

# **How to Draw Redistricting Plans That Will Stand Up in Court**

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**National Conference of State Legislatures  
Online Redistricting Seminar**

DENVER, COLORADO

JANUARY 17, 2021 UPDATE

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## **I. Introduction**

The purpose of this paper is to acquaint you with the major federal cases that will govern the way you draw your legislative and congressional redistricting plans following a new census so that you may learn how to draw redistricting plans that will stand up in court.

Before I get into the cases, I'd like to clarify some terms I will be using and explain how the redistricting process works.

### **A. Reapportionment and Redistricting**

“Reapportionment” is the process of reassigning a given number of seats in a legislative body to established districts, usually in accordance with an established plan or formula. The number and boundaries of the districts do not change, but the number of members per district does.

“Redistricting” is the process of changing the district boundaries. The number of members per district does not change, but the districts’ boundaries do.

The relationship between reapportionment and redistricting can most easily be seen by examining the U.S. House of Representatives. Every ten years the 435 seats in the House of Representatives are reapportioned among the 50 states in accordance with the latest federal census. As the population of some states grows faster than that of others, congressional seats move from the slow-growing states to the fast-growing ones. Then, within each of the states that is entitled to more than one representative, the boundaries of the congressional districts are redrawn to make their populations equal. The state is redistricted to accommodate its reapportionment of congressmen.

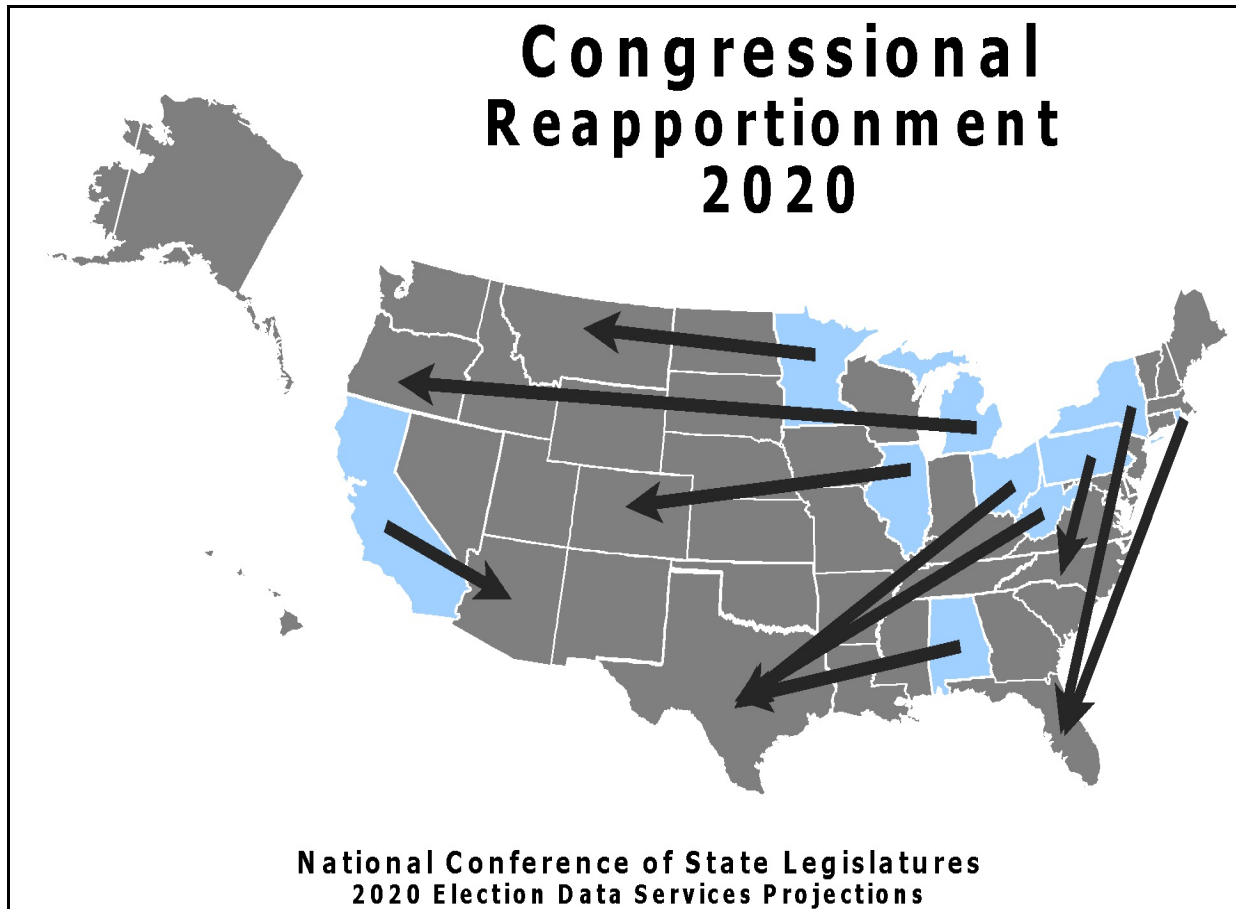
Reapportionment, in the narrow sense in which I will be using it here, is not a partisan political process. It is a mathematical one. The decennial reapportionment of the U.S. House of Representatives is carried out in accordance with a statutory formula, called the “method of equal proportions,” established in 1941. [2 U.S.C. § 2a, 2b](#). It is not subject to partisan manipulation, except in determining who gets counted in the census. The decision of Congress to use this particular formula, rather than another, has been upheld by the Supreme Court. *Dept. of Commerce v. Montana*, [503 U.S. 442](#) (1992).

Redistricting, on the other hand, is highly partisan. This is because, in redrawing district boundaries, the drafter has such wide discretion in deciding where the boundaries will run. Creative drafting can give one party a significant advantage in elections.

### **B. Why Redistrict?**

#### **1. Reapportionment of Congressional Seats**

Why do we redistrict? The first reason is because of population shifts that cause congressional seats to move from state to state.



This map shows how congressional seats are projected to move from state to state as a result of the 2020 census. It shows the continued shift of population from the North and East to the South and West, as captured by each of the last several censuses, plus the first loss by California in its history.

In each of the states that has gained or lost a seat, the congressional districts must be redrawn to accommodate the new number of districts

## **2. Population Shifts within a State**

The second reason we must redistrict is population shifts within a state.

Even if the number of districts has not changed, if the population growth has not been uniform throughout a jurisdiction, the districts will tend to have grown out of population balance. There are exceptions, of course. In preparation for the 1990 round of redistricting, the City of St. Paul purchased the necessary hardware and software, appointed a redistricting commission, and prepared to draw new city council districts. When the population counts arrived, the city discovered that its population growth had been so uniform that no district was far enough out of population



balance to require redistricting. They disbanded the commission and continued to use the old districts for another decade. Others have not been so lucky.

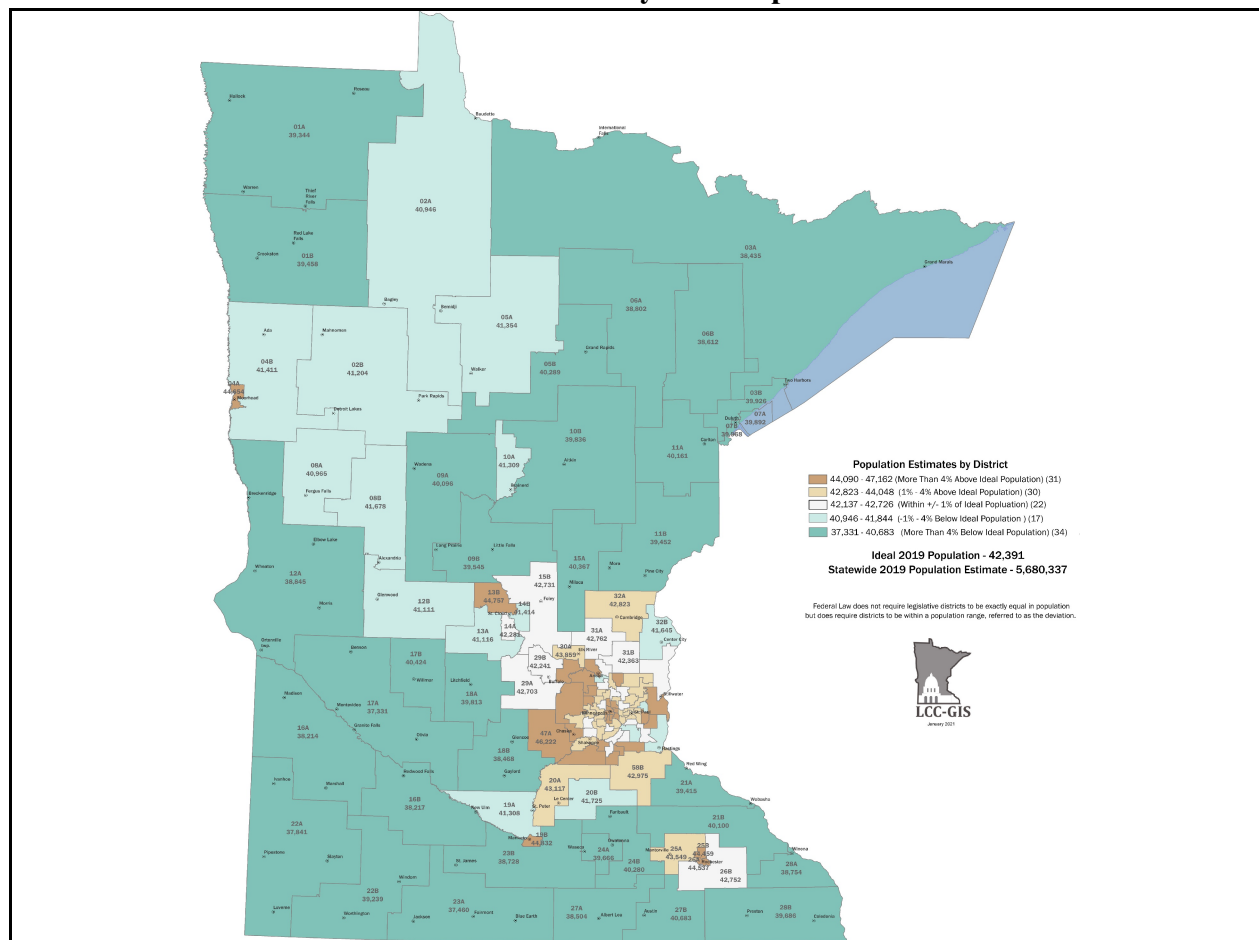
## C. The Facts of Life

### 1. Equal Population

It is a fact of life in redistricting that absolute numbers are less important than relative numbers. Getting the numbers right is important, but once you have them your concern is not their absolute value but rather how they relate to each other.

Even if all areas of a state are growing, what is important for each region, or each district, is whether it has grown faster or slower than average. Districts that have grown slower than average will have to grow in area. Districts that have grown faster than average will have to shrink in area.

**Minnesota House Districts by 2019 Population Estimates**



This map shows the State of Minnesota's estimated population by House District as of 2019, and whether a district's population was larger or smaller than average, that is, larger or smaller than

the ideal. The districts in white, in east central Minnesota, were within 1 percent of the ideal district size, plus or minus. Those in light green, running down the middle of the state, were between 1 and 4 percent below the ideal. Those in dark green, in the four corners of the state, were more than 4 percent below the ideal. Those in light brown, in the east central part of the state, were between 1 and 4 percent above the ideal. Those in dark brown, in the Twin Cities metropolitan area, Moorhead, St. Cloud, Mankato, and Rochester, were more than 4 percent above the ideal. The green districts must grow in area, and the brown districts must shrink in area in order to meet equal population requirements.

You might think that the white districts would have nothing to worry about, since their populations were close to ideal. But if the green districts must grow in area, where would they get their new population? The other green districts, which must replace that lost population by taking from their neighboring green, white, and brown districts. It's a ripple effect that can put quite a strain on relationships between neighbors who used to be friends.

## **2. Gerrymandering**

It is a fact of life in redistricting that the district lines are always going to be drawn by the majority in power, and the majority will always be tempted to draw the lines in such a way as to enhance their prospects for victory at the next election. The term "gerrymandering" is often used to describe any technique by which a political party attempts to give itself an unfair advantage in redistricting.

Used in its narrow sense, to refer only to the practice of drawing districts with odd shapes that look like monsters, there are two primary techniques—packing and cracking. How do they work?

### **a. Packing**

"Packing" is drawing district boundary lines so that voters who support candidates of the minority party are concentrated, or "packed," into as few districts as possible. They become a supermajority in the packed districts—60, 70, or 80 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are "wasted." They are not available to help elect representatives in neighboring districts, so they cannot elect representatives in proportion to their numbers in the state as a whole.

### **b. Cracking**

"Cracking" is drawing district lines so that voters who support candidates of the minority party are broken up. They are spread among as many districts as possible, keeping them a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts.

### c. Pairing

Two secondary techniques for gerrymandering are pairing and kidnapping of incumbents.

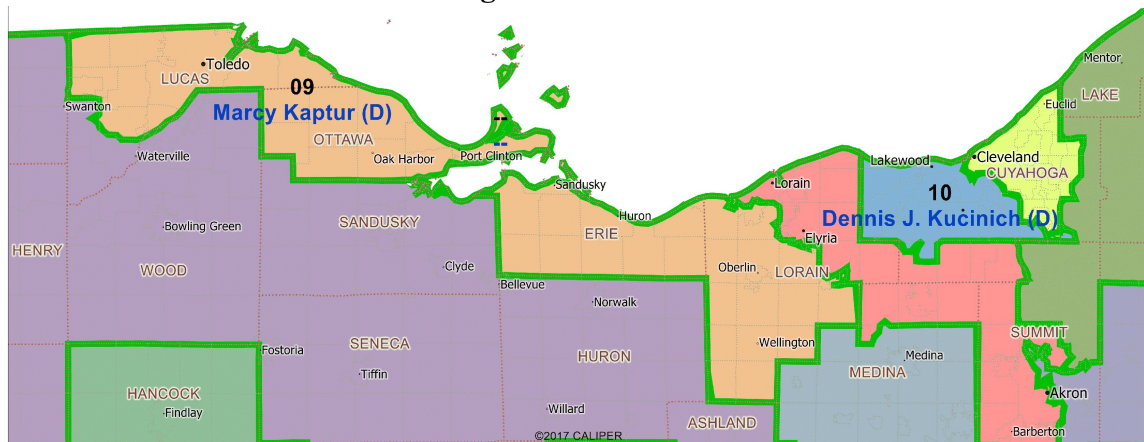
While moving through the state packing and cracking voters likely to support the minority party, the majority drawing the map may also take advantage of opportunities to draw two or more incumbents of the minority party into the same district. This is called “pairing.” All but one of the incumbents must either retire, move to another district, or be defeated.

### d. Kidnapping

Even without drawing an incumbent into the same district as another, a district may be drawn so that the incumbent is separated from the voters who elected them. They are drawn into a district with strangers. This is called “kidnapping.”

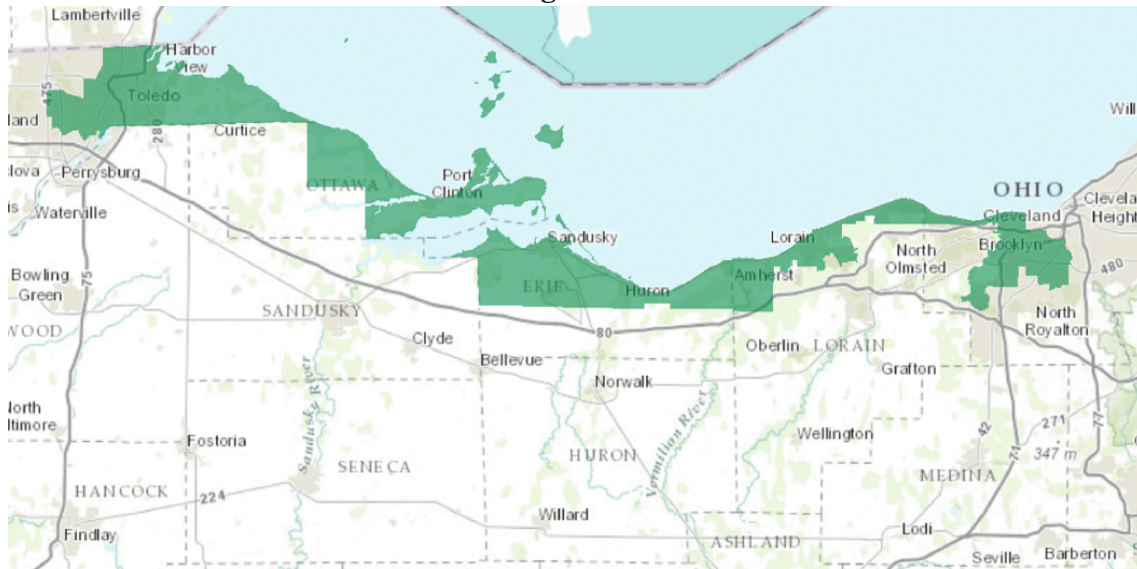
The following two maps show both pairing and kidnapping.

**2003 Ohio Congressional Districts 9 and 10**



Ohio Congressional Districts 9 and 10, as drawn in 2003, made Toledo the base of District 9 and Cleveland the base of District 10. Democrat Marcy Kaptur represented District 9 and Democrat Dennis Kucinich represented District 10.

### 2011 Ohio Congressional District 9



When Republicans redrew the congressional map in 2011, they stretched District 9 along the shore of Lake Erie to include not only the home of Rep. Kaptur in Toledo but also the home of Rep. Kucinich in Cleveland. The two incumbents were paired. Rep. Kucinich was also kidnapped, since few of the voters in the district had been his constituents. As expected, Rep. Kaptur defeated him in the 2012 election.

#### e. Creating a Gerrymander

If the supporters of the minority party were distributed evenly throughout the state, there would be no need to gerrymander. In a state where the minority party had 49 percent of the vote, they would lose every seat.

But political minorities tend not to be evenly distributed. In fact, they tend to cluster, just as majorities do. So the persons drawing the redistricting plan try to determine where they are, and draw their districts accordingly: first packing as many of the minority into as few districts as possible and then, where they can't be packed, cracking them into as many districts as possible.

It is this process of drawing the district lines to first pack and then crack the minority that creates the dragon-like districts called gerrymanders.

In drawing districts after the 2010 census, there was less need to gerrymander than in the past. Both Republicans and Democrats had been packing themselves. An analysis of housing trends over the three decades before 2010 showed that Americans had been choosing more and more to live among those whose political views were just like theirs, causing more and more counties to become

“landslide counties” that consistently voted overwhelmingly for one party or the other. BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF AMERICA IS TEARING US APART* (2008).

## **D. The Need for Limits**

To counter the temptation of plan drafters to give their party an unfair advantage in redistricting, constitutions, courts, and citizens have imposed various limits: limits on who will draw the plans, on the data that may be used, on the procedures they must follow, and on the districts that result. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *Limits on Gerrymanders (other than districting principles)* (last update Nov. 12, 2018).

### **1. Who Draws the Plans**

In some states, responsibility for redistricting has been taken away from incumbent legislators and given to a commission. Depending on the state, the commission may include no legislators, no appointees of a legislator, no public officials, or even no politicians. See *Limits on Gerrymanders (other than districting principles)*; NATIONAL CONFERENCE OF STATE LEGISLATURES, *Redistricting Commissions: State Legislative Plans*, <https://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx> (last updated Jan. 9, 2020); *Redistricting Commissions: Congressional Plans*, <https://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx> (last updated Apr. 18, 2019). The commission may be required to include members of the minority party, or be equally balanced between members of the majority and minority parties. *Id.* A commission that is equally balanced may include a tie-breaker chosen by its members, or appointed by a neutral, such as the state Supreme Court. *Id.*

### **2. Data that May be Used**

A state’s constitution, laws, or policies, may limit the data that may be used in redistricting. The limits may prohibit the use of data on party registration, election results, or socio-economic data, other than Census Bureau population counts. See “*Limits on Gerrymanders; Districting Principles for 2010 and Beyond*,” <https://www.ncsl.org/research/redistricting/districting-principles-for-2010-and-beyond.aspx> (last update June 4, 2019). Plan drafters may be prohibited from using data on where incumbent members reside. *Id.*

### **3. Review by Others**

A state’s constitution, laws, or policies may require that a redistricting plan be reviewed by people other than the plan drafters before it may take effect. The plan drafters may be required to hold at least one public hearing before adopting a plan, they may be required to issue a preliminary plan for public inspection before adopting their final plan, or the state Supreme Court may be required to review the plan before it may take effect. *Id.*

#### **4. Districts that Result**

In addition to these state limits on the procedures used to adopt a plan, federal as well as state law imposes limits on the districts that result. Federal law requires districts to have equal populations and to allow racial and language minorities a fair opportunity to elect representatives of their choice. Under certain circumstances, federal law may require the districts to follow “traditional districting principles.” In a given state, the law may require that the districts consist of contiguous territory, that they be compact, that the districts not divide political subdivisions or communities of interest, that house districts be nested within senate districts, that the districts not favor or disfavor incumbents by pairing or kidnapping them, or that the districts be free from partisan bias. Limits on partisan bias may include that minority voters not be excessively packed or cracked, that the districts be politically competitive, or that there be some correlation between the statewide vote and the number of seats won. *Id.*

All these limits are intended to restrain the majority from taking unfair advantage of their position when drawing district lines.

## **II. Draw Districts of Equal Population**

### **A. Use Official Census Bureau Population Counts**

#### **1. Alternative Population Counts**

The first requirement for any redistricting plan to stand up in court is to provide districts of substantially equal population. But how do you know the population? The obvious way is to use official Census Bureau population counts from the 2020 census.

It is true that some legislatures have chosen to use data other than the Census Bureau’s population counts to draw their districts and have had their plans upheld by federal courts. For example, back in 1966, Hawaii used the number of registered voters, rather than the census of population, to draw its legislative districts, and had its plan upheld by the U.S. Supreme Court in the case of *Burns v. Richardson*, 384 U.S. 73. But there the Court found that the results based on registered voters were not substantially different from the results based on the total population count.

A state may conduct its own census on which to base its redistricting plans. For example, a 1979 Kansas legislative redistricting plan based on the state’s 1978 agricultural census was upheld by a federal district court. *Bacon v. Carlin*, 575 F. Supp. 763 (D. Kan. 1983), *aff’d* 466 U.S. 966 (1984). And in 1986, a Massachusetts legislative redistricting plan based on a state census was upheld by a federal district court. *McGovern v. Connolly*, 637 F. Supp. 111 (D. Mass 1986).

Late in the decade, a federal court may find that local government estimates are a more accurate reflection of current population than old census counts and thus are an acceptable basis for developing redistricting plans before the next census. *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.1990).



But generally, the federal courts will not simply accept an alternative basis used by the states. Rather, they will first check to see whether the districts are of substantially equal population based on Census Bureau figures. If they are not, the courts will strike them down.

So, if you want your plans to stand up in court, the easiest way is use official Census Bureau population counts.

## **2. Use of Sampling to Eliminate Undercount**

In the 1990s, the main political fight over how to count the population concerned how to compensate for the historic undercounting of racial and ethnic minorities. In response to a suit by the City of New York and other plaintiffs that sought to compel the Census Bureau to make a statistical adjustment to the population data to account for people the Bureau failed to count, the Bureau agreed to make a fresh determination of whether there should be a statistical adjustment for an undercount or overcount in the 1990 census. The Bureau agreed to conduct a post enumeration survey of at least 150,000 households to use as the basis for the adjustment. The Bureau agreed that, by July 15, 1991, it would either publish adjusted population data or would publish its reasons for not making the adjustment. Any population data published before then, such as the state totals published December 31, 1990, and the block totals published April 1, 1991, would contain a warning that they were subject to correction by July 15. The Bureau ultimately decided not to make a statistical adjustment to correct for the undercount, and the Supreme Court found that its decision was reasonable and within the discretion of the Secretary of Commerce, in whose Department the Census Bureau is located. *Wisconsin v. City of New York*, [517 U.S. 1](#) (1996).

For the 2000 census, the fight was over whether to use scientific sampling techniques to conduct the census from the beginning, rather than adjusting the population counts after they had been issued. The Census Bureau proposed that, in order to obtain information on at least 90 percent of the households in each census tract, it would use statistical sampling techniques to estimate the characteristics of the households that did not respond to the first two mailings of a census questionnaire. In each census tract, the fewer households that responded initially, the larger would be the size of the sample enumerators would contact directly as part of their follow-up. The addresses that would be included in the sample would be scientifically chosen at random to insure they were statistically representative of all nonresponding housing units in that census tract.

Congress attempted to stop the use of sampling by enacting Pub. L. No. 105-119 § 209(j), [111 Stat. 2483](#) (1997), which required that all data releases for the 2000 census show “the number of persons enumerated without using statistical methods.” It also authorized lawsuits to determine whether the Bureau’s plan to use sampling for apportioning seats in Congress was constitutional.

In *Dept. of Commerce v. U.S. House of Representatives*, [525 U.S. 316](#) (1999), the Supreme Court ruled that the Census Act prohibits the use of sampling for purposes of apportioning representatives in Congress among the states. It did not rule on the constitutionality of using sampling to determine the distribution of population within each state for purposes of redistricting its apportionment of congressional seats or the seats in its state legislature.

Having used statistical techniques to adjust the population counts for undercounts and overcounts, the Census Bureau, shortly before the release of the official census counts in 2001, decided not to release the adjusted counts, saying it was not confident they were correct. The federal courts upheld the decision of the Bureau not to release the adjusted counts. *Carter v. U.S. Department of Commerce*, 307 F.3d 1084 (9<sup>th</sup> Cir. 2002).

The Census Bureau did not make a statistical adjustment to the 2010 census.

### **3. Exclusion of Undocumented Aliens**

The census is not limited to citizens. It is not even limited to permanent residents. The constitution says to count “persons,” [Art. I](#), § 2, as amended by the [Fourteenth Amendment](#), so even the homeless are counted where they usually sleep.

Pennsylvania and other states have sought without success to require the Census Bureau to exclude undocumented aliens from the population counts used to apportion the members of Congress among the states. See *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989); *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980, *appeal dismissed*, 447 U.S. 916 (1980)).

### **4. Inclusion of Overseas Military Personnel**

In 1990, the Department of Defense conducted a survey of its overseas military and civilian employees and their dependents to determine their “address of record.” These overseas military personnel were allocated to the states according to their address of record for purposes of apportioning the House of Representatives, but were not included in the April 1, 1991, block counts given to the states for use in redistricting. Allocating overseas military personnel to the states caused one congressional seat to be shifted from Massachusetts to Washington State. Massachusetts sued the Secretary of Commerce, but the Supreme Court upheld the allocation. *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

## **B. Census Geography**

### **1. Public Law 94-171**

When a state receives its official Census Bureau population counts, what do they look like? What each state gets depends on what it asked for.

[Public Law 94-171](#), 89 Stat. 1023 (1975) (codified as amended at [13 U.S.C. § 141\(c\)](#)), permits each state to request the Census Bureau to provide it with population counts tabulated in accordance with the geographic areas identified by the state and requires the Bureau to provide those counts before April 1 in the year ending in one. These counts are often referred to as the “PL data.”



Most states ask the Census Bureau to provide them with population counts by precincts and other political units and work with the Bureau for years before the census to get those precinct boundaries included in the census geography.

What does that geography look like? First, you need to know there are two kinds of geography: the statistical geography and the political geography.

## **2. Statistical**

The statistical geography includes blocks, block groups, census tracts, and counties.

### **a. Block**

A census block in an urban area is usually a city block, bounded by streets. In suburban and rural areas, where there may not be streets laid out in a grid pattern, census blocks may be quite large and irregular, bounded by roads, railroads, rivers, lakes, and any number of recognizable, visible, physical features, as well as by invisible city, town, or county boundaries. The average population of a census block is about 100 people.

### **b. Block Group**

A block group may have ten, twenty, thirty, or more blocks, all with the same first digit in their block number. Block groups tend to be relatively compact and rectangular.

### **c. Census Tract**

Those blocks and block groups are aggregated into census tracts, which likewise tend to be relatively compact and rectangular. They average about 4,000 people. Unlike block boundaries, which tend to change significantly from one census to the next, census tract boundaries are relatively stable, in order to facilitate comparisons from one decade to the next.

### **d. County**

The census tracts are aggregated by county. They do not cross county boundaries.

## **3. Political**

In addition to this statistical geography, the Census Bureau tabulates and reports population counts by many kinds of political geography. Following is a partial list, the units most commonly used to build legislative and congressional districts.

- Precinct, ward, election district
- City, town

- Incorporated place

They all begin with the census block. Most states try not to have precinct or ward boundaries that split a census block, but they don't always succeed.

Here is where census geography gets confusing. The political geography of one state may differ greatly from others. Even if two states have the same political geography, they may not ask the Census Bureau to report their population counts based on the same set of political units. So, when you hear someone from another state talking about the population counts they get, you may not realize the reason you don't understand what they're talking about is simply because their state uses a redistricting geography that is different from yours.

To bring some order out of this chaos, the Census Bureau has invented some terms.

**a. Precinct, Ward, Election District = VTD**

What many states call precincts, but some call wards, election districts, or another area they use to tabulate election results, the Census Bureau calls Voting Districts, or VTDs.

**b. City, Town, Village, Unorganized Territory, Other = MCD**

General purpose local governmental units within a county, such as cities, towns, villages, boroughs, and unorganized territory, are called Minor Civil Divisions, or MCDs.

**c. Place**

In some states, incorporated governmental units are called Places.

**d. County**

VTDs and MCDs do not cross county boundaries. Where a city crosses a county boundary, the portion on either side of the boundary gets a different MCD number, coded to its host county.

So, ask around to find out what kinds of census units are used to build legislative and congressional districts in your state, and you'll get a better idea of what your population counts will look like.

**C. Measuring Population Equality**

How does a court measure the degree of population equality in a redistricting plan? Let me give you an example. Let's say we have a state with a population of one million, and that it is entitled to elect ten representatives in Congress. (That is not a realistic number, but it is easier to work with.) The average, or "ideal," district population would be 100,000. Let's say the legislature draws a redistricting plan that has five districts with a population of 90,000 and five districts with a

population of 110,000. The “deviations” of the districts would be 10,000 minus and 10,000 plus, or minus ten percent and plus ten percent. The “average deviation” from the ideal would be 10,000 or ten percent. And the “overall range” would be 20,000, or 20 percent. Most courts have used what statisticians call the “overall range” to measure the population equality of a redistricting plan, though they have usually referred to it by other names, such as “maximum deviation,” “total deviation,” or “overall deviation.”

## **D. Congressional Plans**

### **1. “As Nearly Equal in Population As Practicable”**

Once you know the population, and you know how to measure the degree of population equality in a plan, how equal do the districts have to be? First, you must understand that the federal courts use two different standards for judging redistricting plans — one for congressional plans and a different one for legislative plans.

The standard for congressional plans is based on [Article I](#), § 2, of the U.S. Constitution, which says:

Representatives . . . shall be apportioned among the several States . . . according to their respective numbers . . . .

The standard for congressional plans is strict equality. In the 1964 case of *Wesberry v. Sanders*, [376 U.S. 1](#), the U.S. Supreme Court articulated that standard as “as nearly equal in population as practicable.”

Notice the choice of words. The Court did not say “as nearly equal as *practical*.” The *American Heritage Dictionary* defines “practicable” as “capable of being . . . done . . . .” It notes that something “practical” is not only capable of being done, but “also sensible and worthwhile.” It illustrates the difference between the two by pointing out that “It might be *practicable* to transport children to school by balloon, but it would not be *practical*.”

In 1983, in *Karcher v. Daggett*, [462 U.S. 725](#), the U.S. Supreme Court struck down a congressional redistricting plan drawn by the New Jersey Legislature that had an overall range of less than one percent. To be precise, .6984 percent, or 3,674 people. The plaintiffs showed that at least one other plan before the Legislature had an overall range less than the plan enacted by the Legislature, 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.

In the 1980s, three-judge federal courts drawing their own redistricting plans achieved near mathematical equality. For example, in Minnesota the court-drawn plan had an overall range of 46 people (.0145 percent), *LaComb v. Growe*, [541 F. Supp. 145](#) (D. Minn. 1982) *aff’d mem. sub nom. Orwoll v. LaComb*, [456 U.S. 966](#) (1982) (Appendix A, unpublished) (In its opinion, the Court tells only the *sum* of all the deviations, 76 people, and refers to it as the “total population deviation”); in

Colorado the court-drawn plan had an overall range of *ten* people (.0020 percent), *Carstens v. Lamm*, 543 F. Supp. 68, 99 (D. Colo. 1982).

With the improvements in the census and in the computer technology used to draw redistricting plans after the 1990 census, the degree of population equality that was “practicable” was even greater than that achieved in the 1980s.

In the 2000s, 17 states drew congressional plans with an overall range of either zero or one person, and 12 more drew plans with an overall range of two to ten persons. See NATIONAL CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 (2009), [https://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting\\_2010.pdf](https://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting_2010.pdf), table 3, “Population Equality of 2000s Districts.”

In the 2010s, 30 states drew congressional plans with an overall range of either zero or one person, and five more drew plans with an overall range of two to 20 persons. See NATIONAL CONFERENCE OF STATE LEGISLATURES, 2010 Redistricting Deviation Table, <https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx> (last update Jan. 15, 2020).

If you can’t draw congressional districts that are mathematically equal in population, don’t assume that others can’t. Assume that you risk having your plan challenged in court and replaced by another with a lower overall range.

## **2. Unless Necessary to Achieve “Some Legitimate State Objective”**

Even if a challenger is able to draw a congressional plan with a lower overall range than yours, you may still be able to save your plan if you can show that each significant deviation from the ideal was necessary to achieve “some legitimate state objective.” *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). As Justice Brennan, writing for the 5-4 majority in *Karcher v. Daggett*, said:

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 . . . . By necessity, whether deviations are justified requires case-by-case attention to these factors.

462 U.S. at 740-41.

If you intend to rely on these “legitimate state objectives” to justify *any* degree of population inequality in a congressional plan, you would be well advised to articulate those objectives in advance, follow them consistently, and be prepared to show that you could not have achieved those objectives *in each district* with districts that had a smaller deviation from the ideal.

In the 1990s, Arkansas, Maryland, and West Virginia were all able to meet that burden when congressional plans drawn by the legislature were challenged in court. See *Turner v. Arkansas*, 784 F. Supp. 585 (E.D. Ark. 1991); *Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991); *Stone v. Hechler*, 782 F. Supp. 1116 (W.D. W.Va. 1992).

Near the end of the 1990s, the Supreme Court upheld a court-drawn congressional plan in Georgia with an overall range of 0.35 percent (about 2,000 people). *Abrams v. Johnson*, 521 U.S. 74 (1997). But that was the lowest range of all the plans that met constitutional requirements, Georgia was able to show it had a consistent historical practice of not splitting counties outside the Atlanta area, and likely shifts in population since 1990 had made any further effort to achieve population equality illusory.

In the 2000s, Georgia and Kansas withstood equal-population challenges to their congressional plans; see *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), aff'd, 542 U.S. 947 (2004) (No. 03-1413) (mem.); *Graham v. Thornburgh*, 207 F. Supp. 2d 1280 (D. Kan. 2002); while 22 states drew congressional plans with a deviation of more than one person that were not challenged. See REDISTRICTING LAW 2010, table 3, *Population Equality of 2000s Districts*, and NATIONAL CONFERENCE OF STATE LEGISLATURES, *Action on Redistricting Plans: 2001-07*, [https://www.ncsl.org/Portals/1/Documents/Elections/Updated\\_action2000\\_31520.pdf](https://www.ncsl.org/Portals/1/Documents/Elections/Updated_action2000_31520.pdf) (last update Aug. 8, 2017).

In the 2010s, West Virginia again withstood an equal-population challenge to its congressional plan, this time because it used whole counties, avoided contests between incumbents, and shifted fewer people from one district to another than other plans with lower deviations. *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758 (2012) (per curiam). Twelve states drew congressional plans with an overall range of more than one person that were not challenged. See, *2010 Redistricting Deviation Table* and NATIONAL CONFERENCE OF STATE LEGISLATURES, *Action on Redistricting Plans: 2011-20*, [https://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting\\_actionplan\\_2010thru2020.pdf](https://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting_actionplan_2010thru2020.pdf) (last update Nov. 24, 2020).

## **E. Legislative Plans**

### **1. An Overall Range of Less than Ten Percent**

Fortunately for those of you who will be drawing redistricting plans after the next census, the Supreme Court has adopted a less exacting standard for legislative plans. It is not based on the Apportionment Clause of Article I, § 2, which governs congressional plans. Rather, it is based on the Equal Protection Clause of the Fourteenth Amendment.

As Chief Justice Earl Warren observed in the 1964 case of *Reynolds v. Sims*, 377 U.S. 533, 569, “mathematical nicety is not a constitutional requisite” when drawing legislative plans. All that is necessary is that they achieve “substantial equality of population among the various districts.” *Id.* at 579.

“Substantial equality of population” has come to mean that a legislative plan will not be thrown out for inequality of population if its overall range is less than ten percent, unless there is proof of intentional discrimination within that range.

The ten-percent standard was first articulated in a dissenting opinion written by Justice Brennan in the cases of *Gaffney v. Cummings*, 412 U.S. 735, and *White v. Regester*, 412 U.S. 755, in 1973. In later cases, the Court majority has endorsed and followed the rule Justice Brennan’s dissent accused them of establishing. See, e.g., *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Voinovich v. Quilter*, 507 U.S. 146 (1993).

An overall range of less than ten percent is not a safe harbor. Where a court found that the Georgia General Assembly had systematically underpopulated districts in rural south Georgia and inner-city Atlanta and overpopulated districts in the suburban areas north, east, and west of Atlanta in order to favor Democratic candidates and disfavor Republican candidates, that the plans systematically paired Republican incumbents while reducing the number of Democratic incumbents who were paired, and that the plans tended to ignore the traditional districting principles used in Georgia in previous decades, such as keeping districts compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts, it struck the districts down as a violation of the [Equal Protection Clause](#). *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947 (2004) (mem.).

## **2. Unless Necessary to Achieve Some “Rational State Policy”**

The Supreme Court in *Reynolds v. Sims* had anticipated that some deviations from population equality in legislative plans might be justified if they were “based on legitimate considerations incident to the effectuation of a rational state policy . . . .” 377 U.S. 533, 579 (1964). So far, the only “rational state policy” that has served to justify an overall range of more than ten percent in a legislative plan has been respecting the boundaries of political subdivisions. And that has happened in only three Supreme Court cases: *Mahan v. Howell*, 410 U.S. 315 (1973); *Brown v. Thomson*, 462 U.S. 835 (1983); and *Voinovich v. Quilter*, 507 U.S. 146 (1993).

In *Mahan v. Howell*, the Supreme Court upheld a legislative redistricting plan enacted by the Virginia General Assembly that had an overall range among House districts of about 16 percent. The Court took note of the General Assembly’s constitutional authority to enact legislation dealing with particular political subdivisions, and found that this legislative function was a significant and a substantial aspect of the Assembly’s powers and practices, and thus justified an attempt to preserve political subdivision boundaries in drawing House districts.

*Brown v. Thomson*, 462 U.S. 835 (1983), upholding a legislative plan with an overall range of 89 percent, was decided by the Supreme Court on the same day that it decided *Karcher v. Daggett*, 462 U.S. 725 (1983), where it threw out a congressional plan with an overall range of less than one percent. Reconciling these two cases is not easy. Nevertheless, I shall try.

First, as I have noted, the constitutional standard for legislative plans is different from the standard for congressional plans.

Second, it is important to understand that in *Brown v. Thomson* the Court was faced with a *reapportionment* plan rather than with a *redistricting* plan. The members of the Wyoming House of Representatives were being *reapportioned* among Wyoming's counties, rather than having new districts created for them. Because the boundaries of the districts were not being changed, the opportunities for partisan mischief were far reduced.

Third, Wyoming put forward a “rational state policy” to justify an overall range of more than ten percent, and the Court endorsed it. Writing for the Court, Justice Powell concluded that Wyoming's constitutional policy—followed since statehood—of using counties as representative districts and insuring 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. 462 U.S. at 843-46.

But 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 the smallest county a representative. 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. 462 U.S. at 850. 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.” *Board of Estimate v. Morris*, 489 U.S. 688, 702 (1989).

In *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Supreme Court reversed a decision of the federal district court striking down Ohio's legislative plan because the overall range of the House plan was 13.81 percent and the overall range of the Senate plan was 10.54 percent. The Court pointed out that preserving the boundaries of political subdivisions was a “rational state policy” that might justify an overall range in excess of ten percent.

There may not be any other “rational state policies” that will justify a legislature in exceeding the ten-percent standard. But with the multitude of plans that are likely to be submitted to you for your consideration, you may wish to adopt other policies to govern plans that are within the ten-percent overall range.

Courts that are called upon to draw redistricting plans, when legislatures have not, often have adopted policies for the parties to follow in submitting proposed plans to the court. These policies are not required by the federal constitution, and have not been used to justify exceeding the ten-percent standard, but they have helped the three-judge courts to show the Supreme Court that they were fair in adopting their plans. These policies often have included:



- districts must be composed of contiguous territory; *Carstens v. Lamm*, 543 F. Supp. 68, 87-88 (D. Colo. 1982); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 931 (W.D. Mo. 1982) *aff'd sub nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *LaComb v. Growe*, 541 F. Supp. 145, 148 (D. Minn. 1982);
- districts must be compact; *e.g.*, *Carstens v. Lamm*, 543 F. Supp. at 87-88; *Shayer v. Kirkpatrick*, 541 F. Supp. at 931; *LaComb v. Growe*, *supra*; *South Carolina State Conference of Branches of the National Association for the Advancement of Colored People v. Riley*, 533 F. Supp. 1178, 1181 (D. S.C. 1982); *Dunnell v. Austin*, 344 F. Supp. 210 (E.D. Mich. 1972); *David v. Cahill*, 342 F. Supp. 463 (D. N.J. 1972); *Preisler v. Secretary of State*, 341 F. Supp. 1158 (W.D. Mo. 1972); *Skolnick v. State Electoral Board*, 336 F. Supp. 839, 843 (N.D. Ill. 1971); *Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 734 (D. Md. 1966) *aff'd mem. sub nom. Alton v. Tawes*, 384 U.S. 315 (1966); and
- districts should attempt to preserve communities of interest; *e.g.*, *Carstens v. Lamm*, 543 F. Supp. at 91-93; *Shayer v. Kirkpatrick*, 541 F. Supp. at 934; *LaComb v. Growe*, *supra*; *Riley*, 533 F. Supp. at 1181; *Dunnell v. Austin*, 344 F. Supp. at 216; *Tawes*, 253 F. Supp. at 735; *Skolnick*, 336 F. Supp. at 845-46.

As of 1983, the constitutions of 27 states required districts to be composed of contiguous territory, and the constitutions of 21 states required that districts be compact. *Karcher v. Daggett*, 462 U.S. 725, 756 n. 18 (1983) (Stevens, J., concurring).

The Supreme Court refers to these policies (including respecting the boundaries of political subdivisions) as “traditional districting principles.” *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 647 (1993); *Miller v. Johnson*, 515 U.S. 900, 919 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952, 959 (1996); *Abrams v. Johnson*, 521 U.S. 74, 84-95 (1997).

### III. Don’t Discriminate Against Racial or Language Minorities

#### A. Section 2 of the Voting Rights Act

##### 1. A National Standard

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

In a democracy, “power to the people” means the power to vote. Section 2 of the Voting Rights Act of 1965 (codified as amended at 52 U.S.C. § 10301<sup>1</sup>), attempts to secure this political

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<sup>1</sup> § 10301 Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any



power for racial and language minorities by prohibiting states and political subdivisions from imposing or applying election laws that deny or abridge the right to vote on account of race or color or because a person is a member of a language minority group. A “language minority group” is defined as “American Indian, Asian American, Alaskan Natives or of Spanish heritage.”<sup>2</sup>

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

## **2. Data on Race and Language Minorities**

In order to facilitate enforcement of the Voting Rights Act, the Census Bureau asks each person counted to identify their race and whether they are of Hispanic or Latino origin. For the 2020 Census, the racial categories are: White, Black, American Indian, Asian, Native Hawaiians and other Pacific Islanders, and Some Other Race. Persons of Hispanic or Latino origin might be of any race. Persons are given the opportunity to select more than one race.

The Census Bureau reports racial data in 63 categories, covering those who report being in up to all six racial groups. Double that for Hispanic or Latino origin and double it again for those under and over 18. There are 252 potential categories of population count *for each block*!

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

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citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b) of this section.

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

[§ 10303](#)(f)(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

[§ 10310](#)(c)(3) The term “language minorities” or “language minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

<sup>2</sup> 52 U.S.C. [§ 10310](#)(C)(3) (2018).

before they may take effect, the U.S. Department of Justice says that, in most of the usual cases, the Department will analyze only eight categories of race data:<sup>3</sup>

Non-Hispanic White

Non-Hispanic Black plus Non-Hispanic Black and White

Non-Hispanic Asian plus Non-Hispanic Asian and White

Non-Hispanic American Indian/Alaska Native plus Non-Hispanic American Indian/Alaska Native and White

Non-Hispanic Pacific Islander plus Non-Hispanic Pacific Islander and White

Non-Hispanic Some Other Race plus Non-Hispanic Some Other Race and White

Non-Hispanic Other multiple-race (where more than one minority race is listed)

Hispanic

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

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

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

### **3. No Discriminatory Effect**

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

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

In 1982, Congress amended the Voting Rights Act to reject the Court's interpretation. As enacted, § 2 had prohibited conduct "to deny or abridge" the rights of racial and language minorities. Pub. L. No. 89-110 § 2, [79 Stat. 437](#) (1965) (codified as amended at [52 U.S.C. § 10301](#)). The 1982 amendments changed that to prohibit conduct "which results in a denial or abridgement" of those rights. Pub. L. No. 97-205 § 3, [96 Stat. 134](#) (codified as amended at [52 U.S.C. § 10301](#)). Before *Bolden*, courts had generally considered whether a particular redistricting plan had the *effect* of diluting the voting strength of the Black population. Congress codified that pre-*Bolden* case law by adding:

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<sup>3</sup> U.S. Dept. of Justice, "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, Notice," [76 Fed. Reg. 7470](#) (Feb. 9, 2011).

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

52 U.S.C. § 10301 (b).

#### 4. The Three *Gingles* Preconditions

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

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

478 U.S. at 50-51.

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

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

In order to establish the first precondition, the minority group must be sufficiently large to constitute a majority of the voting-age population in the proposed district. *Bartlett v. Strickland*, 556 U.S. 1 (2009). If not, the jurisdiction cannot be held liable for violating § 2.

## **5. “The Totality of the Circumstances”**

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

- 1) the extent of the history of official discrimination that touched the right of members of the minority group to register, to vote, or otherwise participate in the democratic process;
- 2) the extent to which voting in elections is racially polarized;
- 3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination;
- 4) whether members of the minority group have been denied access to the candidate slating process, if there is one;
- 5) the extent to which the members of the minority group bear the effects of discrimination in areas like education, employment, and health, which hinder effective participation in the political process;
- 6) whether political campaigns have been characterized by overt or subtle racial appeals;
- 7) the extent to which members of the minority group have been elected to public office;
- 8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the members of the minority group; and
- 9) whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.

[478 U.S. at 36-37.](#)

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

## **6. A Realistic Opportunity to Elect Officials of Choice**

If you have a minority population that could elect a representative if given an ideal district, and the minority population has been politically cohesive, but bloc voting by Whites has prevented the minority’s preferred candidates from being elected in the past, you may have to create a district where minority voters have “a realistic opportunity to elect officials of their choice.” *Kirksey v. Board of Supervisors*, [402 F. Supp. 658, 676](#) (S.D. Miss. 1975), *aff’d* [528 F. 2d 536](#) (5<sup>th</sup> Cir. 1976), *rev’d on other grounds*, [554 F.2d 139](#) (5<sup>th</sup> Cir.) (en banc), *cert. denied*, [434 U.S. 968](#) (1977). To do

that, they will need an effective voting majority in the district. See *Johnson v. De Grandy*, 512 U.S. 997 (1994). How much of a majority is that?

**a. “A Searching Practical Evaluation”**

You will need to undertake a “searching practical evaluation of the ‘past and present reality,’” *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 417, 97<sup>th</sup> Cong., 2d Sess. 28, reprinted in 1982 U.S. Code Cong. & Admin. News 177, 205), to determine, in the real world, what it takes for minority voters to elect their chosen candidate. It is not sufficient simply to preserve in a plan for the current decade the same minority percentages as were in the plan for the last decade. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 -74 (2015). It may be a super-majority, or it may be less than a simple majority, depending on the circumstances.

**(1) More Than a Simple Majority**

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

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

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

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

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

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

*Id.* at 1415. Over the years, many courts have continued to require a supermajority of the voting-age population. See, e.g., *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1023 (8<sup>th</sup> Cir. 2006).

But the Court of Appeals in *Ketchum* also noted that “The 65% figure . . . should be reconsidered regularly to reflect new information and new statistical data.” *Id.* at 1416. In redistricting following the 1990 census, several courts found that, in view of rising rates of voter registration and voter participation among minority groups, a minority voting-age population of slightly more than 50 percent was sufficient to provide an effective voting majority.

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

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

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

In some districts, less than a simple majority may be enough. Crossover voting by Whites and coalition voting by Hispanics may give African Americans an effective voting majority even if African Americans are less than a simple majority of the voting-age population. *Page v. Bartels*, 144 F. Supp.2d 346 (D. N.J. 2001). A legislative choice to draw two effective coalition or crossover districts rather than one majority-minority district may be perfectly legitimate. *Bartlett v. Strickland*, 556 U.S. 1, 23-25 (2009); *Georgia v. Ashcroft*, 539 U.S. 461, 480-83 (2003).

### **b. Damned if You Don’t, Damned if You Do**

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

### **c. Ten Years of Election History**

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

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

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

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

### **(2) Less Probative – Exogenous Elections**

Elections for other offices and by other electorates are “exogenous” elections. *See, e.g., Bone Shirt v. Hazeltine*, [461 F.3d 1011, 1020 n.8](#) (8<sup>th</sup> Cir. 2006); *Jeffers v. Clinton*, [730 F. Supp. 196, 208](#) (E.D. Ark. 1989). When a legislative district is at issue, statewide, federal, and local elections are exogenous elections. Exogenous elections tend to be less probative when assessing racially polarized voting. *See, e.g., NAACP v. Fordice*, [252 F.3d 361, 370](#) (5<sup>th</sup> Cir. 2001); *Johnson v. Hamrick*, [196 F.3d 1216, 1222](#) (11<sup>th</sup> Cir. 1999); *Goosby v. Town Bd. of Hempstead*, [180 F.3d 476, 497](#) (2<sup>nd</sup> Cir. 1999), *cert. denied*, [528 U.S. 1138](#) (2000). Because they are for a different office by a different electorate, they have a different dynamic and are a less reliable predictor of how the voters for a legislative seat will behave. The different dynamic is that the issues in national, statewide, and local elections tend to be different from the issues in legislative elections, the resources of the candidates are different, and the methods of campaigning are different. The expensive, media-intensive campaigns of candidates for president have little parallel in the low-budget, low-visibility campaigns of candidates for a seat in the state legislature. In addition, there is down-ballot voter falloff — once voters have made up their mind about the candidates, many go to the polls and vote only for president, not for offices farther down the ballot.

### **(3) Most Probative – Biracial Contests**

The contests that are most probative for determining whether voting is racially polarized are contests that include both a minority and a White candidate. *Rural West Tenn. African American Affairs Council v. Sundquist*, [209 F.3d 835, 840-41](#) (6<sup>th</sup> Cir. 2000); *Jenkins v. Manning*, [116 F.3d 685, 692, 694-95](#) (3<sup>rd</sup> Cir. 1997); *Vecinos de Barrio Uno v. City of Holyoke*, [72 F.3d 973, 988 n.8](#) (1<sup>st</sup> Cir. 1995); *Nipper v. Smith*, [39 F.3d 1494, 1540](#) (11<sup>th</sup> Cir. 1994) (*en banc*); *Westwego Citizens for Better Gov’t v. City of Westwego*, [872 F.2d 1201, 1208 n.7](#) (5<sup>th</sup> Cir. 1989); *United States v. City of Euclid*, [580 F. Supp.2d 584, 596 n.16](#) (N.D. Ohio 2008); *Black Political Task Force v. Galvin*, [300 F. Supp.2d 291, 305](#) (D. Mass. 2004); *Smith v. Clinton*, [687 F. Supp. 1310, 1316-17](#) (E.D. Ark. 1988). The fact that minority voters vote for a White candidate when there is no minority candidate does not predict that they will vote for a White candidate when they have a choice to vote for a minority candidate.



#### (4) Three Analytical Techniques

There are three statistical techniques that courts most frequently use to analyze election results under the Voting Right Act: homogenous precinct analysis (“HPA”), bivariate ecological regression analysis (“BERA”), and ecological inference (“EI”).

The U.S. Supreme Court has considered homogenous precinct analysis and bivariate ecological regression analysis to be the “standard in the literature for the analysis of racially polarized voting.” *Thornburg v. Gingles*, 478 U.S. 30, 52-53n.20 (1986). One or the other, and often both, have been used in almost every voting rights case since *Gingles*. See, e.g., *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1026 (8<sup>th</sup> Cir. 2006) (relying on BERA and HPA); *Old Person v. Cooney*, 230 F.3d 1113, 1123 (9<sup>th</sup> Cir. 2000) (relying on BERA); *Rural West Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835, 839 (6<sup>th</sup> Cir. 2000) (considering BERA and HPA); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1386 (8<sup>th</sup> Cir. 1995) (relying on regression analysis).

To refuse to consider homogenous precinct analysis and bivariate ecological regression analysis in a § 2 Voting Rights Act case can be reversible error. See *Sanchez v. Colorado*, 97 F.3d 1303, 1321 (10<sup>th</sup> Cir. 1996) (district court rejected plaintiffs’ HPA and BERA and erroneously relied on multivariate analysis); *Teague v. Attala County, Miss.*, 92 F.3d 283, 290 (5<sup>th</sup> Cir. 1996); *Houston v. Lafayette County, Miss.*, 56 F.3d 606, 611-12 (5<sup>th</sup> Cir. 1995).

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

#### B. Section 5 of the Voting Rights Act

##### 1. Redistricting Plans No Longer Need to be Precleared

From 1965 to 2013, § 5 of the Voting Rights Act (codified as amended at 52 U.S.C. § 10304), prohibited certain states and political subdivisions from changing any voting law or practice without first obtaining from either the U.S. Attorney General or the U.S. District Court for the District of Columbia a determination that the change neither had the purpose nor would have the effect of denying or abridging the right to vote on account of race or color, or membership in a language minority group.<sup>4</sup> This process was called “preclearance.” A redistricting plan had to be precleared before it could take effect. Section 5 applied only to certain jurisdictions in the South and elsewhere that met the requirements of § 4(b) (codified as amended at 52 U.S.C. § 10303(b)): the jurisdiction had imposed a literacy test or similar requirement making it difficult to vote and less than 50 percent of its voting-age population had been registered to vote or had voted in the

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<sup>4</sup>A “language minority group” is defined as “American Indian, Asian American, Alaskan Natives or of Spanish heritage.” 52 U.S.C. § 10310(c)(3) (2018).



presidential election of 1964, 1968, or 1972 (depending on when the jurisdiction first became subject to § 5).

In 2013, the U.S. Supreme Court held that the coverage formula in § 4(b) was unconstitutional because it had become outdated. *Shelby County v. Holder*, [570 U.S.529](#). The Court found that literacy tests and similar anti-voting devices had been banned nationwide for more than 40 years. Voter registration and turnout rates for minorities had reached parity with Whites and minority candidates held office in unprecedented numbers. Because of these developments and data, the coverage formula was no longer sufficiently related to the problem it targeted and the current burdens of the Voting Rights Act were not justified by current needs. With its coverage formula no longer in effect, § 5 no longer applies and redistricting plans no longer need to be precleared.

## **2. You May Retrogress**

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

The no “retrogression” test was first set forth in *Beer v. United States*, [425 U.S. 130](#) (1976). It was reaffirmed in the next round of redistricting, in *City of Lockhart v. United States*, [460 U.S. 125](#) (1985).

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

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

Justice O’Connor further instructed that, “In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice.” 539 U.S. at 480. She said that whether minority incumbents benefit by and support the

plan is relevant to whether the plan is retrogressive. 539 U.S. at 483-84. This further instruction was rejected by Congress in 2006, when it stated explicitly that the purpose of § 5 was “to protect the ability of [racial and language minorities] to elect their preferred candidates of choice.” Pub. L. No. 109-246 § 5(d), 120 Stat. 581 (2006) (codified as amended at 52 U.S.C. § 10304(d)); see H.R. REP. NO. 109-478 at 93-94, *reprinted in* 2006 U.S.C.C.A.N. 618, 678-79.

With § 5 no longer in force because of the Supreme Court’s decision in *Shelby County v. Holder*, a plan drawn after 2013 will no longer be struck down simply because it reduces the ability of members of a racial or language minority group to elect representatives of their choice.

### **3. Do Not Intend to Discriminate**

When § 5 was in effect, if those who drafted a redistricting plan intended it to discriminate against a racial or language minority, preclearance of the plan had to be denied, even if the plan did not cause the minority to regress. See Act of July 27, 2006, Pub. L. No. 109-246, sec. 5(c), 120 Stat. 581 (codified as amended at 52 U.S.C. § 10304(c)). H.R. REP. NO. 109-478 at 93-94, *reprinted in* 2006 U.S.C.C.A.N. 618, 678-79.

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

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

When the case returned to the Supreme Court, *Bossier Parish II*, 528 U.S. 320, 328-36 (2000), the Court ruled that a discriminatory purpose only encompasses an intent to regress, not any other intent to discriminate.

In 2006, Congress rejected the Court’s *Bossier Parish II* interpretation of § 5, amending it to say that “any discriminatory purpose” (not just a purpose to regress) required denial of preclearance. See Act of July 27, 2006, Pub. L. No. 109-246, sec. 5(c), 120 Stat. 581 (codified as amended at 52 U.S.C. § 10304(c)); H.R. REP. NO. 109-478 at 93-94, *reprinted in* 2006 U.S.C.C.A.N. 618, 678-79.

With § 5 no longer in effect, a redistricting plan drawn with an intent to discriminate may be struck down under § 2.

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

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

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

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

[Section 2](#) included a proviso, added through the efforts of Senator Dole in 1982, that “nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” [52 U.S.C. § 10301\(b\)](#). In other words, § 2 did not mandate proportional representation. So, how could it be construed by the Justice Department to require that a minority group be given the *maximum* number of elected representatives?

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

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

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

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

515 U.S. at 924-25.

### **C. Equal Protection Clause of the Fourteenth Amendment**

When drawing a minority district to avoid a violation of § 2 of the Voting Rights Act, you must take care not to create a racial gerrymander that runs afoul of the [Equal Protection Clause](#) of the Fourteenth Amendment.

#### **1. You May Consider Race in Drawing Districts**

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

[R]edistricting differs from other kinds of state decisionmaking in that the legislature is always *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination . . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

509 U.S. at 646.

You may even intentionally create majority-minority districts without violating the Equal Protection clause. See *Bush v. Vera*, [517 U.S. 952, 958](#) (1996); *DeWitt v. Wilson*, [856 F. Supp. 1409](#) (E.D. Cal. 1994), *summarily aff'd* [515 U.S. 1170](#) (1995).

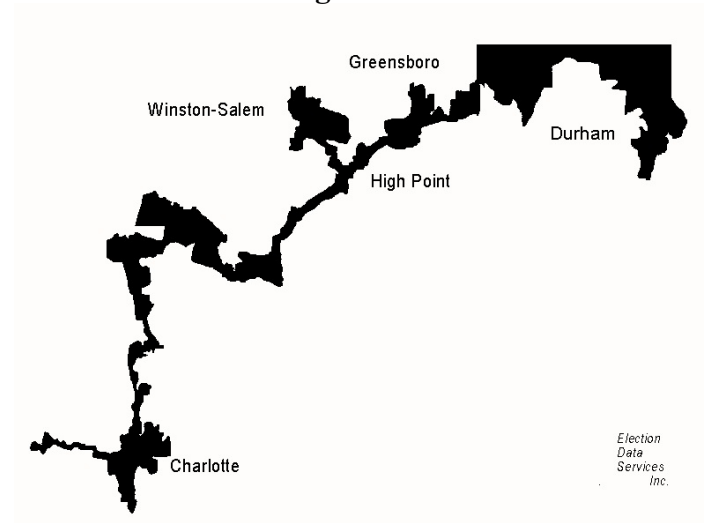
## 2. Avoid Drawing a Racial Gerrymander

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

### a. Beware of Bizarre Shapes

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

#### North Carolina Congressional District 12 - 1992



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

Next, it was attacked as a racial gerrymander. That attack failed in the district court, *Shaw v. Barr*, [808 F. Supp. 461](#) (W.D. N.C. 1992), but the legal theory on which it was based was endorsed by the Supreme Court in *Shaw v. Reno*, [509 U.S. 630](#) (1993).

As Justice O'Connor said, "[R]eapportionment is one area in which appearances do matter." 509 U.S. at 647.

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls . . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

509 U.S. at 647-48.

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

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

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

[517 U.S. 952, 980](#) -81 (1996).

#### **b. Draw Districts that are Reasonably Compact**







To avoid districts with bizarre shapes, you will want to draw districts that are compact. How compact must they be? *Reasonably* compact. As Justice O'Connor said in *Bush v. Vera*:

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

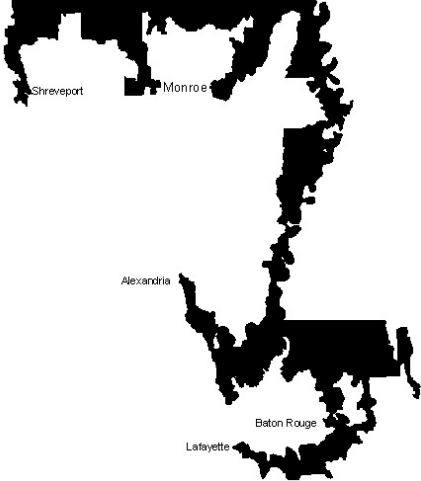

517 U.S. at 977.

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

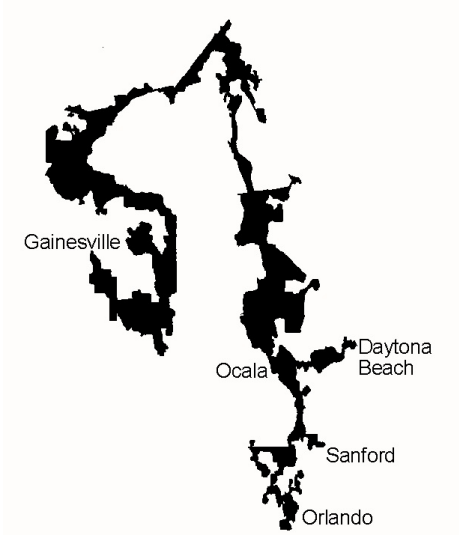

Texas

Congressional District 30	
1992	1996
	
Congressional District 18	
1992	1996
	
Congressional District 29	
1992	1996
	

## Louisiana

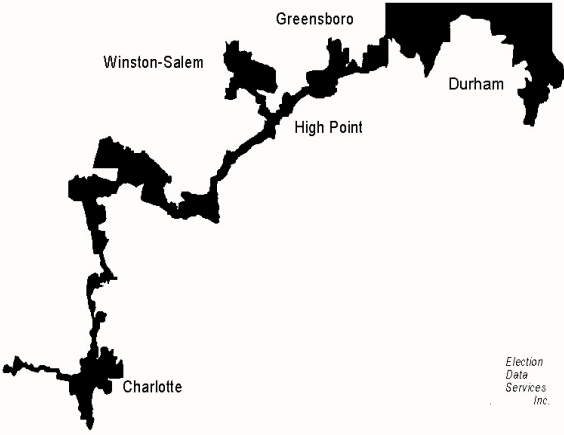

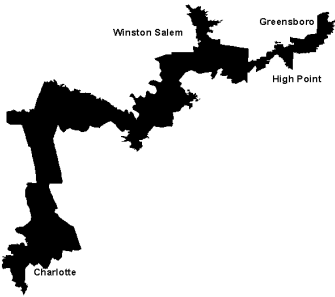
Congressional District 4	
1992	1996
	

## Florida

Congressional District 3	
1992	1996
	



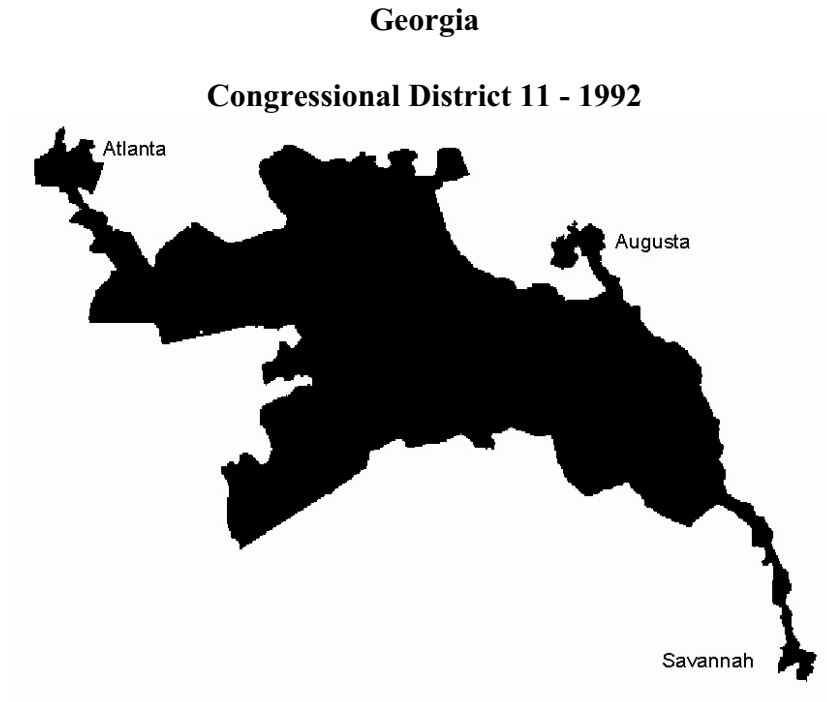
## North Carolina

Congressional District 12	
1992	1998
	
2000	
	

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

**c. Beware of Making Race Your Predominant Motive**

Even if the shapes of your districts are not bizarre, and even if they are reasonably compact, you may nevertheless run afoul of the [Equal Protection Clause](#) if race was your predominant motive for drawing the lines the way you did.



Georgia's 11th Congressional District, as enacted in 1992, stretched from Atlanta to the sea, but not in the 60-mile-wide swath cleared by General Sherman. Rather, it began with a small pocket of Blacks in Atlanta, spread out to pick up the sparsely populated rural areas, and narrowed considerably to pick up more pockets of Blacks in Augusta and Savannah, 260 miles away. *Miller v. Johnson*, [515 U.S. 900](#), 908-09 (1995).

It had not been included in either of the first two plans enacted by the Legislature in 1991 and sent to the Department of Justice for preclearance. Both of those plans had included two Black-majority districts. The Justice Department had rejected them for failure to create a third. This rejection had occurred notwithstanding that the 1982 plan had included only one Black-majority district and that there was no evidence the Georgia Legislature had intended to discriminate against Blacks in drawing the 1991 plans. The new district in the 1992 plan was drawn to meet the Department's requirement that the state maximize the number of Black-majority districts, and its inclusion in the third plan was sufficient to obtain preclearance from the Justice Department. 515 U.S. at 906-09.

In *Miller v. Johnson*, [515 U.S. 900](#) (1995), the Supreme Court shifted its focus away from the shape of the district, saying that plaintiffs challenging a racial gerrymander need not prove that a district has a bizarre shape. The shape of the district is relevant, not because bizarreness is a

necessary element of the constitutional wrong, but because it may be persuasive circumstantial evidence that race was the Legislature’s predominant motive in drawing district lines. Where district lines are not so bizarre, plaintiffs may rely on other evidence to establish race-based redistricting. 515 U.S. at 912-13.

In Georgia’s case, the Legislature’s correspondence with the Justice Department throughout the preclearance process demonstrated that race was the predominant factor the Legislature considered when drawing the 11<sup>th</sup> District. The Court found that the Legislature had considered “traditional race-neutral districting principles,” such as compactness, contiguity, and respect for political subdivisions and communities of interest, but that those principles had been subordinated to race in order to give the 11<sup>th</sup> District a Black majority. 515 U.S. at 919-20. The Court subjected the district to strict scrutiny and struck it down. [515 U.S. at 920-27](#).

A district need not conflict with traditional districting principles to be struck down, so long as there is other evidence that race was the predominant motive guiding its lines. *Bethune-Hill v. Va. Bd. of Elections*, [No. 15-680](#), slip op. at 10-11, 580 U.S. \_\_\_, \_\_\_ (2017).

**d. Beware of Using Race as a Proxy for Political Affiliation**

If you want to argue that partisan politics, not race, was your predominant motive in drawing district lines, beware of using racial data as a proxy for political affiliation. The Texas Legislature tried that in the 1990s, and three of its congressional districts were struck down.

**Congressional District 30**



**Congressional District 18**



**Congressional District 29**



Under the 1990 reapportionment of seats in Congress, Texas was entitled to three additional congressional districts. The Texas Legislature decided to draw one new Hispanic-majority district in South Texas, one new African American majority district in Dallas County (District 30), and one new Hispanic-majority district in the Houston area (District 29). In addition, the Legislature decided to reconfigure a district in the Houston area (District 18) to increase its percentage of African Americans. The Texas Legislature had developed a state-of-the-art computer system that allowed

it to draw congressional districts using racial data at the census block level. Working closely with the Texas congressional delegation and various members of the Legislature who intended to run for Congress, the Texas Legislature took great care to draw three new districts and reconfigure a district that the chosen candidates could win.

Plaintiffs challenged 24 of the state's 30 congressional districts as racial gerrymanders. The federal district court struck down three, Districts 18, 29, and 30, *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994). On appeal, the state argued that the bizarre shape of District 30 in Dallas County was explained by the drafters' desire to unite urban communities of interest and that the bizarre shape of all three districts was attributable to the Legislature's efforts to protect incumbents of old districts while designing the new ones. The Supreme Court upheld the district court's finding to the contrary, holding that race was the predominant factor.

The Legislature's redistricting system had election data and other political information at the precinct level, but it had race data down to the block level. The district lines closely tracked the racial block data. The Court found that, to the extent there was political manipulation, race was used as a proxy for political affiliation. It was race that predominated. *Bush v. Vera*, 517 U.S. 952, 965-73 (1996). The Court subjected the districts to strict scrutiny and struck them down. 517 U.S. at 976-83.

When the North Carolina General Assembly, in response to the 2010 Census, increased the Black voting-age population of Congressional District 12 from 43.8% to 50.7%, the legislators and consultant who drew the plan testified to a three-judge federal district court that they had done so solely for partisan advantage, without regard to race and without regard to the requirements of the Voting Rights Act. Testifying to the contrary on behalf of the plaintiffs, the incumbent congressman and an expert witness said the district's design was dominated by race and the desire to ensure preclearance under § 5 of the Voting Rights Act. The court credited plaintiffs' witnesses over defendants' and found that considerations of race had predominated over partisan advantage. On appeal, the U.S. Supreme Court found no clear error, held that no alternative plan for District 12 was required of plaintiffs, and struck the district down as a racial gerrymander. *Cooper v. Harris*, No. 15-1262, slip op. at 18-34, 581 U.S. \_\_\_, \_\_\_ (2017).

#### **e. Follow Traditional Districting Principles**

As the preceding discussion shows, one way to avoid drawing a racial gerrymander that runs afoul of the [Equal Protection Clause](#) is to follow traditional districting principles. What are "traditional districting principles" and where do they come from?

The Supreme Court first used the term "traditional districting principles" in the 1993 North Carolina case, mentioning "compactness, contiguity, and respect for political subdivisions" as examples. *Shaw v. Reno*, 509 U.S. 630, 647. Later, in the 1995 Georgia case, it added "respect for . . . communities defined by actual shared interests." *Miller v. Johnson*, 515 U.S. 900, 919-20 (1995). In the Texas case, it added "maintaining . . . traditional boundaries." *Bush v. Vera*, 517 U.S. 952, 977 (1996). And in the 1997 Georgia case, it added "maintaining . . . district cores" and "[p]rotecting incumbents from contests with each other." *Abrams v. Johnson*, 521 U.S. 74, 84.

These “traditional districting principles” are not found in the U.S. Constitution, but rather in the constitutions, laws, and resolutions of the several states. The districting principles used by each state in the 2000s are shown in table 8 and appendix E of NCSL’s book, [REDISTRICTING LAW 2010](#). The districting principles used by each state in the 2010s are shown in NCSL’s “Districting Principles for 2010 and Beyond,” <https://www.ncsl.org/Portals/1/Documents/Redistricting/DistrictingPrinciplesFor2010andBeyond-6-edited-June-4.pdf?ver=2019-06-04-092717-547&timestamp=1559662054405> (June 4, 2019). The Supreme Court has now mentioned all of the most common districting principles used by the states, but there are a number of others used by only a few states.

Before drawing any plan for your state, you will want to become familiar with the requirements of your own constitution and consider whether to adopt additional districting principles to govern your plans.

### **3. Strict Scrutiny is Almost Always Fatal**

If you do choose to subordinate traditional districting principles to race in order to create a majority-minority district, be aware that it is unlikely your district will stand up in court. A racial gerrymander is subject to strict scrutiny under the [Equal Protection Clause](#) of the Fourteenth Amendment. *Shaw v. Reno*, [509 U.S. 630](#) (1993). To survive strict scrutiny, a racial classification must be narrowly tailored to serve a compelling governmental interest. *Id.*

#### **a. A Compelling Governmental Interest**

What may qualify as a “compelling governmental interest”? So far, the Supreme Court has considered remedying past discrimination, avoiding retrogression in violation of § 5 of the Voting Rights Act, and avoiding a violation of § 2 of the Voting Rights Act to be possible compelling governmental interests.

#### **b. Narrowly Tailored to Achieve that Interest**

During the 1990s and 2000s, however, no racial gerrymander was explicitly found by the Supreme Court to have been sufficiently narrowly tailored to achieve any of these compelling governmental interests. *See, e.g., Shaw v. Reno*, [509 U.S. 630](#) (1993); *Miller v. Johnson*, [515 U.S. 900](#) (1995); *Bush v. Vera*, [517 U.S. 952](#) (1996); *League of United Latin American Citizens (LULAC) v. Perry*, [548 U.S. 399](#) (2006); *contra, King v. State Board of Elections*, [979 F. Supp. 582](#) (N.D. Ill. 1996), *vacated mem. sub nom. King v. Illinois Board of Elections*, 519 U.S. 978, *on remand* [979 F. Supp. 619](#) (N.D. Ill. 1997), *aff’d mem. 522 U.S. 1087* (1998). Don’t assume that yours will be the first.

#### **(1) Remedying Past Discrimination**

Remedying past discrimination has traditionally been a justification for a governmental entity to adopt a racial classification. *See, e.g., Richmond v. J.A. Croson Co.*, [488 U.S. 469, 491-93](#) (1989); *Wygant v. Jackson Bd. of Ed.*, [476 U.S. 267, 280-82](#) (1986). In the context of redistricting, this

justification has not yet proved sufficient. In *Shaw v. Reno*, the Supreme Court warned that the state must have “a strong basis in evidence for concluding that remedial action is necessary,” 509 U.S. 630, 656, and that “race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the state employs sound districting principles, and only when the affected racial group’s residential patterns afford the opportunity of creating districts in which they will be in the majority.” 509 U.S. at 657 (internal citations and quotations omitted). North Carolina failed to meet this standard, and its 12<sup>th</sup> congressional district was struck down. *Shaw v. Hunt*, 517 U.S. 899 (1996).

In *Bush v. Vera*, 517 U.S. 952 (1996), the Court found that the district lines drawn by the Texas Legislature were not justified as an attempt to remedy the effects of past discrimination, since there was no evidence of present discrimination other than racially polarized voting.

## **(2) Avoiding Retrogression Under § 5**

The Supreme Court has assumed, without deciding, that avoiding retrogression in violation of § 5 of the Voting Rights Act would be a compelling governmental interest.

In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court anticipated that the state might assert on remand that complying with § 5 was a compelling governmental interest that justified the creation of District 12. But the Court warned that “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.” 509 U.S. at 655. In *Shaw v. Hunt*, 517 U.S. 899 (1996), the Court noted that, before the 1990 census, North Carolina had had no Black-majority districts. The first plan drawn by the state after the 1990 census had included one Black-majority district, not District 12. The Court found that adding District 12 as a second Black-majority district was not necessary in order to avoid retrogression. 517 U.S. at 912-13. Since the 12<sup>th</sup> district was not narrowly tailored to serve the state’s interest in complying with § 5, or any other compelling state interest, the Court struck it down.

In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court found that it was not necessary for the Georgia Legislature to draw a third Black-majority district in order to comply with § 5. The plan for the 1980s had included one Black-majority district. The first two previous plans enacted by the Georgia Legislature after the 1990 census had included two Black-majority districts, thus improving on the status quo. Adding a third Black-majority district was not necessary and thus not narrowly tailored to achieve the state’s interest in complying with § 5. 515 U.S. at 920-27.

On remand, the federal district court first allowed the Georgia Legislature an opportunity to draw a new plan. When the Legislature failed to agree on a plan, the district court found that Georgia’s Second Congressional District was also an unconstitutional racial gerrymander. *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995). The district court reasoned that, since the enacted plan was the product of improper pressure imposed by the Justice Department, it did not embody the Legislature’s own policy choices and therefore should not be used as the basis for the court’s remedial plan. The district court then imposed an entirely new plan with only one Black-majority district, District 4. 922 F. Supp. at 1556.

## Georgia Congressional District 4 - 1996



The court's plan was used for the 1996 election, but the district court's decision was appealed to the Supreme Court on the ground that the court failed to give due deference to the Legislature's policy choices.

In *Abrams v. Johnson*, [521 U.S. 74](#) (1997), the Supreme Court affirmed. It found that neither the Legislature's 1991 plan, rejected by the Justice Department because it contained only two Black-majority districts, nor the 1992 plan, with three Black-majority districts, embodied the Legislature's own policy choices because of the improper pressure imposed by the Justice Department. It found the district court was within its discretion in deciding it could not draw two Black-majority districts without engaging in racial gerrymandering. Since the last valid plan, the 1982 plan, contained only one Black-majority district, the district court's one-district plan did not retrogress in violation of [§ 5](#) of the Voting Rights Act.

### (3) Avoiding a Violation of § 2

In *Shaw v. Reno*, [509 U.S. 630](#) (1993), the Supreme Court noted that the State of North Carolina had asserted that a race-based district was necessary to comply with [§ 2](#) of the Voting Rights Act. The Court left the arguments on that question open for consideration on remand. 509 U.S. at 655-56.

When the case returned to the Court for a second time, after the district court had found the plan to be narrowly tailored to comply with both § 2 and § 5, *Shaw v. Hunt*, [861 F. Supp. 408](#) (E.D. N.C. 1994), the Supreme Court again reversed the district court.

The Court said that, to make out a violation of [§ 2](#), a plaintiff must show that a minority population is "sufficiently large and geographically compact to constitute a majority in a single member district." The Court noted that District 12 had been called "the least geographically compact district in the Nation." *Shaw v. Hunt*, [517 U.S. 899](#), 905-06 (1996). There may have been a place in North Carolina where a geographically compact minority population existed, but the shape of District 12 showed that District 12 was not that place. Since District 12 did not encompass any

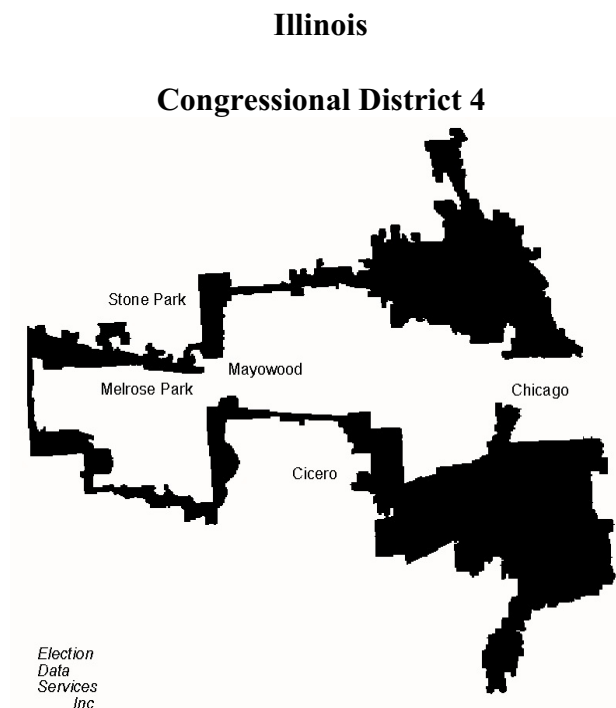


“geographically compact” minority population, there was no legal wrong for which it could be said to provide the remedy. 517 U.S. at 916.

In the Texas case, *Bush v. Vera*, 517 U.S. 952 (1996), the Court again assumed without deciding that complying with § 2 was a compelling state interest, 517 U.S. at 977, but found that the districts were not narrowly tailored to comply with § 2 because all three districts were bizarrely shaped and far from compact as a result of racial manipulation. The Court pointed out that, if the minority population is not sufficiently compact to draw a compact district, there is no violation of § 2; if the minority population is sufficiently compact to draw a compact district, nothing in § 2 requires the creation of a race-based district that is far from compact. 517 U.S. at 979. The Court reached a similar result in a Texas case ten years later. *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 423-43 (2006).

If crossover voting by Whites is sufficient to permit African Americans to elect their candidate of choice, even though they are less than a majority of the voting-age population in the district, § 2 does not require the map drawers to create a district with a voting-age majority of African Americans. *Cooper v. Harris*, No. 15-1262, slip op. at 12-18, 581 U.S. \_\_\_, \_\_\_ (May 22, 2017).

During the 1990s, one racial gerrymander did survive strict scrutiny: the Fourth Congressional District of Illinois, the “ear muff” district in Chicago. It was found necessary in order to achieve the compelling state interest of remedying a potential violation of, or achieving compliance with, § 2 of the Voting Rights Act.



The district had been drawn by a federal district court to create an Hispanic-voting-majority district without diminishing the African-American voting strength in three adjacent districts with African-American majorities. See *Hastert v. Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). Following the Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), plaintiffs in Illinois attacked District 4.

A different panel of the district court found that the compactness requirement of *Thornburg v. Gingles* applied only in determining whether a § 2 violation had occurred, not in drawing a district to remedy the violation. It found that the ear muff shape was necessary in order to provide Hispanics with the representation that their population warranted without causing retrogression in three adjacent African-American districts. It held that the Fourth District survived strict scrutiny. *King v. State Board of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996).

Plaintiffs appealed. The Supreme Court vacated the judgment and remanded to the district court for further consideration in light of its decisions in the North Carolina and Texas cases. *King v. Illinois Board of Elections*, 519 U.S. 978 (1996) (mem.).

On remand, the district court found that the Fourth District had been narrowly tailored to achieve the compelling state interest of remedying a potential violation of, or achieving compliance with, § 2 and, therefore, did not violate the Equal Protection Clause. *King v. State Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd mem.* 522 U.S. 1087 (1998).

#### **IV. Don't Go Overboard with Partisan Gerrymandering**

##### **A. Partisan Gerrymandering is No Longer Justiciable in Federal Court**

###### **1. It Was Justiciable - *Davis v. Bandemer* (1986)**

The Voting Rights Act does not apply to conduct that has the effect of diluting the voting strength of partisan minorities, such as Democrats in some states and Republicans in others. Partisan minorities must look elsewhere for protection.

Modern technology, while making it practicable to draw districts that are mathematically equal, also allows the majority to draw districts that pack and crack the partisan minority in such a way as to minimize the possibility of their ever becoming a majority. Indeed, modern technology makes it possible for those drawing a plan to win a majority of seats in a legislative body even when they receive substantially less than a majority of the vote statewide.

Long before any court had developed standards for judging whether a redistricting plan was so unfair as to deny the members of a political party their rights under the U.S. Constitution, the Supreme Court held, in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering was a justiciable issue.

*Davis v. Bandemer* involved a legislative redistricting plan adopted by the Indiana Legislature in 1981. Republicans controlled both houses. Before the 1982 election, several Indiana Democrats attacked the plan in federal court for denying them, as Democrats, the equal protection of the laws.

The plan had an overall range of 1.15 percent for the Senate districts and 1.05 percent for the House districts, well within equal-population requirements. The plan's treatment of racial and language minorities met the requirements of the Voting Rights Act.

The Senate was all single-member districts, but the House included nine double-member districts and seven triple-member districts, in addition to 61 that were single-member. The lower court found the multimember districts were "suspect in terms of compactness." Many of the districts were "unwieldy shapes." County and city lines were not consistently followed, although township lines generally were. Various House districts combined urban and suburban or rural voters with dissimilar interests. Democrats were packed into districts with large Democratic majorities, and cracked into districts where Republicans had a safe but not excessive majority. The Speaker of the House testified that the purpose of the multimember districts was "to save as many incumbent Republicans as possible."

At the 1982 election, held under the challenged plan, Democratic candidates for the Senate received 53.1 percent of the vote statewide and won 13 of the 25 seats up for election. (Twenty-five other Senate seats were not up for election.) Democratic candidates for the House received 51.9 percent of the vote statewide, but won only 43 of 100 seats. In two groups of multimember House districts, Democratic candidates received 46.6 percent of the vote, but won only 3 of 21 seats.

The Supreme Court, in an opinion by Justice White, held that the issue of fair representation for Indiana Democrats was justiciable, but that the Democrats had failed to prove that the plan denied them fair representation. The Court agreed that "in order to succeed the *Bandemer* plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 128. It observed that, "As 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." *Id.* at 130. But the Court denied that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," *id.* at 131, since, if the vote in all districts were proportional to the vote statewide, the minority would win no seats at all. Further, if districts were drawn to give each party its proportional share of safe seats, the minority in each district would go unrepresented. Justice White concluded that:

[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the [Equal Protection Clause](#).

... 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*. (Emphasis added.)

... 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.

478 U.S. at 132-33.

Merely showing that the minority was likely to lose elections held under the plan was not enough. As the Court pointed out, “the power to influence the political process is not limited to winning elections . . . . We cannot presume . . . , without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters [who did not vote for him or her].” *Id.*

## **2. Three Decades Attempting to Measure It**

### **a. Failure - 1988 to 2006**

How do the members of a major political party prove that they do not have “a fair chance to influence the political process?” For 30 years after *Bandemer*, they failed.

When California Republicans attacked the partisan gerrymander enacted by the Democratic legislature to govern congressional redistricting, the Supreme Court summarily affirmed the decision of a three-judge court dismissing the suit on the ground that the Republicans had failed to show that they had been denied a fair chance to influence the political process. *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989).

During the 1990s, the Virginia state house plan and the North Carolina congressional plan were attacked as partisan gerrymanders, but both attacks failed. *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991); *Pope v. Blue*, 809 F. Supp. 392 (W.D. N.C. 1992), *aff'd mem.* 506 U.S. 801 (1992).

During the 2000s, attacks on the Pennsylvania and Texas congressional plans also failed. *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 416-23 (2006). In the Pennsylvania case, Justices Scalia, Thomas, Rehnquist, and O'Connor expressed their desire to overrule *Davis v. Bandemer*. They concluded that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards exist for adjudicating them. Justice Kennedy agreed to dismiss the complaint, but held open the possibility that standards might yet be found. Justices Stevens, Souter, and Breyer each proposed different standards. In the Texas case, Justice Kennedy considered the appellants proposed standards, but found them wanting. 548 U.S. at 420-23.

## **b. Success - 2016 to 2019**

From 2016 to 2019, federal district courts in five states (Wisconsin, North Carolina, Maryland, Michigan, and Ohio) struck down congressional and legislative plans as partisan gerrymanders. See *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. Nov. 21, 2016); *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C. Aug. 27, 2018); *Benisek v. Lamone*, No. 1:13-cv-3233 (D. Md. Nov. 7, 2018); *League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148 (E.D. Mich. Apr. 25, 2019); *Ohio A. Philip Randolph Inst. v. Householder*, No. 1:18-cv-357 (S.D. Ohio May 3, 2019).

They developed and enforced tests and measures under the Fourteenth Amendment's Equal Protection Clause, the [First Amendment](#), and Article I.

### **(1) Fourteenth Amendment Equal Protection**

For challenges under the Fourteenth Amendment's [Equal Protection Clause](#), *Bandemer* provided a two-part test, “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” 478 U.S. at 128. The four federal district courts that ruled on an Equal Protection claim this decade added a third part: permitting the defenders of a plan to justify its discrimination by proving that the discriminatory effects are attributable to the state's political geography or another legitimate state redistricting objective. *Ohio A. Philip Randolph Inst. v. Householder*, slip op. at 167; *League of Women Voters of Mich. v. Benson*, slip op. at 58-59; *Common Cause v. Rucho*, slip op. at 127-28; *Whitford v. Gill*, 218 F. Supp. 3d at 884.

#### **(a) Discriminatory Intent**

The discriminatory intent required was one to “subordinate adherents of one political party and entrench a rival party in power.” *Rucho*, slip op. at 130-31, (quoting *Ariz. State Leg. v. Ariz. Indep. Redist. Comm’n*, No. 13-1314, slip op. at 1, 576 U.S. \_\_\_\_ (June 29, 2015)); *Householder*, slip op. at 167; *Benson*, slip op. at 59; *Whitford*, 218 F. Supp. 3d at 887. Although the *Whitford* district court only required the discriminatory intent to be one of perhaps many “motivating” factors, 887-88, the three later decisions required it to be the “predominant” factor because that was the test used in racial gerrymandering cases. *Id.* at 168-71; *Benson*, slip op. at 58-59; *Rucho*, slip op. at 131-34.

Discriminatory partisan intent might be proved by a combination of direct and indirect evidence. *Householder*, slip op. at 172-73. Direct evidence might include the public and private statements and correspondence of the map drafters, legislators, legislative staff, and political operatives about their goals in drawing the map. *Householder* at 172-73, 184-85; *Benson*, slip op. at 104-05; *Rucho* slip op. at 144-45; *Whitford*, 218 F. Supp. 3d at 894.

Indirect evidence might include departures from the normal procedural sequence (such as excluding the minority party and the public from the process of drawing and adopting the maps). *Id.* at 172-73, 178-79; *Rucho* slip op. at 143. The draft maps themselves might provide indirect evidence of discriminatory intent when they included or were accompanied by reports of the partisan

composition of the districts that the drafters relied on when drawing the maps. *Householder*, slip op. at 185. Districts that packed and cracked minority-party voters were indirect evidence of discriminatory intent. *Id.* at 172-73. Districts that split an excessive number of political subdivisions, or had bizarre shapes or low compactness scores were also indirect evidence of discriminatory intent. *Id.* at 172-73, 186-87. Indirect evidence might also include districts that paired incumbents in a way likely to benefit the majority party. *Id.* at 184-85. “[E]xtreme levels of partisan bias across multiple metrics and data sets and when compared to a large array of historical elections” might also be evidence of a discriminatory intent. *Id.* at 187.

### (b) Discriminatory Effect

The *Bandemer* requirement that the discriminatory effect “consistently degrade a voter’s or a group of voters’ influence on the political process as a whole” proved unworkable and was abandoned by the Court in *Vieth*. 541 U.S. at 281-84. In its place, the federal district courts this decade have relied on the definition of partisan gerrymandering coined by the Supreme Court in 2015, “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” *Ariz. State Leg.*, slip op. at 1, *quoted in Householder*, slip op. at 167, 174.

To determine discriminatory effect, they used a two-part test, one for subordination and the other for entrenchment.

The test for subordination was whether district boundaries diluted the votes of members of the disfavored party by packing or cracking them. *Id.* at 173. Packing or cracking causes the plaintiff’s vote “to carry less weight than it would in another, hypothetical district.” *Gill v. Whitford*, slip op. at 15-16. This makes it more difficult for the members of the disfavored party to translate their votes into seats in the legislative body. *Householder*, slip op. at 173.

Packing and cracking were measured in a variety of ways.

1. The **number of Republican and Democratic districts**, using the results of elections held under the enacted plan compared to simulated plans drawn by experts. *Id.* at 75. If simulated plans that adhered to traditional districting principles produced more districts likely to be won by the disfavored party, the enacted plan might be biased against the disfavored party.



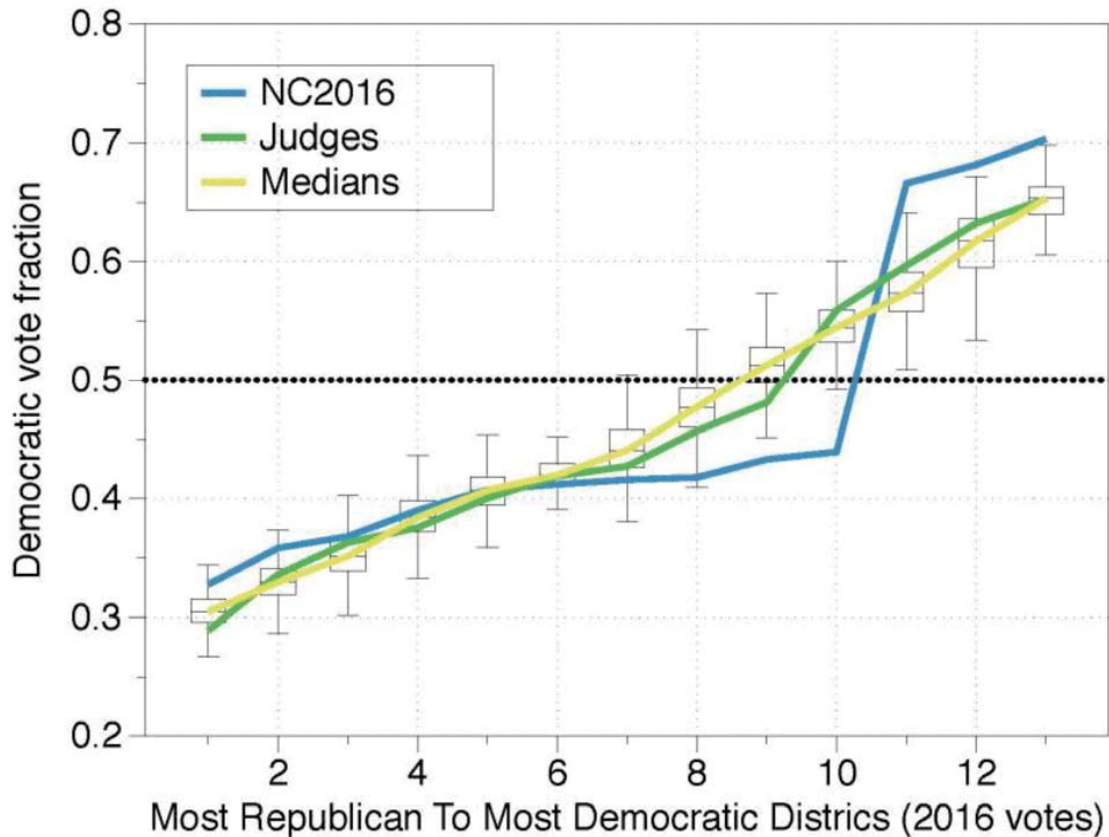


Figure 1: The “signature” of gerrymandering

*Rucho*, slip op. at 152.

2. The **efficiency gap** “compares each party’s respective ‘wasted’ votes across all legislative districts. ‘Wasted’ votes are those cast for a losing candidate [cracked votes] or for a winning candidate in excess of what that candidate needs to win [packed votes].” *Gill v. Whitford*, slip op. at 4. If the favored party has wasted a lower percentage of its votes than the disfavored party, the plan might be biased against the disfavored party.
3. A **uniform swing analysis** “compares how both parties’ seat shares change as their vote shares increase or decrease.” *Householder*, slip op. at 58 (referred to as “partisan symmetry in the vote-seat curve”), 74 (referred to as “responsiveness and bias”); *Rucho*, slip op. at 189-90 (referred to as “partisan bias”); *Whitford v. Gill*, 218 F. Supp. 3d at 899-901 (referred to as “swing analysis”). If one party’s share of seats increases faster or reduces slower than its share of the vote, the plan might be biased in favor of that party.
4. The **mean-median gap** is “the difference between a party’s vote share in the median district and their average vote share across all districts. If the party wins more votes in the median

district than in the average district, they have an advantage in the translation of votes to seats.” *Rucho*, slip op. at 150-51, 191-92.

5. **Declination** is a comparison of the vote share in districts won by one party with the vote share in districts won by the other party, shown as angles on a graph. *Householder*, slip op. at 59. The partisan lean of each district is plotted on a graph, showing how far each district is above or below 50%. The median district for each party is identified and the angle of that district’s position on the graph from the 50% line is computed. The two angles are compared. The party with the smaller angle is favored by the plan.

The test for entrenchment was whether the subordination was durable, *Householder*, slip op. at 174-75; whether it was likely to last for the decade the plan was in place, until a new one was drawn after the next census, *Benson*, slip op. at 104; and whether “an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party.” *Rucho*, slip op. at 140.

Durability might likewise be measured in a variety of ways.

1. A **lack of competitive districts** might make it unlikely that seats would change parties during the life of the plan. *Householder*, slip op. at 174-75, 191-92.
2. **Election results under the enacted plan** might show that the favored party has been able to win a majority of seats even when its share of the statewide vote declined, and thus be able to hold control throughout the decade. *Id.* at 189-90.
3. **Election results under other plans** used in multiple elections might demonstrate that the plan will retain its bias “under any *likely* electoral scenario” for the remainder of the decade. *Rucho*, slip op. at 193 (quoting *Whitford*, 218 F. Supp. 3d at 899).
4. **Uniform swing analysis** might be used to predict whether a swing in the partisan vote in the range of what has occurred in past elections would be enough to cause the favored party to fail to win a majority of seats. If not, the plan is not responsive and the subordination is durable. *Householder*, slip op. at 62-63, 192.
5. A large **efficiency gap** is likely to be durable. *Benson*, slip op. at 50.

### (c) Justification

If plaintiffs proved discriminatory intent and discriminatory effect, the federal district courts permitted defendants to attempt to save their plan by proving that the plan’s discriminatory effect was justified by the state’s political geography or another legitimate districting objective. *Householder*, slip op. at 175.



A state's political geography is where the supporters of each party live—how they are distributed around the state. *Id.* at 96, 176. This might be shown by party registration data or by election results.

Other legitimate districting objectives include adhering to traditional districting principles, such as “making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives[.]” *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (quoted in *Householder*, slip op. at 175); and maintaining communities of interest, *Evenwel v. Abbott*, No. 14-940, slip op. at 3, 578 U.S. \_\_\_\_ (Apr. 4, 2016). Complying with the Voting Rights Act was also a legitimate districting objective. *Householder*, slip op. at 175.

## **(2) First Amendment**

The test for a First Amendment claim was similar to the test for a Fourteenth Amendment [equal protection](#) claim:

(1) that the challenged districting plan was intended to burden individuals or entities that support a disfavored candidate or political party, (2) that the districting plan in fact burdened the political speech or associational rights of such individuals or entities, and (3) that a causal relationship existed between the governmental actor's discriminatory motivation and the First Amendment burdens imposed by the districting plan.

*Householder*, slip op. at 262 (quoting *Rucho*, slip op. at 263).

### **(a) Intent to Burden**

As with an intent to discriminate under the Equal Protection Clause, the intent to burden supporters of the disfavored party in retaliation for their having expressed political views through their party affiliation and voting history, *see Householder*, slip op. at 263, was a *predominant* intent. *See Rucho*, slip op. at 264.

### **(b) Actual Burden**

The burden was one that had a chilling effect or adverse impact on the free speech rights of a member of the disfavored party. *Rucho*, slip op. at 265.

Measures of that burden included difficulties in recruiting candidates and volunteers, raising money, registering voters, getting candidates and elected officials to interact with voters, and getting out the vote in districts that are not competitive. *See Householder*, slip op. at 275–77. “[T]he splitting of neighborhoods, cities, and counties makes campaigning more difficult in those areas and therefore results in a demobilizing effect.” *Id.* at 274.

### (c) Causation

As an aspect of causation, the federal district courts said a First Amendment burden might be justified by a legitimate state redistricting objective. *See Id.* at 263.

In each case, plaintiffs had failed to prove a justification for the burdens imposed.

### (3) Article I Right of the People to Elect Their Representatives

[Article I](#) of the U.S. Constitution provides that the House of Representatives must be elected “by the People of the several states,” § 2, but that the “Times, Places and Manner of holding elections for . . . Representatives shall be prescribed in each State by the Legislature thereof . . .” § 4.

Congressional plans alleged to be partisan gerrymanders were struck down by the federal district courts under Article 1 as a “non-neutral regulation that constrains the free choice of the people to elect their representatives.” *Householder*, slip op. at 284.

[Article 1](#), § 4, the Elections Clause, authorizes a legislature to regulate elections to the House of Representatives, but not in a way that disfavors a class of candidates or dictates the outcome of an election. *U.S. Term Limits, Inc. v. Thornton*, [514 U.S. 779, 833–34](#) (1995). The regulations must be neutral as to the time, place, and manner of elections. *Cook v. Gralike*, [531 U.S. 510, 527](#) (2001) (Kennedy, J., concurring).

In North Carolina, the General Assembly had adopted a districting criterion that required the committee drawing the plan to “make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina’s congressional delegation.” [N.C. Cong. Plan Criteria](#), Joint Select Comm. on Cong. Redist. (Feb. 16, 2016). Testimony of the consultant who drew the plan and the legislators who sponsored it in the House and Senate was that “the 2016 Plan was intended to disfavor non-Republican candidates and supporters of such candidates and favor Republican candidates and their supporters.” *Rucho*, slip op. at 287. The plan had the intended effect, electing 10 Republicans and 3 Democrats, and demonstrating that the legislature’s attempt to dictate election outcomes had been successful. *Id.* at 287-88. The court in *Rucho* held that the North Carolina congressional plan violated [Article 1](#), § 2, without regard to the Equal Protection Clause or First Amendment.

In Ohio, the court in *Householder* held that the congressional plan violated [Article 1](#), § 2 because it unconstitutionally diluted votes because of partisan affiliation under the [Equal Protection Clause](#) and infringed on the associational rights of voters under the First Amendment. Slip op. at 288.

### 3. It is No Longer Justiciable - *Rucho v. Common Cause* (2019)

In 2019, the U.S. Supreme Court put a stop to this policing of partisan gerrymandering in federal court. It found the tests and measures developed by the district courts to be inadequate. “There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.” *Rucho v. Common Cause*, No. 18-422, [slip op.](#) at 19, 588 U.S. \_\_\_\_ (June 27, 2019). The judgment of the North Carolina district court, along with the judgment of the Maryland district court, was vacated, and the cases were remanded with instructions to dismiss for lack of jurisdiction. *Slip op.* at 34. The judgments in Wisconsin, Michigan, and Ohio were similarly vacated and the cases dismissed. *See Whitford v. Gill*, No. 15-cv-421, *dismissed for lack of jurisdiction*, [Opinion & Order](#) (W.D. Wis. July 2, 2019); *League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148 (E.D. Mich. Apr. 25, 2019), *vacated & remanded*, [No. 19-220](#), 589 U.S. \_\_\_\_ (Oct. 21, 2019) (mem.); *Ohio A. Philip Randolph Inst. v. Householder*, No. 1:18-cv-357, *dismissed for lack of jurisdiction*, [Order of Dismissal](#) (S.D. Ohio Oct. 29, 2019).

#### B. Beware of State Prohibitions on Partisan Gerrymandering

Although the Court held that “partisan gerrymandering claims present political questions beyond the reach of the federal courts,” *Rucho*, *slip op.* at 30, it also said:

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts.

*Slip op.* at 31.

As an example, the Court pointed with approval to the language of the Florida Constitution that says no plan or district “shall be drawn with the intent to favor or disfavor a political party.” FLA. CONST. Art. III, §§ [20\(a\)](#) (congressional districts), [21\(a\)](#) (legislative districts). *Slip op.* at 31-32.

Before the 2010 Census, nine states had a specific prohibition against partisan gerrymandering in either legislative or congressional plans. Most were statutory, beginning with Delaware in 1956. DEL. CODE § [804](#) (“Each district shall, insofar as is possible . . . [n]ot be created so as to unduly favor any . . . political party.”). HAW. REV. STATS. § [25-2\(b\)\(1\)](#) (1979) (congressional); ORE. REV. STAT. § [188.010\(2\)](#) (1979); IOWA CODE § [42.4](#) (1980); IDAHO CODE § [72-1506\(8\)](#) (1996); MONT. CODE ANN. § [5-1-115\(3\)](#) (2003).

Hawaii was the first state to add the prohibition to its constitution, when it created a commission to draw legislative and congressional districts. *See* HAW. CONST. art IV, § [6\(2\)](#) (1978) (constitutional prohibition applies to legislative districts only). Other states have done the same. *See* WASH. CONST. [art. II](#), § [43\(5\)](#) (1983); CAL. CONST. [art. XXI](#), § [2\(e\)](#) (2008).

None of those older prohibitions have yet been tested in court.

Since the 2010 Census, seven more states have added a specific prohibition against partisan gerrymandering. All but Utah were by constitutional amendment. *See* FLA. CONST. art III, § 20(a) (congressional), § 21(a) (legislative) (2010); NY CONST. art. III, § 4(c)(5) (2014); OHIO CONST. art. IX, § 6(A) (legislative) (2015); OHIO CONST. art. XIX, § 1(C)(3)(a) (congressional) (2018); COLO. CONST. art. V, § 44.3(4)(a) (congressional), § 48.1 (4)(a) (legislative) (2018); MICH. CONST. art. IV, § 6(13)(d) (2018); MO. CONST. art. III, § 3(c)(1)(b) (2018); UTAH CODE § 20A-19-103(3) (2018).

## 1. Florida

Florida’s 2010 constitutional amendment was a citizens initiative that said, “No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” It also required that districts not discriminate against racial or language minorities, be compact and, where feasible, utilize existing political and geographical boundaries. Unlike the explicit prohibitions in other states, this prohibition has been tested in court and used to strike down both congressional and legislative districts.

In 2015, a Florida circuit court was presented with direct evidence of the intent of legislators to favor the Republican party and incumbents in drawing their 2012 congressional plan, as well as indirect evidence of intent as shown by the ways in which the plan violated other constitutional requirements. The court struck down two of the 27 congressional districts. *Romo v. Detzner*, No. 2012-CA-412 (2nd Cir. Leon County July 10, 2014). On appeal, the Florida Supreme Court struck down a total of eight congressional districts: five that intentionally favored the Republican party and incumbents, and three that were not compact or did not utilize existing political and geographic boundaries. *League of Women Voters of Fla. v. Detzner* (Apportionment VII), 172 So.3d 363 (Fla. July 9, 2015). The Florida Senate then stipulated that the Senate plan drawn by the legislature had likewise intentionally been drawn to favor a political party or incumbent and would not be enforced or used for the 2016 elections. When the legislature failed to enact a remedial plan, a plan submitted by the plaintiffs was adopted by the trial court. *League of Women Voters of Fla. v. Detzner*, No. 2012 CA 2842 (2nd Cir. Leon County Dec. 30, 2015).

## 2. Pennsylvania

In Pennsylvania, since 1776 the constitution has included a requirement that, “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” PA. CONST., art. I, § 5.<sup>5</sup> A 1968 amendment required that

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<sup>5</sup>A Free and Equal Elections Clause with the same or similar language is found in the constitutions of 25 other states. *See*, ARIZ. CONST. art. II, § 21; ARK. CONST. art. III, § 2; COLO. CONST. art. II, § 5; DEL. CONST. art. I, § 3; ILL. CONST. art. III, § 3; IND. CONST. art. II, § 2; KY. CONST. § 6; MD. CONST. DECLARATION OF RIGHTS, art. 7; MA. CONST. pt. I, art. IX; MO. CONST. art. I, § 25; MONT. CONST. art. II, § 13; NEB. CONST. art. I, § 22; N.H. CONST. pt. I, art. 11; N.M.

legislative districts “be composed of compact and contiguous territory as nearly equal in population as practicable” and that, “Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.” Art. II, § 16.

In 2018, the Pennsylvania Supreme Court struck down the 2011 congressional plan for violating the Free and Equal Elections Clause by denying voters an equal opportunity to translate their votes into representation.

[P]artisan gerrymandering dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage. By placing voters preferring one party’s candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing), the non-favored party’s votes are diluted. It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation . . . .

*League of Women Voters of Pa. v. Pennsylvania*, No. J-1-2018, slip op. at 117-18 (Pa. Feb. 7, 2019), *cert. denied*, *Turzai v. Brandt*, No. 17-1700 (U.S. Oct. 29, 2018).

### 3. North Carolina

In North Carolina, the state courts picked up where the federal courts left off.

#### a. Legislative Plans - *Common Cause v. Lewis*

In November 2018, as the federal court’s order in *Common Cause v. Rucho* was under appeal to the U.S. Supreme Court, plaintiffs challenged many of the 2011 legislative districts in state court. *Common Cause v. Lewis*, No. 18 CVS 014001, [Complaint](#) (N.C. Super. Ct. Wake County Nov. 13, 2018). As required by N.C. GEN. STAT. § 1.267.1 for challenges to enacted legislative and congressional redistricting plans, the case was assigned to a three-judge panel of the Wake County Superior Court, including the senior resident judge and two judges appointed by the Chief Justice of the Supreme Court to represent the remainder of the state.

On September 3, 2019, the panel held that the enacted plans violated the Free Elections Clause of the North Carolina Constitution, [art. I](#), § 10 (“All elections shall be free.”), [Judgment](#) at

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CONST. art. II, § 8; N.C. CONST. [art. I](#), § 10; OKLA. CONST. [art. II](#), § 4; OR. CONST. art. II, § 1; S.C. CONST. art. I, § 5; S.D. CONST. art. VII, § 1; TENN. CONST. art. I, § 5; UTAH CONST. art. I, § 17; VT. CONST. ch. I, art. 8; VA. CONST. art. I, § 6; WASH. CONST. [art. I](#), § 19; WYO. CONST. art. I, § 27.

298-306; the Equal Protection Clause, [art. I](#), § 19 (“No person shall be denied the equal protection of the laws . . . .”) *Id.* at 307–17; and the Freedom of Speech and Freedom of Assembly Clauses, [art. I](#), § 14 (“Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained . . . .”) and [art. I](#), § 12 (“The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances . . . .”) *Id.* at 317-31.

The panel struck down 21 Senate districts and 55 House districts. It ordered the General Assembly to enact remedial maps by September 18, 2019. *Id.* at 350. The General Assembly did so, N.C. SESS. LAWS [2019-219](#) (Senate), [2019-220](#) (House), and the panel approved the enacted plans. [Order](#) (Oct. 28, 2019). Plaintiffs’ appeal to the North Carolina Supreme Court with regard to the House districts was denied. [No. 417P19](#) (Nov. 15, 2019).

### **b. Congressional Plan - *Common Cause v. Harper***

Less than four weeks after the three-judge panel had struck down the legislative plan, plaintiffs filed a similar [complaint](#) against the congressional plan. *Harper v. Lewis*, No. 19 CVS 012667 (N.C. Super. Ct. Wake County Sept. 27, 2019). The case was assigned to the same panel. Plaintiffs moved for a preliminary injunction, arguing that neither the relevant facts nor the law were in dispute after *Common Cause v. Lewis*, and that a remedial plan could be in place by late November. [Motion](#) (Sept. 30, 2019).

Defendants removed the case to federal district court, but the federal court remanded it to the state court because, under *Rucho v. Common Cause*, No. 18-422, 588 U.S. \_\_\_\_ (June 27, 2019), federal courts no longer have jurisdiction over partisan gerrymandering claims. [Order](#), *Harper v. Lewis*, No. 5:19-CV-452 (E.D.N.C. Oct. 22, 2019).

On remand, the three-judge state panel preliminarily enjoined the state from running the 2020 elections under the 2016 congressional districts, while retaining jurisdiction to move the dates of primary elections if necessary to provide effective relief. [Order](#) (Oct. 28, 2019). The panel noted that summary judgment or trial might not be needed if the General Assembly, on its own initiative, promptly enacted new congressional districts. The panel suggested that the General Assembly adopt a process “that ensures full transparency and allows for bipartisan participation and consensus to create new congressional districts” that meet state constitutional requirements. *Id.* at 17-18.

On November 15, 2019, the General Assembly enacted new congressional districts, N.C. SESS. LAWS [2019-249](#). The plan received no Democratic votes in either the House or the Senate. *Id.* Plaintiffs challenged the new districts and defendants sought their approval. The panel declined to enjoin the plan. [Order](#) (Dec. 2, 2019).

### **C. Lessons Learned**

For more than 30 years, I have been advising state legislatures not to go overboard with partisan gerrymandering, lest they provide the courts with fact situations they could not ignore,



forcing them to begin striking down plans. Wisconsin, Maryland, Michigan, and Ohio got a reprieve this decade. Florida, Pennsylvania, and North Carolina did not.

If you wish to avoid future legal trouble with a plan you are drawing, here are suggestions for things *not* to do:

1. Articulate, in public or private statements, that your goal is to favor the party drawing the plan;
2. Attempt to draw a plan that favors your party more than any other plan you or anyone else can devise;
3. Draw districts with shapes so bizarre they draw public ridicule; or
4. Exclude the minority party from participating in drafting the plan.

In spite of *Rucho v. Common Cause*, my advice remains: Don't go overboard with partisan gerrymandering.

## **V. Prepare to Defend Your Plan in Both State and Federal Courts**

After the 2000 census, 18 states had suits in state courts concerning legislative or congressional redistricting plans; 21 states had suits in federal court. Nine states had suits in both state and federal courts *on the same plan*. See NATIONAL CONFERENCE OF STATE LEGISLATURES, *Action on Redistricting Plans, 2001-07*,

[https://www.ncsl.org/Portals/1/Documents/Elections/Updated\\_action2000\\_31520.pdf](https://www.ncsl.org/Portals/1/Documents/Elections/Updated_action2000_31520.pdf) (last update Aug. 8, 2017).

After the next census, you had better be prepared to defend your plan in both state and federal courts *at the same time*. How should all this parallel litigation be coordinated?

### **A. Federal Court Must Defer to State Court**

In a 1965 case, *Scott v. Germano*, 381 U.S. 407 (per curiam), the Supreme Court 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. See, e.g., *Members of the Cal. Democratic Congressional Delegation v. Eu*, 790 F. Supp. 925 (N.D. Cal. 1992), *rev'd*, *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994) (deferral until conclusion of state proceedings was proper; dismissal “went too far”). Others did not. See, e.g., *Kansas ex rel. Stephan v. Graves*, 796 F. Supp. 468 (D. Kan. June 24, 1992) (too late in election process for legislature to correct flaws in congressional plan after state supreme court review); *Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 677 (E.D. N.Y. May 5,

1992) (proceedings on congressional plan in state court enjoined), *injunction stayed sub nom. Gantt v. Skelos*, [504 U.S. 902](#) (1992) (mem.).

In Minnesota, after a state court had issued a preliminary order correcting the technical errors in the legislative plan enacted by the Legislature, the federal district court enjoined the state court from issuing its final plan. *Emison v. Growe*, [Order](#), No. 4-91-202 (D. Minn. Dec. 5, 1991). The U.S. Supreme Court summarily vacated the injunction a month later. *Cotlow v. Emison*, [502 U.S. 1022](#) (1992) (mem.). 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. *Emison v. Growe*, [782 F. Supp. 427](#) (D. Minn. 1992). The federal court’s order regarding the legislative plan was stayed pending appeal, *Growe v. Emison*, No. 91-1420 (Mar. 11, 1992) (Blackmun, J., in chambers), but the congressional plan was allowed to go into effect for the 1992 election. After the election, the Supreme Court reversed.

In *Growe v. Emison*, [507 U.S. 25](#) (1993), 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.” 507 U.S. at 34. 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.

507 U.S. at 35.

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. 507 U.S. at 37. 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. 507 U.S. at 34. 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. *Id.* 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.

## **B. Federal Court May Not Directly Review State Court Decision**

Once a state court has completed its work, the Full Faith and Credit Act, [28 U.S.C. § 1738](#), requires a federal court to give the state court’s judgment the same effect as it would have in the state’s own courts. *Parsons Steel Inc. v. First Ala. Bank*, [474 U.S. 518, 525](#) (1986). 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. *Rooker v. Fidelity Trust Co.*, [263 U.S. 413](#) (1923); *D.C. Court of Appeals v. Feldman*, [460 U.S. 462](#) (1983). This principle is now known as the “*Rooker-Feldman* doctrine.” See also, *Atlantic Coast Line R. Co. v. Locomotive Engineers*, [398 U.S. 281](#) (1970).



### **C. Plan Approved by State Court Subject to Collateral Attack in Federal Court**

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 in federal court for different reasons or by different parties. *See, e.g., Branch v. Smith*, 538 U.S. 254, 261-66 (2003); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Nerch v. Mitchell*, No. 3:92-cv-0095, Doc. 114 (M.D. Pa. Aug. 13, 1992) (per curiam).

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.

### **D. Federal Court Must Defer 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 the 1990s in North Carolina, Georgia, and Texas, the federal district court that had struck down a congressional plan as a racial gerrymander allowed the legislature an opportunity to correct the plan at its next session. *See Cromartie v. Hunt*, 34 F. Supp.2d 1029 (E.D. N.C. 1998), *rev'd*, *Hunt v. Cromartie*, 526 U.S. 541 (1999); *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 515 U.S. 900 (1995); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996). Only when the Georgia and Texas legislatures had failed to enact a corrected plan did the federal courts in those states impose plans of their own. *See Johnson v. Miller II*, 922 F. Supp. 1552 (S.D. Ga. 1995); 922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996); 980 F. Supp. 251 (S.D. Tex. 1997); 980 F. Supp. 254 (S.D. Tex. 1997).

In contrast, 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, *Wetherell v. De Grandy*, 505 U.S. 1232 (1992) (mem.), and eventually reversed on the merits without comment on the conduct of the district court in so hastily imposing a remedy. *See Johnson v. De Grandy*, 512 U.S. 997 (1994).

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. *Upham v. Seamon*, 456 U.S. 37 (1982). The federal court must adopt a plan that remedies the violations but incorporates as much of the state's redistricting law as possible. *Perry v. Perez*, No. 11-713, 565 U.S. \_\_\_\_ (Jan. 20, 2012) (per curiam); *Upham v. Seamon*, 456 U.S. at 43; *White v. Weiser*, 412 U.S. 783, 793-97 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971). See also *Abrams v. Johnson*, 521 U.S. 74 (1997).

#### **E. Attorney General May Represent State 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, *Grove v. Emison*, 507 U.S. 25 (1993), 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. 521 U.S. 567 (1997).

Florida Senate District 21 (Tampa Bay) had been challenged in federal court on the ground that it violated the [Equal Protection Clause](#) of the U.S. Constitution. The district had been drawn by the Florida Legislature; the Justice Department had refused to preclear it because it failed to create a majority-minority district in the area; the governor and legislative leaders had refused to call a special session to revise the plan; the state Supreme Court, performing a review mandated by the Florida Constitution before the plan could be put into effect, had revised the plan to accommodate the Justice Department's objection; and the plan had been used for the 1992 and 1994 elections. A suit had been filed in April 1994, and a settlement agreement was presented for court approval in November 1995. The Florida attorney general appeared representing the State of Florida, and lawyers for the president of the Senate and the speaker of the House appeared representing their respective bodies. All parties but two supported the settlement agreement, and in March 1996 the district court approved it. Appellants argued that the district court had erred in not affording the Legislature a reasonable opportunity to adopt a substitute plan of its own. The Supreme Court did not agree.

Justice Souter, 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. 521 U.S. at 577 n.4.

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.

521 U.S. at 589.

Now that it is clear that 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.

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