative candidates.

Michigan

No specific date by which the Legislature must redistrict.

Minnesota

The deadline is 25 weeks before the state primary election in the year ending in two (March 19, 2002).

Mississippi

The Legislature must redistrict at its regular session the second year following the 2000 census.

Missouri

The commission has six months from the date of appointment to develop a plan.
Montana

The Districting and Apportionment Commission must submit its 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 4, 2001. (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 apportionment commission must certify a redistricting 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 February 1, 2001, whichever is later.

New Mexico

No specific date by which the Legislature must redistrict.

New York

Resdistricting must occur before the next election cycle (2002).

North Carolina

The first regular session after return of the decennial federal census. Practically, in time for Section 5 preclearance before filing opens the first Monday in January 2002.
North Dakota

First legislative session following the decennial census.

Ohio

The Apportionment Board must meet between August 1 and October 1, 2001, and the plan must be published by October 5, 2001.

Oklahoma


Oregon

July 1, 2001.

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

December 1, 2001.
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 2001.

Utah

“At the session next following an enumeration made by the authority of the United States...” The 2002 General Session begins on January 21, 2002, and ends on March 6, 2002.

Vermont

At the biennial session following the taking of the decennial census.

Virginia

Prior to 2001 House elections that are scheduled for November 2001.

Washington

January 1, 2002.

West Virginia

No specific date by which the Legislature must redistrict.

Wisconsin

The first legislative session following the decennial census.

Wyoming

February 15, 2002.
APPENDIX B

REDISTRICTING LOCAL GOVERNMENTS

Since Justice White opined for a majority of the United States Supreme Court in Avery v. Midland County,\textsuperscript{527} 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," state political subdivisions that have general governmental powers have been subjected over a period of time to most of the same legal standards for redistricting as have the states.

Nevertheless, the Supreme Court did recognize in the Avery case that neither the Court nor the Constitution should throw up "roadblocks in the path of innovation, experiment, and development among units of local government."\textsuperscript{528} As a consequence of this reasoning, the U.S. Supreme Court has allowed greater latitude to political subdivisions on at least one redistricting principle. As one expert commentator has flatly stated: "Local governments have been allowed greater flexibility regarding equal population standards than have larger political units."\textsuperscript{529} As the Supreme Court said in Abate v. Mundt:

\begin{quote}
[The 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.\textsuperscript{530}
\end{quote}

\textsuperscript{527} 390 U.S. 474, 482 (1968).
\textsuperscript{528} 390 U.S. at 485.
\textsuperscript{529} Bernard Grofman, 33 UCLA L. Rev. 77, 1985.
\textsuperscript{530} 403 U.S. 182, 185 (1971).
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 states. The U.S. Supreme Court has repeatedly held in disfavor local multimember district plans that dilute minority voting strength. The Supreme Court established the now famous "not-retrogression standard" in Beer v. United States, 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


actually originated in local jurisdiction redistricting cases.\textsuperscript{534} There also are many local jurisdictions in 16 different states that fall under the sanction of Section 5 of the Voting Rights Act,\textsuperscript{535} which requires preclearance by the U.S. Justice Department of any change in the election procedures or districts in those jurisdictions. Of course, all local jurisdictions fall under the aegis of Section 2 of the Voting Rights Act.\textsuperscript{536}


APPENDIX C
REDISTRICTING THE COURTS

The U.S. Supreme Court affirmed without comment in 1986\textsuperscript{537} and 1990\textsuperscript{538} lower court decisions that applied Section 5 of the Voting Rights Act to judicial districts. In 1991, the Court in \textit{Clark v. Roemer}\textsuperscript{539} affirmed its earlier decisions requiring Section 5 covered jurisdictions 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 \textit{Lopez v. Monterey County}.

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.\textsuperscript{541}

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.


\textsuperscript{540} No. 95-1201, 136 L. Ed. 2d 273 (1996).

The Supreme Court has affirmed its holding that the one person, one vote standard does not apply to a judicial election, but has rejected the position that a vote dilution case cannot be proved without the one person, one vote standard.

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 test to prove vote dilution. Then, applying the “totality of circumstances” test, the courts, when 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. The courts rejected as a remedy the idea of cumulative voting, or subdistricting (single-member districts). A petition for certiorari was filed Oct 5, 1998.

543 501 U.S. at 403.
545 145 F.3d 818 (6th Cir. 1998).
# Appendix D

## Redistricting Authority in Each State

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<td>L</td>
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<tr>
<td>South Carolina</td>
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<td>South Dakota</td>
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<td>Tennessee</td>
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<td>Texas</td>
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<td>Utah</td>
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<td>Vermont</td>
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<td>Virginia</td>
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<tr>
<td>Washington</td>
<td>C</td>
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</tr>
<tr>
<td>West Virginia</td>
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<td>L</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>L</td>
<td>L</td>
</tr>
<tr>
<td>Wyoming</td>
<td>L</td>
<td>L</td>
</tr>
</tbody>
</table>

**Key:**
- L = Legislature
- G = Governor
- C = Commission
- B = Board

*Source: NCSL, 1999.*
### APPENDIX E
### REDISTRICTING COMMISSIONS: LEGISLATIVE PLANS

<table>
<thead>
<tr>
<th>State</th>
<th>Number of Members</th>
<th>Selection Requirements</th>
<th>Formation Date</th>
<th>Initial Deadline</th>
<th>Final Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>5</td>
<td>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 may be a public employee or official.</td>
<td>By September 1, 2000</td>
<td>30 days after census officially reported</td>
<td>90 days after census officially reported</td>
</tr>
<tr>
<td>Arkansas</td>
<td>3</td>
<td>Commission consists of the governor, secretary of state, and the attorney general</td>
<td>None</td>
<td>By February 1, 2001</td>
<td>Plan becomes official 30 days after it is filed</td>
</tr>
<tr>
<td>State</td>
<td>Number of Members</td>
<td>Selection Requirements</td>
<td>Formation Date</td>
<td>Initial Deadline</td>
<td>Final Deadline</td>
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</tr>
<tr>
<td>Colorado</td>
<td>11</td>
<td>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.</td>
<td>By August 1, 2001</td>
<td>90 days after the availability of the census data, or after the formation of the committee, whichever is later</td>
<td>March 15, 2002</td>
</tr>
<tr>
<td>Hawaii</td>
<td>9</td>
<td>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 may run for the legislature in the two elections following redistricting.</td>
<td>By March 1, 2001</td>
<td>80 days after the commission forms</td>
<td>150 days after commission formation</td>
</tr>
<tr>
<td>Idaho</td>
<td>6</td>
<td>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 may be an elected or appointed official in the state at the time of designation.</td>
<td>Within 15 days after the secretary of state orders creation of a commission</td>
<td>None</td>
<td>90 days after the commission is organized, or after census data is receive, whichever is later</td>
</tr>
<tr>
<td>State</td>
<td>Number of Members</td>
<td>Selection Requirements</td>
<td>Formation Date</td>
<td>Initial Deadline</td>
<td>Final Deadline</td>
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<td>------------------------------------------------------</td>
<td>----------------------------------------------------</td>
</tr>
</tbody>
</table>
| Missouri  | 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 may 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                         |
| Montana   | 5                 | Majority and minority leaders of both houses of the Legislature each select one member. Those four select a fifth, who is the chair. Members cannot be public officials. Members cannot run for public office in the two years after the completion of redistricting.                                                                                                               | The legislative session after 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 | 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.                                                                                                                                                | December 1, 2000  
February 1, 2001, or one month after the census data becomes available | The initial deadline, or one month after the 11th member is picked | The initial deadline, or one month after the 11th member is picked |
| Ohio      | 5                 | Board consists of the governor, auditor, secretary of state, and two people selected by the legislative leaders of each major political party.                                                                                                                                                                                                 | Between August 1 and October 1, 2001   
None                                                                 | October 5, 2001                                      | October 5, 2001                                      |
<table>
<thead>
<tr>
<th>State</th>
<th>Number of Members</th>
<th>Selection Requirements</th>
<th>Formation Date</th>
<th>Initial Deadline</th>
<th>Final Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td>5</td>
<td>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.</td>
<td>None listed</td>
<td>90 days after the availability of the census data or after commission formation, whichever is later</td>
<td>30 days after the last public exception that is filed against the initial plan</td>
</tr>
<tr>
<td>Washington</td>
<td>5</td>
<td>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 January 1, 2001, the state Supreme Court will select the fifth by February 5, 2001. No commission member may be a public official.</td>
<td>January 31, 2001</td>
<td>None</td>
<td>January 1, 2002</td>
</tr>
</tbody>
</table>
## APPENDIX F
### Redistricting Commissions: Congressional Plans

<table>
<thead>
<tr>
<th>State</th>
<th>Number of Members</th>
<th>Selection Requirements</th>
<th>Formation Date</th>
<th>Initial Deadline</th>
<th>Final Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>9</td>
<td>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 may run for the Legislature in the two elections following redistricting.</td>
<td>By March 1, 2001</td>
<td>80 days after the commission forms</td>
<td>150 days after commission formation</td>
</tr>
<tr>
<td>State</td>
<td>Number of Members</td>
<td>Selection Requirements</td>
<td>Formation Date</td>
<td>Initial Deadline</td>
<td>Final Deadline</td>
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</tr>
<tr>
<td>Idaho</td>
<td>6</td>
<td>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 may be an elected or appointed official in the state at the time of designation.</td>
<td>Within 15 days after the secretary of state orders creation of a commission</td>
<td>None</td>
<td>90 days after the commission is organized, or after census data is receive, whichever is later</td>
</tr>
<tr>
<td>Montana</td>
<td>5</td>
<td>Majority and minority leaders of both houses of the Legislature each select one member. Those four select a fifth, who is the chair. Members cannot be public officials. Members cannot run for public office in the two years after the completion of redistricting.</td>
<td>The legislative session after the census data is available</td>
<td>The commission must give the plan to the Legislature at the first regular session after its appointment</td>
<td>30 days after the plan is returned by the Legislature</td>
</tr>
<tr>
<td>State</td>
<td>Number of Members</td>
<td>Selection Requirements</td>
<td>Formation Date</td>
<td>Initial Deadline</td>
<td>Final Deadline</td>
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</tr>
<tr>
<td>New Jersey</td>
<td>13</td>
<td>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 may vote to appoint the 13th, 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.</td>
<td>August 1, 2001</td>
<td>January 15, 2002</td>
<td>January 15, 2002</td>
</tr>
<tr>
<td>Washington</td>
<td>5</td>
<td>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 January 1, 2001, the state Supreme Court will select the fifth by February 5, 2001. No commission member may be a public official.</td>
<td>January 31, 2001</td>
<td>None</td>
<td>January 1, 2002</td>
</tr>
</tbody>
</table>

APPENDIX G
STATE DISTRICTING PRINCIPLES

Alabama

Reapportionment Committee Guidelines for Legislative and Congressional Redistricting

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

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**

*General Guidelines for Creating a Redistricting Plan, adopted by the Joint Select Committee on Reapportionment and Redistricting, July 2, 1991*

a. The state legislative districts should be substantially equal in population.

b. Each congressional district must be as nearly equal in population as practicable. Any deviation must be justified by its necessity to meet a rational state policy.
c. Redistricting plans should not have either the purpose or the effect of diluting racial minority voting strength and shall comply with the Voting Rights Act of 1965, as amended, and the 14th and 15th Amendments to the United States Constitution.

d. All legislative and congressional districts should be reasonably compact.

e. All legislative and congressional districts should be composed of contiguous geography.

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. ***

(a) Each member of the Senate, Assembly, Congress, and the Board of Equalization shall be elected from a single-member district.

(b) The population of all districts of a particular type shall be reasonably equal.

(c) Every district shall be contiguous.

(d) Districts of each type shall be numbered consecutively commencing at the northern boundary of the State and ending at the southern boundary.

(e) The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating the requirements of any other subdivision of this section.
Colorado

Constitution, Article V, Section 47

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.


The 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. sec. 1973 (b).

Of secondary importance are the preservation of county boundaries, the preservation of municipal lines, and the formation of compact districts. State Constitution, Article V, Section 47 (1) and (2).

The third level of importance is the preservation of communities of interest. State Constitution, Article V, Section 47 (3).

The last and unofficial level which the Commission considered was the preservation of politically competitive districts.

Connecticut

Constitution, Article III, Section 3, as amended by Article II, Sec. 1, and Article XV, Sec. 1, of the Amendments to the Constitution of the State of Connecticut

Senate, number, qualifications.

Sec. 3. ** * Each senatorial district shall be contiguous as to territory ... .

National Conference of State Legislatures
Constitution, Article III, Section 4, as amended by Article II, Sec. 2, and Article XV, Sec. 2, of the Amendments to the Constitution of the State of Connecticut

House of representatives, how constituted.

Sec. 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, Sec. 1, of the Amendments to the Constitution of the State of Connecticut

Congressional and general assembly districts to be consistent with federal standards.

Sec. 5. The establishment of congressional districts and of districts in the general assembly shall be consistent with federal constitutional standards.

Delaware

29 Delaware Code, Section 804

Sec. 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

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 2

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

Section 6. ***

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.

Idaho

Constitution, Article III, Section 5

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, Section 72-1506

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.

* * *

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 no 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.

National Conference of State Legislatures
(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 4, Section 3(a)

(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

Section 5. Legislative apportionment

The General Assembly elected during the year in which a federal decennial census is taken shall fix by law the number of Senators and Representatives and apportion them among districts according to the number of inhabitants in each district, as revealed by that federal decennial census. The territory in each district shall be contiguous.

Iowa

Constitution, Article III

Sec. 34. Senate and house of representatives—limitation. ** Each district so established shall be of compact and contiguous territory. **

Sec. 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, 1997 Supplement, Chapter 42, Section 4

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. It is preferable that districts be compact in form, but the standards established by subsections 1, 2 and 3 take precedence over compactness where a conflict arises between compactness and these standards. In general, compact districts are those which are square, rectangular or hexagonal in shape to the extent permitted by natural or political boundaries. When it is necessary to compare the relative compactness of two or more districts, or of two or more alternative districting plans, the tests prescribed

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by paragraphs "b" and "c" of this subsection shall be used. Should the results of these two tests be contradictory, the standard referred to in paragraph "b" of this subsection shall be given greater weight than the standard referred to in paragraph "c" of this subsection.

a. As used in this subsection:

(1) "Population data unit" means a civil township, election precinct, census enumeration district, census city block group, or other unit of territory having clearly identified geographic boundaries and for which a total population figure is included in or can be derived directly from certified federal census data.

(2) The "geographic unit center" of a population data unit is that point approximately equidistant from the northern and southern extremities, and also approximately equidistant from the eastern and western extremities, of a population data unit. This point shall be determined by visual observation of a map of the population data unit, unless it is otherwise determined within the context of an appropriate coordinate system developed by the federal government or another qualified and objective source and obtained for use in this state with prior approval of the legislative council.

(3) The "x" co-ordinate of a point in this state refers to the relative location of that point along the east-west axis of the state. Unless otherwise measured within the context of an appropriate co-ordinate system obtained for use as permitted by subparagraph 2 of this paragraph, the "x" co-ordinate shall be measured along a line drawn due east from a due north and south line running through the point which is the northwestern extremity of the state of Iowa, to the point to be located.

(4) The "y" co-ordinate of a point in this state refers to the relative location of that point along the north-south axis of the state. Unless otherwise measured within the context of an appropriate co-ordinate system obtained for use as permitted by subparagraph (2) of this paragraph, the "y" co-ordinate shall be measured along a line drawn due south from the northern boundary of the state or the eastward extension of that boundary, to the point to be located.

b. 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.

(1) In measuring the length and the width of a district by means of electronic data processing, the difference between the "x" co-ordinates of the easternmost and the westernmost geographic unit centers included in the district shall be compared to the difference between the "y" co-ordinates of the northernmost and southernmost geographic unit centers included in the district.
(2) To determine the length and width of a district by manual measurement, 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 shall each be measured. If the northernmost or southernmost portion of the boundary, or each of these points, is a part of the boundary running due east and west, the line used to make the measurement required by this paragraph shall either be drawn due north and south or as nearly so as the configuration of the district permits. If the easternmost or westernmost portion of the boundary, or each of these points, is a part of the boundary running due north and south, a similar procedure shall be followed. The lines to be measured for the purpose of this paragraph shall each be drawn as required by this paragraph, even if some part of either or both lines lies outside the boundaries of the district which is being tested for compactness.

(3) 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. However, it is not valid to cumulate or compare absolute values computed under subparagraph (1) with those computed under subparagraph (2) of this paragraph.

c. The compactness of a district is greatest when the ratio of the dispersion of population about the population center of the district to the dispersion of population about the geographic center of the district is one to one, the nature of this ratio being such that it is always greater than zero and can never be greater than one to one.

(1) The population dispersion about the population center of a district, and about the geographic center of a district, is computed as the sum of the products of the population of each population data unit included in the district multiplied by the square of the distance from that geographic unit center to the population center or the geographic center of the district, as the case may be. The geographic center of the district is defined by averaging the locations of all geographic unit centers which are included in the district. The population center of the district is defined by computing the population-weighted average of the “x” co-ordinates and “y” co-ordinates of each geographic unit center assigned to the district, it being assumed for the purpose of this calculation that each population data unit possesses uniform density of population.

(2) The ratios computed for individual districts under this paragraph may be averaged 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.

7. ***

8. ***

Kansas


1. Districts should be numerically as equal in population as practicable. Deviations should not exceed plus or minus 5 percent of the ideal population of 19,563 for each House district and 61,135 for each Senate district, except in unusual circumstances. (The range of deviation for House districts could be plus or minus 978 persons, for districts that could range in population from 18,585 to 20,541. The overall deviation for House districts could be 1,956 persons. The range of deviation for Senate districts could be plus or minus 3,056 persons, for districts that could range in population from 58,079 to 64,192. The overall deviation for Senate districts could be 6,112 persons.)

2. The "building blocks" to be used for drawing district boundaries shall be precincts (VTDs) as described on official 1990 U.S. Census maps.

3. Districts should be as compact as possible and contiguous.
4. The integrity and priority of existing political subdivisions should be preserved as far as practicable.

5. There should be recognition of similarities of interest. Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probably subjects of legislative action (generally termed "communities of interest") should be considered.

6. Redistricting plans will have neither the purpose nor the effect of diluting minority voting strength.

7. Districts should not be drawn to protect or defeat an incumbent.

8. The basis for legislative redistricting is the 1990 U.S. Decennial Census as adjusted by the Kansas Secretary of State pursuant to Article 10, Section 1 of the Constitution of the State of Kansas and K.S.A. 11-301 et seq.

9. Districts should be easily identifiable and understandable by voters.

1992 Congressional Redistricting Guidelines, adopted by the Joint Standing Committees on Apportionment, August 9, 1991

1. Districts are to be as nearly equal in population as practicable without the division of any county into two or more districts. It is to be the policy to preserve county boundaries. County lines are meaningful in Kansas and Kansas counties have historically been significant political units. Many officials are elected on a county-wide 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, cultural, racial and ethnic units, or parts of a larger socio-economic unit. These interests common to the population of the area, generally termed "community of interests" should be considered without breaking county lines.

2. Districts should be as compact as possible and contiguous. If possible, preserving the core of the existing districts should be undertaken when considering the "community of interests" in establishing districts.

3. The basis for redistricting the members of Congress is the 1990 United States Decennial Census as published by the U.S. Department of Commerce, Bureau of the Census. The "building blocks" to be used for drawing district boundaries shall be the counties as their population is reported in the 1990 U.S. Decennial Census.

4. Districts should attempt to recognize "community of interests" when that can be done in compliance with the above guidelines.

National Conference of State Legislatures
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

Louisiana House of Representatives Committee on House and Governmental Affairs, Rules for Legislative Reapportionment, adopted November 1, 1990

Deviation from the “ideal district population” should be justifiable either as a result of limitations of census geography or as a result of the promotion of a rational state policy, including, but not limited to, respect for the traditional political geography and natural geography of the state and the development of compact and contiguous districts.
Maine

Constitution, Article IV, Part First, Section 2

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.

Massachusetts

Constitution, Article Cl, 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.

Maryland

Constitution, Article III, Section 4

3.4 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.

Governor’s Redistricting Advisory Committee, Legal Standards for Plan Development, adopted June 11, 1991

***

National Conference of State Legislatures
B. Minority Representation

Congressional and Legislative district plans may not dilute minority voting strengths and shall comply with 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 choices.”

1. Districts should not be created which would either unduly “pack” a super-majority of a racial or language minority group into a district, or “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 allow 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 not legally or constitutionally required, Congressional districts, to the extent possible, should be 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 not legally or constitutionally required, Congressional districts, to the extent possible, should be compact. To the extent possible, recognition may also be given to prior legislative 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. Among the foregoing legal constraints, it is clear that requirements regarding equal population (A) and minority access (B) hold the highest priority. Constraints regarding contiguity, compactness and natural and subdivision boundaries then follow. In addition to the foregoing legal constraints, the following additional guidelines should be considered.
G. Precinct Lines

To the extent possible, the plan, as adopted, should follow established precinct lines as shown on the 1990 census maps and in the census redistricting population counts.

H. Communities of Interest

The plan should be cognizant of and consideration given to preserving identifiable communities of interest.

I. Cognizance of Existing Lines

It is permissible for the plan to consider existing districts and incumbents.

J. Subdistricting

Subdistricting, with respect to legislative districts, may be permitted to protect county integrity and to comply with the Voting Rights Act, and each county and the City of Baltimore shall be assured at least one Delegate to the extent possible.

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 these 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.

Michigan

Constitution, Article IV, Section 2

Sec. 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.

Minnesota

Constitution, Article IV, Section 3

Sec. 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, Section 2.91, Subdivision 2

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.

House Concurrent Resolution No. 1, establishing standards for congressional redistricting plans, adopted May 13, 1991

A plan presented to the Senate or House of Representatives for redistricting seats in the United States House of Representatives must adhere to the following standards:

(3) The districts must be composed of convenient contiguous territory. To the extent consistent with the other standards in this resolution, districts should be compact. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district.

(5) The districts must not dilute the voting strength of racial or language minority populations. Where a concentration of a racial or language minority population makes it possible, the districts must increase the probability that members of the minority will be elected.

(6) A county, city, or town must 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 territory.

(7) The districts should attempt to preserve communities of interest where that can be done in compliance with the preceding standards.

(8) The geographic areas and population counts used in maps, tables, and legal descriptions of the districts must be those used by the Legislative Coordinating Commission's Subcommittee on Redistricting.

House Concurrent Resolution No. 2, establishing standards for legislative redistricting plans, adopted May 13, 1991
A plan presented to the Senate or House of Representatives for redistricting seats in the Senate and House of Representatives must adhere to the following standards:

***

(3) A representative district may not be divided in the formation of a senate district.

(4) The districts must be substantially equal in population. The population of a district must not deviate from the ideal by more than two percent, plus or minus.

(5) The districts must be composed of convenient contiguous territory. To the extent consistent with the other standards in this resolution, districts should be compact. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district.

(6) The 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 in Minneapolis and St. Paul.

(7) The districts must not dilute the voting strength of racial or language minority populations. Where a concentration of a racial or language minority makes it possible, the districts must increase the probability that members of the minority will be elected.

(8) A county, city, or town should 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 territory.

(9) The districts should attempt to preserve communities of interest where that can be done in compliance with the preceding standards.

(10) The geographic areas and population counts used in maps, tables, and legal descriptions of the districts must be those used by the Legislative Coordinating Commission’s Subcommittee on Redistricting.

***

Mississippi

*Mississippi Code of 1972*

Sec. 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, July 15, 1991

* * *

2. The redistricting plan should not dilute minority voting strength.

3. The redistricting plan should avoid a political gerrymander.

4. Districts must be composed of contiguous territory.

5. Districts should be compact.

6. Districts should cross county lines the least number of times possible, and if county lines are crossed, election precinct lines should be followed if possible.

Missouri

Constitution, Article 3

Section 2

Election of representatives—apportionment commission, appointment, duties, compensation. Section 2. * * * Each district shall be composed of contiguous territory as compact as may be. * * *

Section 45

Congressional apportionment. Section 45. * * * [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

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 Districting and Apportionment Commission, 1992 report

1. Mandatory Guidelines And Criteria

1. Compactness and contiguity. Each legislative district must consist of compact and
contiguous territory. (Article V, section 14, Montana Constitution)

2. Protection of minority rights. The redistricting plan may not dilute the voting strength of
racial or language minorities and must comply with section 2 of the federal Voting Rights
Act. A district plan or proposal for a plan is not 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.”
II. Other Criteria And Policy Considerations

The Commission also adopted the following discretionary nonprioritized guidelines:

1. *Local government boundaries.* Consideration will be given to the boundary lines of existing local government units, including counties, cities, towns, and Indian reservations. The division of local government units into legislative districts should be avoided except as necessary to meet equal population requirements or to comply with the Voting Rights Act.

2. *Precincts.* District lines should follow voting precinct lines to the extent practical in order to minimize voter confusion and the cost of election administration.

3. *School districts.* School district lines should be considered whenever practical.

4. *Communities of interest.* When possible, communities of interest should be preserved. Communities of interest include trade areas; areas linked by common communication and transportation systems; and areas that have similarities of interests, such as social, cultural, and economic interests common to the population of the area.

5. *Geographical boundaries.* Geographical boundaries will be respected to the extent possible.

6. Whenever practical, consideration will be given to existing legislative district lines.

7. Districts may not be drawn for the purpose of favoring a political party or to protect or defeat an incumbent legislator.

**Nebraska**

*Constitution, Article III, Section 5*

Sec. 5. *Any 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.*

Procedural Guidelines adopted by the Government, Military, and Veteran's Affairs Committee for the 1991 and 1992 redistricting sessions

1. District boundary lines shall follow county lines whenever practicable.

2. Districts should be compact and contiguous.
3. Insofar as possible, district boundary lines shall define districts that are easily identifiable and understandable to voters that reflect unity of character or socioeconomic interest.

4. District boundaries shall not be established with the intention of protecting or defeating any incumbent, or with the intention of discriminating against any political party that is legally recognized by the State of Nebraska and qualified to nominate candidates for public office at the time of redistricting plan in question is adopted by the Legislature.

5. Any proposed redistricting plan that has as a consequence the dilution of the voting impact of any minority population shall not be considered.

6. The goal of equality of population from district to district shall guide the Legislature in establishing legislative district boundaries, although minor deviations are permitted. No plan shall be considered which results in an overall range in deviation in excess of 4%, or a relative deviation in excess of +/-2% from the ideal district population.

7. Any deviation in excess of the above must be justifiable as necessary for the realization of a rational state policy.

Nevada

Proposed Rules for Redistricting by the Nevada Legislature

1. Equality of Representation

1. Equality of population of state legislative districts with only minor deviations is the goal of legislative redistricting.

a. 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 including, but not limited to, respect for the traditional political geography and natural geography of the state, protection of a recognized community of interest, and the development of reasonably compact and contiguous districts.

b. In order to meet constitutional guidelines for legislative districts, no plan, or proposed amendment thereto, will be considered which results in an overall range of deviation in excess of ten percent (10%), or a relative deviation in excess of ± five percent (5%) from the ideal district population.

2. Equality of population of congressional districts insofar as is practicable is the goal of congressional redistricting.
a. Any population deviation among the congressional districts from the "ideal districts" populations must be necessary to achieve some legitimate state objective (for example, making districts compact. Respecting political boundaries and so forth).

b. In order to meet constitutional guidelines for congressional districts, no plan, or propose amendment thereto, will be considered which results in an overall range of deviation in excess of one percent (1%), or a relative deviation in excess of ± one-half percent (0.5%) from the ideal district population.

***

III. Districts

Each state senate district must be coterminous with adjoining assembly districts and have its borders set out by reference to those assembly districts.

All districts boundaries created by a redistricting plan must follow the census geography.

IV. Protection of Minority Voting Strength and Minority Participation

1. The dilution of minority voting strength is contrary to public policy. The right of meaningful political participation of minority citizens is recognized. Accordingly, any proposed redistricting plan, or amendment thereto, demonstrated to have the objective or consequence of diluting the voting strength of minority citizens is unacceptable.

2. The redistricting committees will not consider a plan which shows evidence of violating section 2 of the Voting Rights Act. Section 2 of the Voting Rights Act 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. Section 2 is applicable to all states and prohibits purposeful discriminatory practices or practices which result in discrimination. Redistricting is an election practice which must comply with the provisions of section 2 of the Voting Rights Act.

3. The redistricting committees will not consider a plan which shows evidence of packing minority districts ("packing" is drawing district boundary lines so that the members of a minority group are concentrated, or "packed," into as few districts as possible). The redistricting committees also will not consider a plan which shows evidence of fracturing minority districts ("fracturing" is drawing district lines so that the minority population is broken up among several districts to deprive the minority population of its voting strength in a single district).
New Hampshire

Constitution, Part Second, House of Representatives, Article 9

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.

Constitution, Part Second, Senate, Article 26

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. *

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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.

Public Law 1991, Chapter 510, Section 5

(Congressional Districts)

*** preservation of minority voting status ... geographical contiguity ... reasonable protection for districts from decade to decade due to disruptive alteration ... No congressional districts shall be established which fragments an ethnic or racial minority community ... a minority community means any group enjoying special protection under the ... Voting Rights Act of 1965 ... congressional districts shall be drawn so they are contiguous.
New Mexico

New Mexico Statutes Annotated, Section 2-7C-2
2-7C-2. Findings.

*** a precinct is the building block of a district . . .

New Mexico Statutes Annotated, Section 2-7C-3
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.

New Mexico Statutes Annotated, Section 2-8C-2
2-8C-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 and possible.

New York

Constitution, Article III, Section 4
Sec. 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 enclosed 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,
Sec. 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 * * *

Sec. 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 adopted by House and Senate Committees, April 22, 1991

In accordance with the Voting Rights Act of 1965, as amended, and the 14th and 15th Amendments to the Constitution of the United States, the voting rights of racial minorities shall not be abridged or denied.

All districts shall consist of contiguous territory.

Redistricting criteria as stated in Senate Committee Report, May 21, 1998

1) Eliminate the constitutional defects in the 12th Congressional District.

2) Change as few districts as possible.

3) Keep the current partisan balance of the delegation.

4) Keep incumbents in separate districts and preserve the cores of those districts.

5) Reduce division of counties and cities, especially where the court found that the division was on racial lines.

North Dakota

Constitution, Article IV, Section 2

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, Section 54-03001.5

54-03001.5 Legislative Districting. Multi-member senate district authorized when more than 2/3 of the population of a single-seat senate district would be a federal facility or federal installation. Must be compact and contiguous.

House Concurrent Resolution No. 3026, 1991 Session

Legislative Districts must be compact and contiguous except as necessary to preserve county and city boundaries and current legislative district boundaries. Deviation may not exceed 9% except as necessary to preserve city, county, and former legislative district boundaries as boundaries. No legislative district may cross the Missouri River.

Committee Guidelines adopted in 1991

Population variance may not exceed 10 percent, a district may cross the Missouri River if necessary to put all of an Indian Reservation in one district.

Ohio

Constitution, Article XI

§ 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.

§ 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.

§ 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.

§ 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.

§ 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.

National Conference of State Legislatures
§ 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

Section V-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

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. Myersl, 260 Ore. 152 (1971).]
Oregon Revised Statutes, 1997 Edition, Section 188.010

ORS 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

Section 16. [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

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

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

Senate Judiciary Committee’s Subcommittee on Reapportionment and Redistricting, Guidelines for Legislative and Congressional Redistricting, adopted March 30, 1994

* * *

II. 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 Section 2 and 5 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

III. 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 travel within the district and the linkage is designed to meet the other criteria stated herein.

IV. Communities of Interest

Where possible, legislative and congressional districts should attempt to preserve communities of interest where such efforts do not violate Criteria I and II.

V. Constituent Consistency

Efforts will be made to preserve cores of existing districts where such efforts are consistent with and do not violate Criteria I and II.

VI. Precinct Boundary Lines

District boundaries should adhere 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.
**VIII. 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.

A. As a first level of inquiry, a district’s compactness may be determined by considering its appearance and the area of dispersal of the district. This should include a mathematical analysis of:

1. how round, square, long, or wide the district is (round or square being preferable to long or wide);

2. how similar and regular the sides of the district are; and

3. how regularly the population is distributed within the district (where the people are within and just outside the district and where the unpopulated areas are within the district).

Irregular geographical boundaries and/or significant land areas with little or no population may justify unequal district lines if such district lines follow a significant geographical feature or political subdivision boundary or must be drawn to include necessary population(s).

B.1. 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; and

b. enhanced opportunity for voters to know their representative and the other voters he represents.

2. Therefore, and in addition to a mathematical analysis of a district’s compactness, a functional analysis may be undertaken to ensure that the compactness also reflects:

a. utilization of historically defined political subdivisions as building blocks to ensure voter identity and efficient political mobilization;

b. utilization of vernacularly insular regions so as to allow for the representation of common interest; and
c. utilization of districts which facilitate a representative’s capabilities to effectively and efficiently communicate with his constituents in cognizably media markets.

South Dakota

Constitution, Article III, Section 5

§ 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, Section 2-2-23

2-2-23. Legislative policy in redistricting. The Legislature, in making the

1991 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 Article III, section 5, of the Constitution;

(2) Protection of minority voting rights pursuant to the United States Constitution, the South Dakota Constitution and federal statutes;

(3) Protection of socioeconomic relationship by means of compact and contiguous districts; and

(4) Restoration of the boundaries of any county that was split in the previous redistricting.

Tennessee

Tennessee Code Annotated, Section 3-1-103

* * *

(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”;

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(3) Geographic areas, boundaries and population courts used for redistricting shall be based on the 1990 federal decennial census;

(4) Districts must be contiguous and contiguity by water is sufficient;

(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 according to the number of qualified electors, as nearly as may be * * *

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.

House Resolution No. 150, adopted 1991

1) avoid arbitrariness and afford all interested parties a right of access to the political process;

2) take notice of all federal and state court decisions on reapportionment;

3) comply with requirements of the federal Voting Rights Act and all applicable federal and state law in formulating redistricting proposals;

4) make the basic demographic and statistical data available to all interested parties;

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5) define all proposed districts by reference to census geographic units; and

6) act to produce a fair and equitable alignment of district boundaries that provide representation for all the people of Texas.

**Utah**

*Guidelines adopted by Redistricting Committee, May 29, 1991*

Plus or minus 4 percent deviation for legislative districts, plus or minus 1 percent deviation for congressional districts. Single member districts only. As contiguous and compact as practicable. Efforts will be made to maintain communities of interest and geographical boundaries and to respect existing political subdivisions as far as practicable. Districts will not be drawn to intentionally protect or defeat any incumbent.

**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, Section 1903*

§ 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.

* Vermont Statutes Annotated, Title 17, Chapter 34A, Section 1906b *

§ 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.

* Vermont Statutes Annotated, Title 17, Chapter 34A, Section 1906c *

§ 1906c. Division of Districts Having Three or More Representatives.

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(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

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. **

Resolution No. 1, Redistricting Plans for the Senate of Virginia, adopted by the Senate Committee on Privileges And Elections, February 22, 1991

***
II. Criteria

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B. Minority Representation

1. Voting Rights Act §§ 2 and 5. District plans shall not dilute minority voting strength and shall comply with §§ 2 and 5 of the Voting Rights Act. No district 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."

The Committee seeks the participation of minority group members in the redistricting process. Minority group members shall be afforded a full and fair opportunity to participate in the process leading to the adoption of any redistricting plan.

2. Voting Rights Act preclearance. Legislation adopted to redistrict the Senate shall be submitted promptly to the Department of Justice for preclearance under § 5 of the Voting Rights Act.

C. Compactness. Districts shall be reasonably compact. Irregular district shapes may be justified because the district line follows a political subdivision boundary or significant geographic feature.

D. Contiguity. Districts shall be composed of contiguous territory. Contiguity by water is acceptable to link territory within a district in order to meet the other criteria stated herein and provided that there is reasonable opportunity for travel within the district.

E. Political Fairness. A redistricting plan shall be unacceptable if it is drawn with the purpose and effect of denying any group of persons who share a common political association a fair opportunity to participate in the political process.

III. Policy Considerations

A. Political Subdivisions. District plans shall be drawn so as to avoid splitting counties, cities, and towns to the extent practicable.

B. Communities of Interest. In drawing district plans, consideration shall be given to preserving communities of interest.

C. Precincts. Precincts *** should serve as the basic building blocks for districts when it is necessary to split any county or city.

D. Existing Districts: Incumbency. It is permissible to consider existing districts and incumbency.
Resolution No. 1, Redistricting Plans for the House of Delegates, adopted by the House Committee on Privileges and Elections, February 23, 1991

***

II. Criteria

***

B. Minority Representation

1. Voting Rights Act §§ 2 and 5. District plans shall not dilute minority voting strength and shall comply with §§ 2 and 5 of the Voting Rights Act. No district 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."

The Committee seeks the participation of minority group members in the redistricting process. Minority group members shall be afforded a full and fair opportunity to participate in the process leading to the adoption of any redistricting plan.


C. Compactness. Districts shall be reasonably compact. Irregular district shapes may be justified because the district line follows a political subdivision boundary or significant geographic feature.

D. Contiguity. Districts shall be composed of contiguous territory. Contiguity by water is acceptable to link territory within a district in order to meet the other criteria stated herein and provided that there is reasonable opportunity for travel within the district.

E. Political Fairness. The Committee is cognizant of the Supreme Court's decision in Davis v. Bandemer and will seek to approve a plan that complies with the equal protection clause of the Fourteenth Amendment to the United States Constitution.

***

III. Policy Considerations

A. Political Subdivisions. District plans shall be drawn so as to avoid splitting counties, cities, and towns to the extent practicable.
B. Communities of Interest. In drawing district plans, consideration shall be given to preserving communities of interest.

C. Precincts. Precincts ** * should serve as the basic building blocks for districts when it is necessary to split any county or city.

D. Existing Districts: Incumbency. It is permissible to consider existing districts and incumbency.

** *

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, Section 44.05.090

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

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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

1-4. **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.

Article VI, Section 4

6-4. **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*

***

**Apportionment.** Section 3. 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.

***

**Representatives to the assembly, how chosen.** Section 4. 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.
Senators, how chosen. Section 5. 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.

Wyoming

Constitution, Article 3, Section 97-3-049

97-3-049. 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.

Principles adopted by Joint Corporations Interim Committee

1. election districts contiguous, compact, and reflect a community of interest.

***

3. To the greatest extent possible, in establishing election districts, county boundaries should be followed.

4. The plan should avoid diluting voting power of minorities in violation of the Voting Rights Act.

***

7. significant geographical features should be considered in establishing districts.

***

9. consideration of residence of current legislators should be avoided.
APPENDIX H

CASES CITED

Abate v. Mundt, 403 U.S. 182 (1971) ................................................................. 40, 132
Abrams v. Johnson, 117 S. Ct. 1925 (1997) .................................................... 22, 26, 28, 44, 73, 74, 78
Allen v. State Board of Elections, 393 U.S. 544 (1969) ....................................... 84, 85, 94
Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws, 781 F. Supp. 394 (D. Md. 1991) ................................................................. 26
Arlington Heights v. Metropolitan Housing Development Corp, 429 U.S. 252 (1977) .................. 93, 94
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Avery v. Midland County, 390 U.S. 474 (1968) .................................................. 132
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Burns v. Richardson, 384 U.S. 73 (1966) .......................................................... 17, 101, 107, 109, 110, 117
Chapman v. Meier, 420 U.S. 1 (1975) ................................................................. 22, 27, 32, 37, 43, 104, 107, 133
Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987), cert. denied, 57 U.S.L.W. 3841
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City of Lockhart v. United States, 460 U.S. 125 (1983) ................................................................. 88, 97
Colegrove v. Green, 328 U.S. 549 (1946) ..................................................................................... 1, 20
Connor v. Finch, 431 U.S. 407 (1977) ......................................................................................... 22, 27, 32, 37, 38, 43, 133
Connor v. Williams, 404 U.S. 549 (1972) ..................................................................................... 107
DeBaca v. County of San Diego, 794 F. Supp. 990 (S.D. Cal. 1992), aff'd, 5 F.3d 535 (9th Cir. 1993) ........ 64
DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Calif. 1994) ............................................................ 26, 77, 78
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) ......................................... 120
Emison v. Gowe, Order, No. 4-91-202 (D. Minn. Dec. 5, 1991) ............................................... 119
Fortson v. Dorsey, 379 U.S. 433 (1965) ....................................................................................... 101, 107, 110
Franklin v. Massachusetts, 505 U.S. 788 (1992) ........................................................................ 12
Fund for Accurate and Informed Representation Inc. (1992) ...................................................... 42, 116
Gantt v. Skelos, 504 U.S. 902 (1992) .......................................................................................... 118
Garza v. County of Los Angeles, 918 F. 2d. 763 (C.A. 9 (Cal.) 1990), cert. denied 498 U.S. 1028 (1991) .......
 ....................................................................................................................................................... 18, 62, 65
Gray v. Sanders, 372 U.S. 368 (1963) .......................................................................................... 1, 21
Growe v. Emison, 478 U.S. at 107 ................................................................................................. 55, 56, 57, 64, 119, 122
Hastert v. State Board of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) ................................. 26, 64
Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) ........................................................................ 53, 54, 96
Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984) ................................................................................ 53, 54, 62, 87
Lawyer v. Department of Justice, 117 S. Ct. 2186 (1997) ........................................................................ 4, 66, 122
Mahan v. Howell, 410 U.S. 315 (1973) .................................................................................................. 22, 29, 31, 32, 33, 36, 37, 38, 42, 44
Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983) ................................................................................ 94, 97
Parsons Steel Inc. v. First Alabama Bank, 474 U.S. 518 (1986) ............................................................. 120
Richards v. Terrazas, 112 S. Ct. 3019 (1992) .............................................................................. 118
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) ........................................................................ 120
Rural West Tennessee African-American Affairs Council Inc. v. McWherter (1994) ..................... 64, 65
Rybicki v. State Board of Elections (Rybicki II), 574 F. Supp. 1147 (N.D. Ill. 1983) ....................... 50, 53
Rybicki v. State Board of Elections (Rybicki I), 574 F. Supp. 1082 (N.D. Ill. 1982) ....................... 53
Scott v. Germano, 381 U.S. 407 (per curiam) ............................................................................. 118
Shaw v. Reno (Shaw II), 509 U.S. 630 (1993) ............................................................ 4, 58, 59, 65, 66, 68, 69, 72, 73, 76, 77, 79
Slagle v. Terrazas, 113 S. Ct. 29 (1992) ....................................................................................... 118
South Carolina v. Katzenbach, 383 U.S. 301 (1966) ................................................................. 80

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United Jewish Organizations v. Carey, 430 U.S. 144, 168 (1977) ................................................................. 62, 77
United States v. Marengo County Comm., 731 F.2d 1546 (11th Cir. 1984) ........................................... 50, 53, 54, 96
Voinovich v. Quilter, 507 U.S. 146 (1993) .......................................................................................... 37, 42, 44, 50, 56, 57, 63, 64
Wesberry v. Sanders, 376 U.S. 1 (1964) ................................................................................................. 1, 23, 24, 44
West v. Clinton, 786 F. Supp. 803 (W.D. Ark. 1992) .......................................................................... 64
White v. Weiser, 412 U.S. 783 (1973) ................................................................................................. 22, 23, 25, 117, 122
Wilson v. Eu, 823 P.2d 545 (Cal. 1990) .............................................................................................. 26
Wise v. Liscomb, 437 U.S. 535 (1978) ............................................................................................... 78
WMCA Inc. v. Lomenzo, 377 U.S. 633 (1964) ...................................................................................... 17
Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) ........................................................................... 53, 104, 134
GLOSSARY

Alternative Population Base—A population count other than the official census data that is used for redistricting.

Apportionment—The process of assigning the number of members of Congress that each state may elect following each census.

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 United States Constitution.

Census blocks, Census tract—Geographic areas recommended by the states and used by the Census Bureau for the collection and presentation of data.

Commission—A statutory or constitutional body charged with researching or implementing policy. Redistricting commissions have been used to draw districts for legislatures and Congress.

Compactness—Having the minimum distance between all the parts of a constituency (a circle 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.

District—The boundaries that define the constituency of an elected official.

Gerrymander—The drawing of districts intentionally to give one group or party advantage over another.

Homogenous district—A voting district with at least 90 percent minority or White population.
Ideal population—The result of the total state population divided by the number of seats in a legislative body.

Majority-minority districts—Term used by the courts for seats where an ethnic minority constitutes a majority of the population.

Multimember district—A district that elects two or more members to a legislative body.

Metes and bounds—A detailed description of district boundaries using specific geographic features.

Natural boundaries—District boundaries that are natural geographic features.

One person, one vote—Constitutional standard established by the 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.

Packing—A term used when one group is consolidated into 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—The federal law that requires the U.S. Census Bureau to provide the states with data for use in redistricting and that 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 preclear 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 that elects only one representative.

Standard deviation—A statistical formula measuring variance from a norm.

Tabulation—The totaling and reporting of the census data.
BIBLIOGRAPHY


Bibliography


——. “Would Vince Lombardi Have Been Right If He Had Said When it comes to redistricting, race isn’t everything, it’s the only thing?’ Cardozo Law Review 14 (April 1993): 1237-1276.


———. “Redistricting, Region and Representation.” Political Geography Quarterly 6, no. 3 (July 1987): 241-261.


National Conference of State Legislatures


Watson, Peter S. “How to Draw Redistricting Plans That Will Stand Up In Court.” Prepared for presentation at a meeting of the National Conference of State Legislatures, Newport Beach, Calif., 1989.


