MINNESOTA STATE SENATE

SUBCOMMITTEE ON REDISTRICTING
OF THE COMMITTEE ON RULES AND ADMINISTRATION

Senator Roger D. Moe, Chairman of the Subcommittee on Redistricting of the Senate Committee on Rules and Administration, called the meeting to order on Monday, February 26, 2001, at 10:10 a.m. in room 107 of the State Capitol.

Members present:

Moe, Chair	
Belanger	Cohen
Hottinger	Johnson DH
Kleis	Knutson
Neuville	Orfield
Pogemiller	Rest

A quorum was present.

Senator Belanger raised a question about Senate Counsel Peter Wattson's February 13, 2001 affidavit filed in Wright County, Tenth Judicial District: Zachman vs. Kiffmeyer. (see attached, Document # 11). No action was taken.

Peter Wattson, Senate Counsel, presented a historical perspective on redistricting and took questions from committee members. (see attached, Documents # 1).

Senator Larry Pogemiller presented SF1013: Legislative and congressional districts redistricting principles, the A-1 amendment and took questions from committee members. (see attached, Documents # 6 - # 8).

The meeting adjourned at 12:01 p.m.

Roger D. Moe
Senator Roger D. Moe, Chairman

Todd Olson
Todd Olson, Committee Clerk

SUBCOMMITTEE ON REDISTRICTING
OF THE
COMMITTEE ON RULES AND ADMINISTRATION

Chair: Roger D. Moe
Monday, February 26, 2001
10:00 a.m.
Room 107, Capitol

A G E N D A

I. Call to Order

II. Discussion of redistricting goals and principles

- Historical Perspective Presentation by Peter Wattson

III. Discussion/Subcommittee Action

IV. Adjournment

Document #1

Traditional Districting Principles

Peter S. Wattson
Senate Counsel
State of Minnesota

Traditional Districting Principles

- Why Do We Need Them?
- What are They?
- Where Do they Come From?

Why Do We Need Them?

- Partisan Gerrymandering
- Racial Gerrymandering

Partisan Gerrymandering

- Packing
- Fracturing
- Creating a Gerrymander
- The Need for Limits

Racial Gerrymandering

Use of Race in Redistricting

- The Voting Rights Act – Damned if you Don't
- The 14th Amendment – Damned if you Do

Voting Rights Act § 2

Damned if You Don't

- Discriminatory Effect
- Three *Gingles* Preconditions
  - Sufficiently Large and Geographically Compact
  - Politically Cohesive
  - Bloc Voting Usually Defeats Minority Choice
- Totality of the Circumstances
- Draw Districts the Minority has a Fair Chance to Win

Equal Protection Clause of the 14th Amendment

Damned if You Do

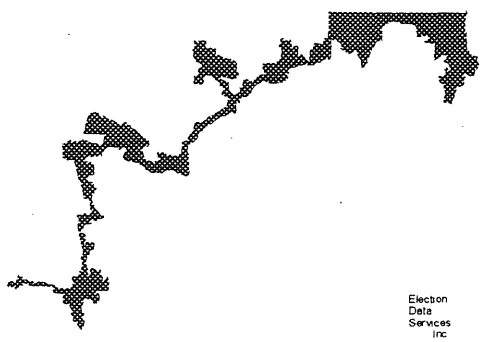
- You May Consider Race in Drawing Districts
- You May Not Allow Race to Predominate Over "Traditional Districting Principles"

Racial Gerrymanders

- Beware of Bizarre Shapes
- Draw Districts that are "Reasonably Compact"

North Carolina

Congressional District 12 - 1992

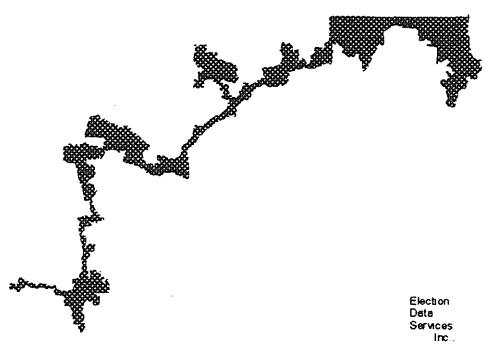


"Reapportionment is one area in which appearances do matter."

Redistricting is one area in which appearances do matter

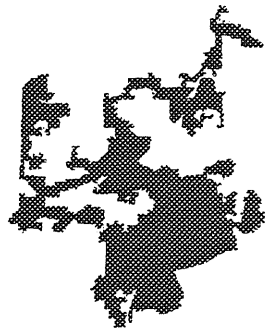
North Carolina

Congressional District 12 - 1992



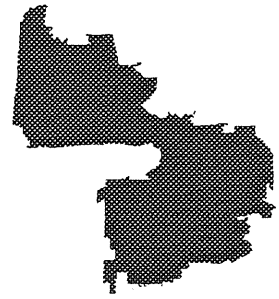
Texas

Congressional District 30 - 1992



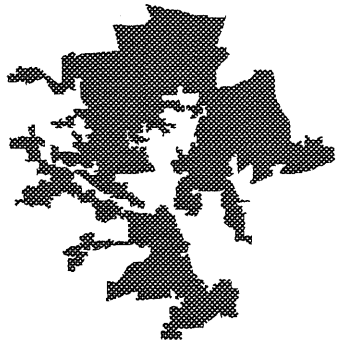
Texas

Congressional District 30 - 1996



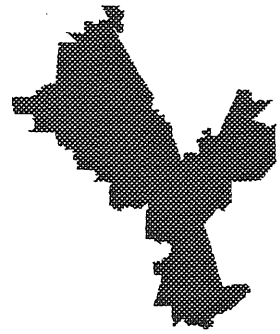
Texas

Congressional District 18 - 1992



Texas

Congressional District 18 - 1996

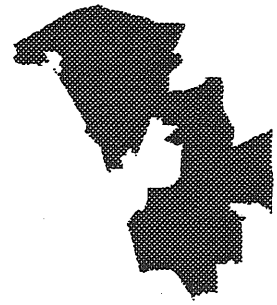


Texas

Congressional District 29 - 1992

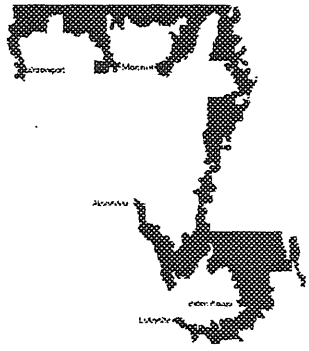
Texas

Congressional District 29 - 1996



Louisiana

Congressional District 4 - 1992

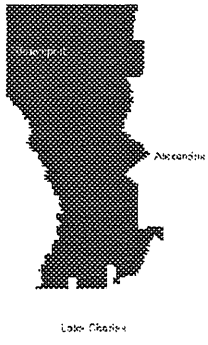


Louisiana

Congressional District 4 - 1994

Louisiana

Congressional District 4 - 1996



Florida

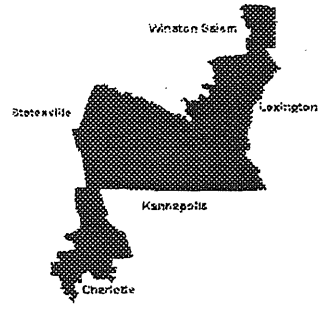
Congressional District 3 - 1992

Florida

Congressional District 3 - 1996

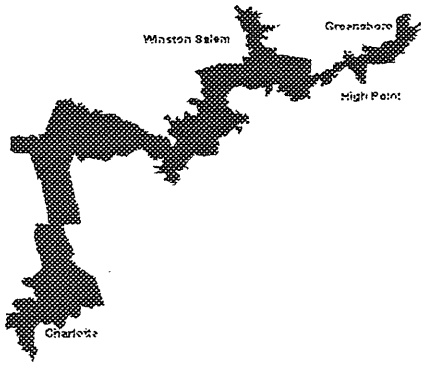
North Carolina

Congressional District 12 - 1998



North Carolina

Congressional District 12 - 2000 (1997)

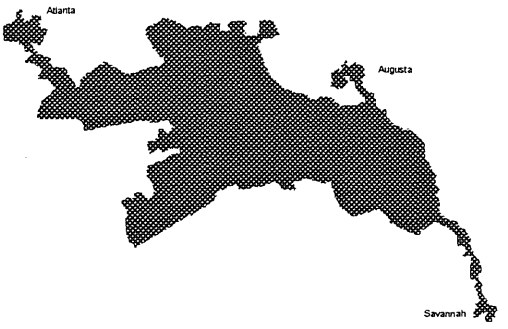


Racial Gerrymanders

- Beware of Making Race Your Dominant Motive

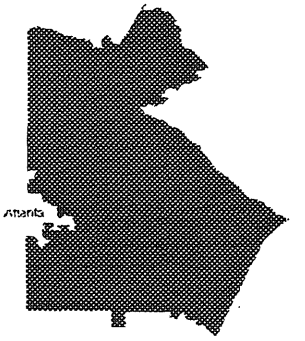
Georgia

Congressional District 11 - 1992



Georgia

Congressional District 4 - 1996



Racial Gerrymanders

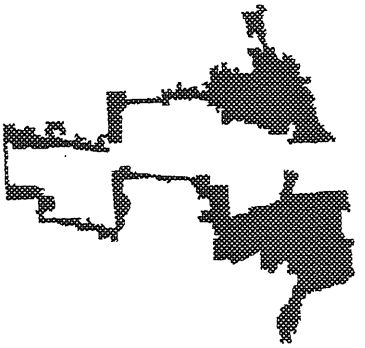
- Beware of Using Race as a Proxy for Political Affiliation

Strict Scrutiny

- A Compelling Governmental Interest
  - Remedying Past Discrimination
  - Avoiding Retrogression Under § 5
  - Avoiding a Violation of § 2
- Narrowly Tailored to Achieve that Interest

Illinois

Congressional District 4 - 1992



Traditional Districting Principles

- You Must Consider Race
- You Must Subordinate Race to "Traditional Districting Principles"

What Are They?

- Equal Population
- Compact
- Contiguous Territory
- House Districts Nested within Senate Districts
- Protect Racial and Language Minorities
- Preserve Political Subdivisions
- Preserve Communities of Interest

Where Do They Come From?

- U.S. Constitution
  - Court Decisions
- State Constitutions
- State Statutes
- State Resolutions
  - Court Decisions

U.S. Constitution

Equal Population

- Article 1, § 2
- 14th Amendment, Equal Protection Clause

Article 1, § 2

Congressional Districts

- "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers . . . ." (1787)

Congressional Districts

- *Wesberry v. Sanders* (1964)
  - "As nearly equal in population as practicable."
- *Karcher v. Daggett* (1983)
  - Unless necessary to achieve "some legitimate state objective"
    - Compact
    - Respect Municipal Boundaries
    - Preserve the Cores of Prior Districts
    - Avoid Contests Between Incumbents

14th Amendment Equal Protection Clause

Legislative Districts

- "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." (1868)
- *Reynolds v. Sims* (1964)
  - "[M]athematical nicety is not a constitutional requisite"
  - States must achieve "sustantial equality of population among the various districts"

Legislative Districts

- An Overall Range of 10 Percent
  - Ideal District
  - Deviation
  - Average Deviation
  - Overall Range
- Unless Necessary to Achieve Some "Rational State Policy"
  - Affording Representation to Political Subdivisions
  - Other State Policies

Minnesota Constitution

- Article IV, § 2
- Article IV, § 3

Article IV, § 2

- "The number of members who compose the senate and house of representatives shall be prescribed by law."
- "The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof."

Article IV, § 3

- "Senators shall be chosen by single districts of convenient contiguous territory."
- "No representative district shall be divided in the formation of a senate district."
- "The senate districts shall be numbered in a regular series."

Minnesota Statutes

- Minn. Stat. § 2.031 – number of members
- Minn. Stat. § 2.91 – correction of errors
  - Omitted territory
  - Duplicate territory
  - Noncontiguous territory
  - Erroneous metes and bounds description

Minnesota Resolutions of 1991

Equal Population – Legislative Districts

- "The population of a district must not deviate from the ideal by more than two percent, plus or minus."

Minnesota Resolutions of 1991

Compactness and Contiguity

- "To the extent consistent with the other standards in this resolution, districts should be compact. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district."

Minnesota Resolutions of 1991

Protection of Minorities

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

Minnesota Resolutions of 1991

Preserving Political Subdivsions

- "A county, city, or town must not be divided into more than one district except as necessary to meet equal-population requirements or to form districts that are composed of convenient contiguous territory."

Minnesota Resolutions of 1991

Communities of Interest

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

Minnesota Resolutions of 1991

Data to be Used

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

Minnesota Resolutions of 1991

Notice of Readiness

- "The Subcommittee on Redistricting will notify the President of the Senate and the Speaker of the House of Representatives when the necessary 1990 census data has been . . . verified as ready for use in redistricting. A redistricting plan will not be considered for adoption by the Senate or House of Representatives until the notice has been given."

Court Decisions

1972 and 1982

- Avoid Contests Between Incumbents

Traditional Districting Principles

Peter S. Wattson
Senate Counsel
State of Minnesota

Document #2

House Concurrent Resolution No. 1
adopted May 13, 1991

A House concurrent resolution
relating to congressional redistricting; establishing standards for redistricting plans.

BE IT RESOLVED, by the House of Representatives of the State of Minnesota, the Senate concurring therein:

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

(1) There must be eight districts, each entitled to elect a single member.

(2) The districts must be as nearly equal in population as practicable.

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

(4) The districts must be numbered in a regular series, beginning with congressional district 1 in the southeast corner of the state and ending with district 8 in the northeast corner of the state.

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

(6) A county, city, or town must not be divided into more than one district except as necessary to meet equal-population requirements or to form districts that are composed of convenient contiguous territory.

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

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

The Subcommittee on Redistricting will notify the President of the Senate and the Speaker of the House of Representatives when the necessary 1990 census data has been received from the United States Census Bureau, loaded into the Subcommittee's computerized redistricting system, and verified as ready for use in redistricting. A redistricting plan will not be considered for adoption by the Senate or House of Representatives until the notice has been given.

House Concurrent Resolution No. 2
adopted May 13, 1991

A House concurrent resolution
relating to legislative redistricting; establishing standards for redistricting plans.

BE IT RESOLVED, by the House of Representatives of the State of Minnesota, the Senate concurring therein:

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

(1) The Senate must be composed of 67 members. The House of Representatives must be composed of 134 members.

(2) Each district is entitled to elect a single member.

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

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

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

(6) The districts must be numbered in a regular series, beginning with House district 1A in the northwest corner of the state and proceeding across the state from west to east, north to south, but bypassing the seven-county metropolitan area until the southeast corner has been reached; then to the seven-county metropolitan area outside the cities of Minneapolis and St. Paul; then in Minneapolis and St. Paul.

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

(8) A county, city, or town should not be divided into more than one district except as necessary to meet equal-population requirements or to form districts that are composed of convenient contiguous territory.

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

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

The Subcommittee on Redistricting will notify the President of the Senate and the Speaker of the House of Representatives when the necessary 1990 census data has been received from the United States Census Bureau, loaded into the Subcommittee's computerized redistricting system, and verified as ready for use in redistricting. A redistricting plan will not be considered for adoption by the Senate or House of representatives until the notice has been given.

Document #3

Treatise
Senate Counsel & Research

Senate
State of Minnesota

Use of Racial Data in Redistricting

by
Peter S. Wattson
Senate Counsel

This paper provides background information on the use of racial data in redistricting in order to assist the Minnesota Legislature's Subcommittee on Geographic Information Systems in deciding how to deal with racial data in its redistricting computer system.

I. The Voting Rights Act

Section 2 of the Voting Rights Act of 1965, as amended in 1982 and interpreted in a series of court decisions, prohibits a state from enacting a redistricting plan that "results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color"[1] or because a person is "a member of a language minority group."[2] A "language minority group" is defined as "American Indian, Asian American, Alaskan Natives or of Spanish heritage."[3]

Note that the law does not prohibit only plans whose drafters intended to discriminate based on race. It prohibits any plan that will result in discrimination. A violation is established if, "based on the totality of the circumstances," the members of a racial or language minority group "have less opportunity that other members of the electorate to . . . elect representatives of their choice."[4]

To prove a violation, a plaintiff must first prove that the minority is "sufficiently large and geographically compact to constitute a majority in a single-member district."[5] In other words, if the number of minority voters is less than needed to elect a representative if all were in the same district and all voted for the same candidate, the minority group can not prevail on a claim that the plan violates § 2. On the other hand, where plaintiffs can show that the members of a racial

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[1] 42 U.S.C. § 1973(a).

[2] 42 U.S.C. § 1973b(f)(2).

[3] 42 U.S.C. § 1973l(c)(3).

[4] 42 U.S.C. § 1973 (b).

[5] *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

or language minority group are sufficiently numerous and geographically compact to constitute a majority in a single-member district, that the minority usually votes for the same candidates, that bloc voting by the White majority usually defeats the minority's preferred candidate, and that the state has a history of discriminating against that minority group, the minority group can demand that a district be drawn that the minority's preferred candidate has a fair chance to win. So, whether a "majority-minority district" is required depends first on a count of the racial and language minority population in the area where a district may be drawn.

Beyond determining whether the plan drafters must draw a majority-minority district, data on race is necessary in order to determine whether a proper majority-minority district has been drawn. In order to have a fair chance to win the district, the minority group must be given, by the plan drafters, an effective voting majority. How much of a majority that is depends again on "the totality of the circumstances." In an ordinary case, that may be a simple majority of the voting-age population in the district. Again, in order to know whether the minority population is a majority of the voting-age population, the plan drafters must be able to count the residents of the proposed district by race.

II. The Office of Management and Budget

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 Spanish heritage. For the 1990 census, the racial categories were: White, Black, American Indian, Asian or Pacific Islander, and Some Other Race. Persons of Spanish heritage might be of any race. For the 2000 census, the Office of Management and Budget required that persons be given the opportunity to select more than one race when answering the census. It also separated Native Hawaiians and other Pacific Islanders from the Asians, so there are now six race categories instead of five.

When we consider those who report being of more than one race, the categories multiply rapidly. The Census Bureau currently plans to report racial data in 63 categories, covering those who report being in up to all six racial groups. Double that for Spanish heritage and double it again for those under and over 18. Double it again if we receive both the raw head count and an adjusted count. That is 504 potential categories of population count *for each block*!

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

1. the five single-race categories;

2. the four most commonly reported combinations of two races: American Indian or Alaska Native *and* White; Asian *and* White; Black or African American *and* White; and American Indian or Alaska Native *and* Black or African American;

3. any other combinations of two or more races that represent more than one percent of the population in a jurisdiction; and

4. the balance reporting more than one race.

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

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

Hispanic
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 plus Non-Hispanic American Indian and White
Non-Hispanic Pacific Islander plus Non-Hispanic Pacific Islander and White
Non-Hispanic Some other race
Non-Hispanic Other multiple-race (where more than one minority race is listed)

The total of these racial groups will add to 100 percent. Where there is an unusual number of people checking multiple race categories, some additional categories may be needed. There may be circumstances in which the total population by race is important, but most redistricting decisions that consider race will be based on the voting age population, that is, persons age 18 and over.

III. The Subcommittee's Redistricting System

The Subcommittee's redistricting system will include all 504 categories of racial and Spanish heritage data, actual and adjusted. A user will be able to select the combinations of data desired and to display that data on a map using numbers, thematic shading, or pie charts. The user will also be able to generate reports showing population counts by race for any of the categories or combinations of categories, such as those required by the Justice Department.

Document #4

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Redistricting
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History of Minnesota Redistricting

Legislature

	Senate	House
	1850 Census	
Gen. Laws 1860, ch. 73 House	21	42
	1860 Census	
Gen. Laws 1866, ch. 4	22	47
	1870 Census	
Gen. Laws 1871, ch. 20	41	106
	1880 Census	
Gen. Laws 1881, ch. 128	47	103
Gen. Laws 1889, ch. 2	54	114
	1890 Census	
Laws 1897, ch. 120	63	119
	1900 Census	
	1910 Census	
Laws 1913, ch. 91	67	130
	1920 Census	
	1930 Census	
	1940 Census	
	1950 Census	
Districts grossly unequal in population, court will defer to legislature - *Magraw v. Donovan*, 163 F.Supp. 184 (D. Minn. 1958)		
Laws 1959, E.S. ch. 45	67	135
	1960	

[redacted]

Census

Plan declared invalid - *Honsey v. Donovan*, 236 F.Supp. 8 (Dec. 4, 1964)

1965 regular session

S.F. No. 102

Introduced	1/19/65	1965 Senate Journal 66
Sent to Governor Rolvaag	5/20/65	1965 Senate Journal 2133
Vetoed	5/24/65	1965 Senate Journal 2554

Veto is valid - *Duxbury v. Donovan*, 272 Minn. 424, 138 N.W.2d 692 (Nov. 26, 1965)

1966 extra session

S.F. No. 2

Introduced	4/25/66	1967 Senate Journal 21
Sent to Governor Rolvaag	5/9/66	1967 Senate Journal 119
Vetoed	5/11/66	1967 Senate Journal 126

S.F. No. 6

Introduced	5/18/66	1967 Senate Journal 133
Sent to Governor Rolvaag	5/18/66	1966 Senate Journal 137
Approved	5/20/66	Laws 1966, ex. sess. ch. 1

1970 Census

1971 regular session

H.F. No. 2531

Introduced	4/15/71	1971 House Journal 1363
Sent to Senate	4/26/71	1971 House Journal 1824
Referred to committee	4/27/71	1971 Senate Journal 1608

1971 extra session

H.F. No. 76

Introduced	6/2/71	1971 E.S. House Journal 51
Sent to Governor Anderson	10/29/71	1971 E.S. Senate Journal 607
House adjourned *sine die*	10/30/71	1971 E.S. House Journal 698
Pocket vetoed	11/1/71	1971 E.S. House Journal 702

Plan declared invalid - *Beens v. Erdahl*, No. 4-71-Civil 151 (D. Minn. Nov. 15, 1971)

Court plan 1	35	105

Beens v. Erdahl, 336 F.Supp. 715 (D. Minn. Jan. 25, 1972) *rev'd sub nom. Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (Apr. 29, 1972)

Court plan 2	67	134

Beens v. Erdahl, 349 F.Supp. 97 (D. Minn. June 2, 1972)

1980 Census

1982 regular session

S.F. No. 1552

Introduced	1/21/82	1982 Senate Journal 3163
Passed Senate	1/28/82	1982 Senate Journal 3242

Referred to committee		1/28/82	1982 House Journal 5144

Court plan - *LaComb v. Growe*, 541 F. Supp. 160 (D. Minn. Mar. 11, 1982)

Laws 1983, ch. 191 - court plan enacted, with adjustments

		1990 Census	
Laws 1991, ch. 246	67	134	
Vetoed		5/28/91	1991 Senate Journal 5544
Filed with Secretary of State		6/7/91	1991 Senate Journal 5566

Procedure set to challenge governor's late vetoes - *Seventy-Seventh Minnesota State Senate v. Carlson,* 472 N.W.2d 99 (Minn. June 20, 1991)

Governor's veto of redistricting law was invalid - *Seventy-Seventh Minnesota State Senate v. Carlson*, No. C3-91-7547 (Dist. Ct., Ramsey Co., Aug. 2, 1991)

State court proceedings enjoined - *Emison v. Growe*, No. 4-91-202 (D. Minn. Dec. 5, 1991)

Chapter 246 construed and corrected, subject to injunction - *Cotlow v. Growe*, No. C8-91-985 (Minn. Spec. Redis. Panel, Dec. 9, 1991)

Laws 1992, ch. 358 (correcting Laws 1991, ch. 246)

Vetoed	1/10/92	1992 Senate Journal 5616

Injunction vacated - *Cotlow v. Emison*, 502 U.S. 1022 (Jan. 10, 1992) (mem.)

Legislative plan rejected, court's plan adopted - *Emison v. Growe*, 782 F. Supp. 427 (D. Minn. Feb. 19, 1992)

Federal court's order on legislative plan stayed pending appeal - *Growe v. Emison*, 112 S.Ct 1461 (Mar. 11, 1992) (Blackmun, J., in chambers)

Federal court's order reversed - *Growe v. Emison*, 507 U.S. 25 (Feb. 23, 1993)

Laws 1994, ch. 612 (correcting legislative districts)

Approved	5/9/94

Laws 1997, ch. 44 (portions of Moorhead Township annexed by City of Dilworth moved from district 9A to district 9B)

Congress

Gen. Laws 1862, ch. 64	2 seats
Gen. Laws 1872, ch. 21	3 seats
Gen. Laws 1891, ch. 3	7 seats
Laws 1901, ch. 92	9 seats
Laws 1913, ch. 513	10 seats
Laws 1931, page 640 - H.F. No. 1456	9 seats

Vetoed

Veto invalid - *State ex rel. Smiley v. Holm*, 184 Minn. 228, 238 N.W. 494 (1931)

State court reversed, law nullified - *Smiley v. Holm*, 285 U.S. 355 (Apr. 11, 1932)

1932 election - 9 seats elected at large

Laws 1933, ch. 185	9 seats
Laws 1961, ex. sess. ch. 2	8 seats

Laws 1971, ch. 897	8 seats	
	1980 Census	
1981 regular session		
H.F. No. 1478		
Introduced	5/7/81	1981 House Journal 2766

1972 plan declared invalid - *LaComb v. Growe*, Civ. No. 4-81-414 (D. Minn. Sept. 15, 1981)

1982 regular session		
H.F. No. 1478		
Passed House	1/21/82	1982 House Journal 5057
Passed Senate	1/27/82	1982 Senate Journal 3239
Motion for conferees	1/28/82	1982 House Journal 5144

Court plan - *LaComb v. Growe*, 541 F.Supp. 145 (D. Minn. Mar. 11, 1982) *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982)

Challenge to court plan as gerrymander rejected as too late in decade - *Emison v. Growe*, No. Civ. 3-90-87 (D. Minn. Apr. 9, 1990)

	1990 Census	

State court proceedings enjoined - *Emison v. Growe*, No. 4-91-202 (D. Minn. Dec. 5, 1991)

Laws 1992, ch. 357	8 seats	
Vetoed	1/10/92	1992 Senate Journal 5618

Injunction vacated - *Cotlow v. Emison*, 502 U.S. 1022 (Jan. 10, 1992) (mem.)

Congressional plan adopted, state enjoined from implementing state court's congressional plan - *Emison v. Growe*, 782 F. Supp. 427 (D. Minn., Feb. 19, 1992)

Congressional plan adopted, subject to federal court's injunction - *Cotlow v. Growe*, No. C8-91-985 (Minn. Spec. Redis. Panel, Apr. 15, 1992)

Federal court's order reversed - *Growe v. Emison*, 507 U.S. 25 (Feb. 23, 1993)

Laws 1994, ch. 406 (enacting state court plan)	8 seats	
Approved	4/11/94	

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Last Updated: 11/29/00 (PSW)

Document #5

How to Draw Redistricting Plans

That Will Stand Up in Court

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Redistricting Task Force

Annual Meeting
Chicago, Illinois
July 17, 2000

Contents

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 the 2000 census so that you may learn how to draw redistricting plans that will stand up in court.

But, before I get into the cases, I think it is important to clarify some terms I will be using and to 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. Sections 2a and 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, as I shall explain in a moment.

B. Gerrymandering

The process of drawing districts with odd shapes to create an unfair advantage is called "gerrymandering."

Like "reapportionment," the term "gerrymandering" has become so popular that it has lost its original precision and is often used to describe any technique by which a political party attempts to give itself an unfair advantage.

Used in its narrow sense, to refer only to the practice of creating districts that look like monsters, there are basically just two techniques — packing and fracturing. How do they work?

1. Packing

"Packing" is drawing district boundary lines so that the members of the minority are concentrated, or "packed," into as few districts as possible. They become a supermajority in the packed districts — 70, 80, or 90 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 other districts, so they cannot elect representatives in proportion to their numbers in the state as a whole.

2. Fracturing

"Fracturing" is drawing district lines so that the minority population is broken up. Members of the minority 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. The Facts of Life

1. Creating a Gerrymander

It is a fact of life in redistricting that the district lines are always going to be drawn by the majority in power, and that 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.

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 I suspect that political minorities are not evenly distributed in any state, so the persons drawing the redistricting plan try to determine where they are, and draw their districts accordingly: first packing as many of them into as few districts as possible and then, where they can't be packed, fracturing them into as many districts as possible. It is this process of drawing the district lines to first pack and then fracture the minority that creates the dragon-like districts called gerrymanders.

2. The Need for Limits

The more freedom the majority has to determine where the district boundary lines will go, the greater the temptation to gerrymander. Equal-population requirements, disfavor of multimember

districts, and minority representation requirements are all attempts by the courts to restrain the majority from taking unfair advantage of their majority position when drawing redistricting plans.

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 2000 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 in the case of *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 in the case of *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*, Findings of Fact and Conclusions of Law, No. CV 88-5143 KN (Ex) (C.D. Cal. June 4, 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

For the year 2000 census, as there was for the 1990 census, there has been a political fight over how the population should be counted.

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 has been over whether to use scientific sampling techniques to conduct the census from the beginning, rather than adjusting the population counts after they have 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. 2480 (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 *Department 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.

Following the Supreme Court's decision, the Census Bureau announced its plan to use statistical sampling methods to conduct a postenumeration survey called the "Accuracy and Coverage Evaluation." As of May 1, 2000, the Bureau was planning to publish the census counts derived from sampling along with the head counts mandated by Pub. L. No. 105-119. In other words, each state would receive two sets of census counts for each area within the state and would have to make its own decision which count to use for each area.

3. Exclusion of Undocumented Aliens

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

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. 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 "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."

C. 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, Section 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"), and 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. Many states drew congressional plans with an overall range of either zero or one person. That is likely to be the standard for most plans in the future.

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.

So, 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. Arkansas, *Turner v. Arkansas*, 784 F. Supp. 553 (E.D. Ark. 1991); Maryland, *Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991); and West Virginia, *Stone v. Hechler*, 782 F. Supp. 1116 (W.D. W.Va. 1992); all were able to meet that burden when congressional plans drawn by the legislature were challenged in court in the 1990s.

Near the end of the decade, 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*, 117 S. Ct. 1925 (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.

D. Legislative Plans

1. An Overall Range of Less than Ten Percent

Fortunately for those of you who will be drawing redistricting plans after the 2000 census, the Supreme Court has adopted a less exacting standard for legislative plans. It is not based on the Apportionment Clause of Article I, Section 2, which governs congressional plans. Rather, it is based on the Equal Protection Clause of the 14th Amendment.

As Chief Justice Earl Warren observed in the 1964 case of *Reynolds v. Sims*, 377 U.S. 533, "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.

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).

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 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.

Three-judge courts, who are called upon to draw redistricting plans when legislatures do not, often have adopted criteria for the parties to follow in submitting proposed plans to the court. These criteria 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 criteria 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 has begun to refer to these criteria (including respecting the boundaries of political subdivisions) as "traditional districting principles." *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (slip op. at 6-17); *Miller v. Johnson*, 515 U.S. 900, 919 (slip op. at 16) (1995); *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 1901 (1996); *Bush v. Vera*, 517 U.S. 952, ____, 116 S. Ct. 1941, 1952 (1996); *Abrams v. Johnson*, 117 S. Ct. 1925, 1932-38 (1997).

III. Don't Discriminate Against Racial or Language Minorities

A. Section 2 of the Voting Rights Act

1. No Discriminatory Effect

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

In a democracy, "power to the people" means the power to vote. Section 2 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973[1], attempts to secure this political power

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

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

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

§ 1973b (f)(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

§ 1973l(c)(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

for racial and language minorities by prohibiting states and political subdivisions from imposing or applying voting qualifications; prerequisites to voting; or standards, practices, or procedures to 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.

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

Until the U.S. Supreme Court case of *City of Mobile v. Bolden*, 446 U.S. 55, in 1980, the courts generally considered whether a particular redistricting plan had the *effect* of diluting the voting strength of the Black population. In *Bolden*, Black residents of Mobile, Alabama, charged that the city's practice of electing commissioners at large diluted minority voting strength. The Supreme Court, however, refused to throw out the at-large plan. The Court interpreted Section 2 as applying only to actions *intended* to discriminate against Blacks, and since the plaintiffs had failed to prove that it was adopted with an *intent* to discriminate against Blacks, the Court concluded that the plan did not violate Section 2.

Congress quickly rejected the Court's interpretation by amending Section 2. As enacted, it had prohibited conduct "to deny or abridge" the rights of racial and language minorities. 42 U.S.C.A. § 1973 (1981). The 1982 amendments changed that to prohibit conduct "which results in a denial or abridgement" of those rights. Pub.L. No. 97-205, § 3, June 29, 1982, 96 Stat. 134, codified as amended at 42 U.S.C. § 1973. Congress also decided to codify the pre-*Bolden* case law by adding:

> A violation of [section 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 [section 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.

42 U.S.C. § 1973 (b).

2. The Three *Gingles* Preconditions

The 1982 amendments to Section 2 were first considered by the Supreme Court in the 1986 case of *Thornburg v. Gingles*, 478 U.S. 30, which challenged 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 Section 2, as amended. In order to assist courts in evaluating challenges to redistricting plans,

Justice Brennan imposed three preconditions that a plaintiff must prove before a court must proceed to a detailed analysis of a plan:

1) that the minority 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.

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

3. "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 Section 2. They include the following:

1) the extent of the history of official discrimination touching on the class participation in the democratic process;

2) racially polarized voting;

3) the extent to which the State or political subdivision has used unusually large election districts, majority vote requirements, antisingle-shot provisions, or other voting practices that enhance the opportunity for discrimination;

4) denial of access to the candidate slating process for members of the class;

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

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

7) the extent to which members of the protected class have been elected;

8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the 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.

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

If you have a minority population that could elect a representative if given an ideal district, and the minority population has been politically cohesive, but bloc voting by Whites has prevented members of the minority from being elected in the past, you may have to create a district that the minority has a fair chance to win. To do that, they will need an effective voting majority in the district. How much of a majority is that?

Under Section 2, that depends on "the totality of the circumstances." In other words, there is no fixed rule that applies to all cases.

The Supreme Court, in the case of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977), 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.

The Court of Appeals for the Seventh Circuit, in the case of *Ketchum v. Byrne*, 740 F.2d 1398 (1984), 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.

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.

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.*

If you face a charge of a Section 2 violation, you had better be prepared with empirical data 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.

B. Section 5 of the Voting Rights Act

1. In "Covered Jurisdictions," Plans Must be Precleared

While Section 2 of the Voting Rights Act applies throughout the United States, Section 5, codified as amended at 42 U.S.C. § 1973c, applies only to certain covered jurisdictions, which are listed in table 6 of NCSL's new book *Redistricting Law 2000* . If you're covered, you know it, because all of your election law changes since 1965, and not just your redistricting plans, have had to be cleared, before they take effect, by either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.

2. Do Not Regress

Section 5 preclearance of a redistricting plan will be denied if the Justice Department or the Court concludes that the plan fails to meet the no "retrogression" test, first set forth in *Beer v. United States*, 425 U.S. 130 (1976), and reaffirmed in *City of Lockhart v. United States.*, 460 U.S. 125 (1985). Simply stated, the test means that a plan will not be precleared if it makes the members of a racial or language minority worse off than they were before. One measure of whether they will be worse off than before is whether they are likely to be able to elect fewer minority representatives than before.

Beer was a challenge to the 1971 redistricting of the city council seats for the city of New Orleans. Since 1954, two of the seven council members had been elected at large; five others had

been elected from single-member wards last redrawn in 1961. Even though Blacks were 45 percent of the population and 35 percent of the registered voters in the city as a whole, Blacks were not a majority of the registered voters in any of the wards, and were a majority of the population in only one ward. No ward had ever elected a council member who was Black. Under the 1971 redistricting plan, one ward was created where Blacks were a majority of both the population and of the registered voters, and one ward was created where Blacks were a majority of the population but a minority of the registered voters. The Supreme Court held that the plan was entitled to preclearance since it enhanced, rather than diminished, Blacks' electoral power.

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

In 1987, the Justice Department announced that, notwithstanding the retrogression test employed by the courts when considering preclearance under Section 5, the Justice Department would apply the stricter standards of Section 2 when deciding whether to preclear a plan under Section 5. Supplemental Information, 52 Fed. Reg. 487 (1987). This practice has now been discredited by the Supreme Court. *See Reno v. Bossier Parish School Bd.*, 117 S. Ct. 1491 (1997).

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 Section 2. The Supreme Court rejected this argument, saying that preclearance under Section 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates Section 2. The Court pointed out that sections 2 and 5 were designed to combat two different evils, and that Section 5 was only directed at effects that are retrogressive.

Even though your plan doesn't make racial or language minorities any worse off than they were before, and therefore gets precleared by the Justice Department, don't think that you are immune from a challenge under Section 2. The Justice Department made it clear in 1987 that "Section 5 preclearance will not immunize any change from later challenge by the United States under amended Section 2." Supplemental Information, 52 Fed. Reg. 487 (1987). After *Bossier Parish*, a subsequent attack by the Justice Department against a precleared plan seems even more likely.

3. 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. These plans have now all been struck down by the courts. *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (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, 116 S. Ct. 1941 (1996).

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

Section 2 included a proviso, added through the efforts of Senator Dole in 1982, that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (b). In other words, Section 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. DeGrandy*, 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 DeGrandy 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 DeGrandy) 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. 1017 (slip op. at 20). Indeed, even a failure to achieve proportionality does not, by itself, constitute a violation of Section 2. 512 U.S. at 1009-12 (slip op. at 11-14).

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

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

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

515 U.S. at 924-25.

C. Equal Protection Clause of the 14th Amendment

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

1. You May Consider Race in Drawing Districts

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

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

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

You may even intentionally create majority-minority districts, as a California state court did, see *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd* 515 U.S. 1170 (1995), without violating the Equal Protection clause. *Bush v. Vera*, 517 U.S. 952, ____, 116 S. Ct. at 1951 (1996).

2. Avoid Drawing a Racial Gerrymander

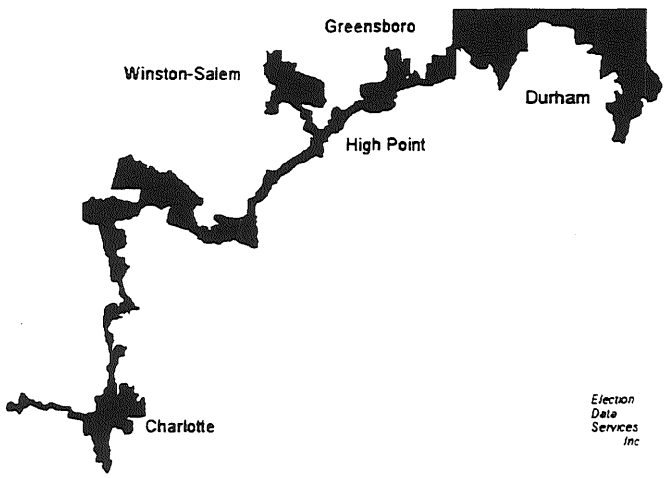
But, when a state creates a majority-minority district without regard to "traditional districting principles," the district will be subject to strict scrutiny and probably thrown out. *Shaw v. Reno*, 509

U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996). If you want your majority-minority districts to stand up in court, you would best avoid drawing a racial gerrymander.

a. Beware of Bizarre Shapes

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

North Carolina Congressional District 12 - 1992



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

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

As Justice O'Connor said, "[R]eapportionment is one area in which appearances do matter." 509 U.S. at 647 (slip op. at 15).

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age,

> education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls . . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

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

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

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

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

517 U.S. 952, ____,116 S. Ct. at 1962 (1996).

b. Draw Districts that are Reasonably Compact

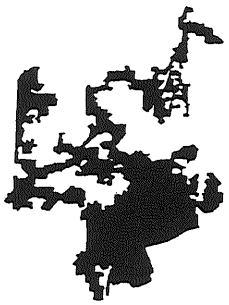
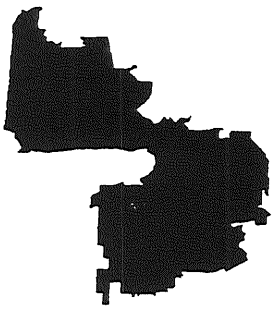
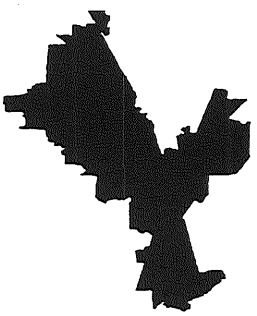
To avoid districts with bizarre shapes, you will want to draw districts that are compact. How compact must they be? *Reasonably* compact. As Justice O'Connor said in *Bush v. Vera*, 517 U.S. 952 (1996):

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

517 U.S. at ____, 116 S. Ct. at 1960.

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.

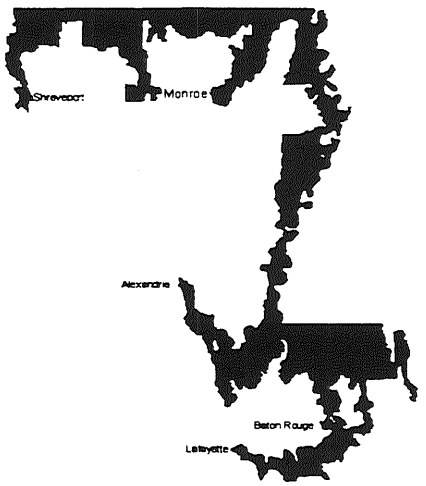
Texas

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

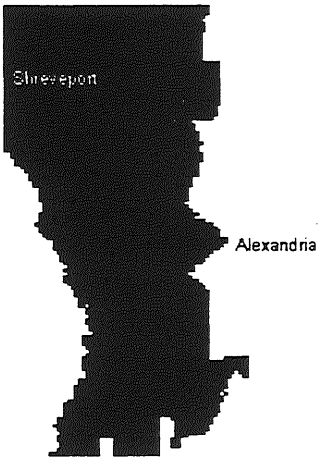
Louisiana

Congressional District 4

1992



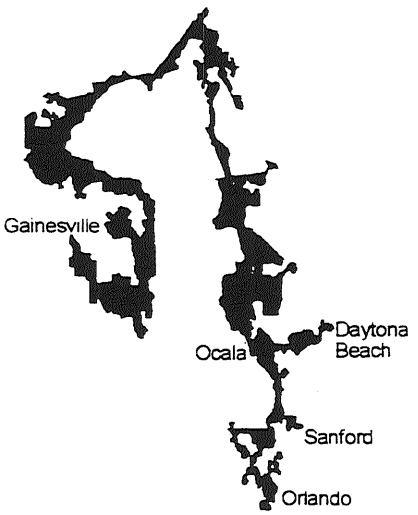
1996



Florida

Congressional District 3

1992

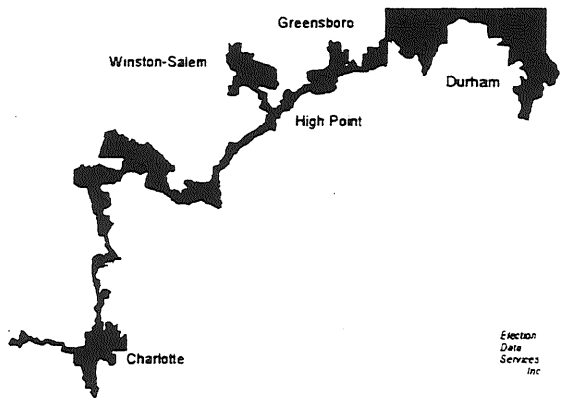


1996

North Carolina

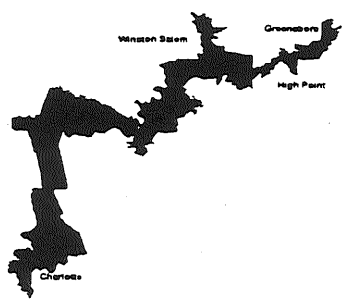
Congressional District 12

1992



1998

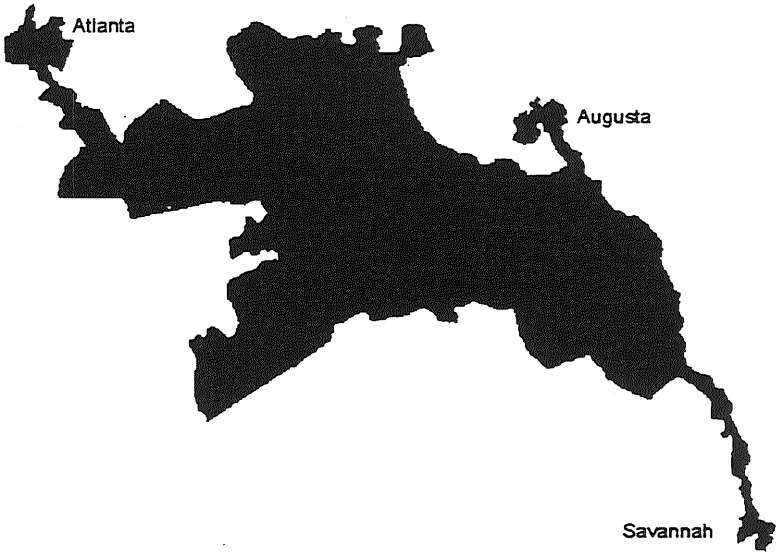
2000



c. Beware of Making Race Your Dominant 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 dominant motive for drawing the lines the way you did.

Georgia
Congressional District 11 - 1992



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 1980 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 it's 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 dominant 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 dominant factor the Legislature considered when drawing the 11th 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 11th 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.

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

If you want to argue that partisan politics, not race, was your dominant 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, ___, 116 S. Ct. 1941, 1959-61 (1996). The Court subjected the districts to strict scrutiny and struck them down. 517 U.S. at ____, 116 S. Ct. at 1961-62.

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 at 647 (slip op. at 15). 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, ____ , 116 S. Ct. at 1960 (1996). And in the 1997 Georgia case, it added "maintaining . . . district cores" and "[p]rotecting incumbents from contests with each other." *Abrams v. Johnson*, 117 S. Ct. 1925, ____ (slip op. at 8-9).

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 1990s are shown in table 5 and appendix G of NCSL's book, *Redistricting Law 2000*. 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 only by 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 14th 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 Section 5 of the Voting Rights Act, and avoiding a violation of Section 2 of the Voting Rights Act to be possible compelling governmental interests.

b. Narrowly Tailored to Achieve that Interest

During the 1990s, 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); *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*, 117 S. Ct. 429, *on remand* 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd mem.* 118 S. Ct. 877 (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. Crosun 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(slip op. at 24), 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 (slip op. at 25) (internal citations and quotations omitted). North Carolina failed to meet this standard, and its 12th congressional district was struck down. *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (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 Section 5

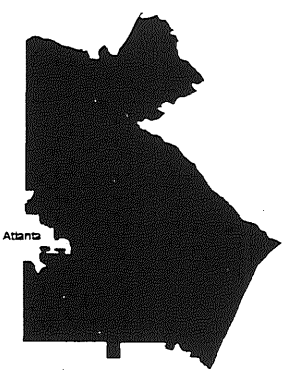
The Supreme Court has assumed, without deciding, that avoiding retrogression in violation of Section 5 of the Voting Rights Act would be a compelling governmental interest.

In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court anticipated that the State might assert on remand that complying with Section 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 (slip op. at 23). In *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (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 ____, 116 S. Ct. at 1904. Since the 12th district was not narrowly tailored to serve the State's interest in complying with Section 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 Section 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 Section 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., Dec. 1, 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. *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga., Dec. 13, 1995).

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*, 117 S. Ct. 1925 (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 Section 5 of the Voting Rights Act.

(3) Avoiding a Violation of Section 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 Section 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 (slip op. at 23-24).

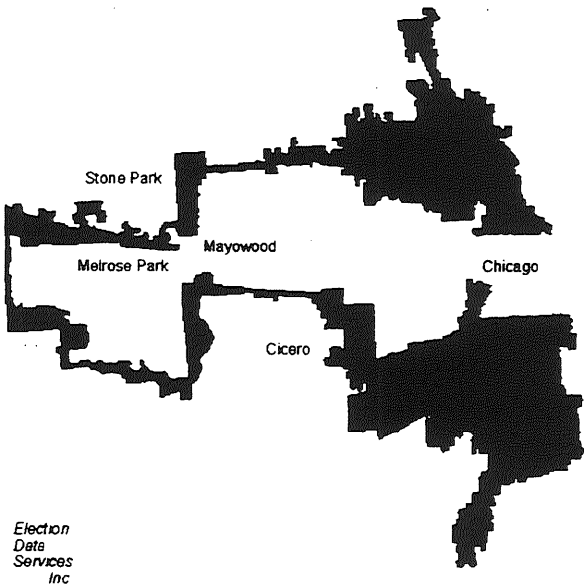
When the case returned to the Court for a second time, after the district court had found the plan to be narrowly tailored to comply with both Section 2 and Section 5, *Shaw v. Hunt*, 861 F. Supp. 408 (E.D. N.C. 1994), the Supreme Court again reversed the district court.

The Court said that, to make out a violation of section 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, ____, 116 S. Ct. 1894, 1901 (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 ____, 116 S. Ct. 1906.

In the Texas case, *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1894 (1996), the Court again assumed without deciding that complying with Section 2 was a compelling state interest, 517 U.S. at ____, 116 S. Ct. at 1960, but found that the districts were not narrowly tailored to comply with Section 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 Section 2; if the minority population is sufficiently compact to draw a compact district, nothing in Section 2 requires the creation of a race-based district that is far from compact. 517 U.S. at ____, 116 S. Ct. at 1961.

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 Section 2 of the Voting Rights Act.

Illinois
Congressional District 4



Following the Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), plaintiffs in Illinois attacked District 4. 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. When forced to review the prior decision in the light of *Shaw v. Reno* and *Miller v. Johnson*, a different panel of the district court found that the compactness requirement of *Thornburg v. Gingles* applied only in determining whether a Section 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 African American representation. 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*, 117 S. Ct. 429 (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 Section 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.* 118 S. Ct. 877 (1998).

IV. Don't Go Overboard with Partisan Gerrymandering

A. Partisan Gerrymandering is a Justiciable Issue

The Voting Rights Act does not apply to conduct that has the effect of diluting the voting strength of partisan minorities, such as Republicans in some states and Democrats in others. Partisan minorities must look for protection to the Equal Protection Clause of the 14th Amendment.

Modern technology, while making it practicable to draw districts that are mathematically equal, has also allowed the majority to draw districts that pack and fracture the partisan minority in such a way as to minimize the possibility of their ever becoming a majority.

While the federal courts have not yet developed criteria for judging whether a gerrymandered redistricting plan is so unfair as to deny a partisan minority the equal protection of the laws, the Supreme Court has held, in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering is a justiciable issue. What this means is that you must be prepared to defend an action in federal court challenging your redistricting plans on the ground that they unconstitutionally discriminate against the partisan minority.

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 no-retrogression test 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 fractured 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 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," 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 is likely to lose elections held under the plan is 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]." 478 U.S. at 132.

B. Can It Be Proved?

How do the members of a major political party prove that they do not have "a fair chance to influence the political process?"

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). As the lower court said:

> Specifically, there are no factual allegations regarding California Republicans' role in 'the political process as a whole.' [citation omitted] There are no allegations that California Republicans have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fundraising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any

> impediments to their full participation in the 'uninhibited, robust, and wide-open' public debate on which our political system relies. [citation omitted]

694 F. Supp. at 670.

Further, the Court took judicial notice that Republicans held 40 percent of the congressional seats and had a Republican governor and United States senator.

> Given also the fact that a recent former Republican governor of California has for seven years been President of the United States, we see the fulcrum of political power to be such as to belie any attempt of plaintiffs to claim that they are bereft of the ability to exercise potent power in 'the political process as a whole' because of the paralysis of an unfair gerrymander.

694 F. Supp. at 672.

During the 1990s, the Virginia state house plan and the North Carolina congressional plan were attacked as partisan political 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).

In a democracy, the majority does not need to have the leaders of the opposition shot, or jailed, or banished from the country, or even silenced. They do not need to shut the minority out of the political process—they simply out vote them.

If the members of the majority party in your State are prepared to let the minority party participate fully in the process of drawing redistricting plans, and simply out vote them when necessary, your State should be prepared to withstand a challenge that the plans unconstitutionally discriminate against the partisan minority.

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

After the 1990 census, 20 states had suits in state courts concerning redistricting plans; 28 states had suits in federal court. Eleven states had suits in both state and federal courts *on the same plan*. New York had cases in four different federal courts and three different state courts.

After the 2000 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"), but others did not. *See, e.g., Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 677 (E.D. N.Y. 1992), *injunction stayed mem. sub nom. Gantt v. Skelos*, 504 U.S. 902 (1992).

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., Johnson v. DeGrandy*, 512 U.S. 997, slip op. at 6-8 (1994); *Nerch v. Mitchell*, No. 3:CV-92-0095, (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 North Carolina, *Cromartie v. Hunt*, 34 F. Supp. 1029 (E.D. N.C. 1998), *rev'd, Hunt v. Cromartie*, 526 U.S. 541 (1999); Georgia, *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 515 U.S. 900 (1995); and Texas, *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996), the federal district court that had struck down a congressional plan as a racial gerrymander allowed the legislature an opportunity to correct the plan at its next session. Only when the Georgia, *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995) and 922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 117 S. Ct. 1925 (1997), and Texas, *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), legislatures had failed to enact a corrected plan did the federal courts in those states impose plans of their own. In contrast, however, the federal district court in Florida imposed a legislative plan of its own within three hours of having struck down the plan enacted by the Legislature and approved by the Florida Supreme Court. The court's order imposing its plan was immediately stayed by the U.S. Supreme Court, *Wetherell v. DeGrandy*, 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. DeGrandy*, 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. *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*, 117 S. Ct. 1925 (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, *Growe 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. 117 S. Ct. 2186 (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 Stevens, writing for the majority, found that action by the Legislature was not necessary. He found that the State was properly represented in the litigation by the attorney general and that the attorney general had broad discretion to settle it without either a trial or the passage of legislation. 117 S. Ct. 2186, slip op. at 8-11.

Justice Scalia, writing for the four dissenters, argued that:

> The "opportunity to apportion" that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.

117 S. Ct. 2186, slip op. at 7.

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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Document #6

S.F. No. 1013 - Districting Principles

Author: Senator Lawrence J. Pogemiller

Prepared by: Peter S. Wattson, Senate Counsel (651/296-3812)

Date: February 22, 2001

S.F. No. 1013 establishes principles to govern the drawing of legislative and congressional district boundaries. The principles are based on the "standards" adopted by concurrent resolution to govern the drawing of legislative and congressional districts in 1991.[1] Those, in turn, were based on "criteria" adopted by three-judge federal courts to govern plans drawn by the courts in 1971[2] and 1981.[3] Calling them "principles," rather than "standards" or "criteria" is in accord with the practice of the U.S. Supreme Court, which refers to them as "traditional districting principles."[4]

Subdivision 1 applies these principles to legislative and congressional districts.

Subdivision 2, paragraph (a), requires that legislative districts be substantially equal in population and not deviate from the ideal by more than two percent, plus or minus.

The Minnesota Constitution, art. 4, § 2, requires that, "The representation in both houses shall be apportioned equally throughout the different sections of the state

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[1] House Concurrent Resolution No. 1 (congressional); House Concurrent Resolution No. 2 (legislative)

[2] *Beens v. Erdahl*, Order, No. 4-71-Civil 151 (D. Minn. Nov. 26, 1971).

[3] *LaComb v. Growe*, Order, Civ. No. 4-81-414 (D. Minn. Dec. 29, 1981), quoted in 541 F. Supp. 145, 148n.5 (D. Minn. Mar. 11, 1982).

[4] *See Shaw v. Reno*, 509 U.S. 630 at 647 (1993).

in proportion to the population thereof." The U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), required that legislative plans achieve "substantial equality of population among the various districts." "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.[5] The federal court criteria for legislative plans adopted in 1971 and 1981, and the concurrent resolution adopted in 1991, permitted deviations in population equality not to exceed two percent, plus or minus. This bill imposes the same standard on plans enacted by the Legislature.

Subdivision 2, paragraph (b), requires that congressional districts be "as nearly equal in population as practicable."

This is the standard set forth by the U.S. Supreme Court in the case of *Wesberry v. Sanders*, 376 U.S. 1 (1964). The federal court's 1981 Minnesota criteria had said that, "The population of the districts shall be as nearly equal as possible. The maximum permissible deviation from population equality will be plus or minus one quarter of one percent (.25 percent), or 1,274 people." The U.S. Supreme Court's decision in *Karcher v. Daggett*, 462 U.S. 725 (1983), made clear that there was no permissible deviation from population equality that could be practicably avoided, except as necessary to achieve "some legitimate state objective," such as making districts compact or respecting municipal boundaries. The 1991 concurrent resolution used the same language as in this bill and resulted in all parties proposing plans that had a deviation no greater than one person.

Subdivision 3 requires the districts to be composed of "convenient contiguous territory" and, to the extent consistent with the other principles, to be compact.

The Minnesota Constitution, art. 4, § 3, requires that Senate districts be composed of "convenient contiguous territory." The constitutional provision does not apply to House districts or congressional districts, but the 1981 federal court criteria for both legislative and congressional districts had said that, "The districts shall be single-member, compact, and contiguous." The sentence on contiguity by water was added by the Legislative Coordinating Commission's Subcommittee on Redistricting when it recommended to both houses the concurrent resolutions that were adopted in the 1991 session. This bill uses the language of those resolutions.

Subdivision 4 requires that the districts be numbered in a regular series and sets forth separate systems for legislative and congressional districts.

The Minnesota Constitution, art. 4, § 3, requires that "Senate districts shall be numbered in a regular series." The federal court criteria adopted in 1981 did not set forth a numbering scheme, but the concurrent resolutions of 1991 did, essentially describing the numbering system that had been used in the 1980s. The bill requires the continued use of the same system.

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[5] *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973).

Subdivision 5 requires that the districts not dilute the voting strength of racial or language minority populations and that, where possible, the districts increase the probability that members of the minority will be elected.

This principle is based on the federal court's criteria adopted in 1971 and 1981 and followed by the Senate in developing its redistricting plans in the 1982 session. The federal court criteria went beyond the minimum requirement of § 2 of the Voting Rights Act of 1965,[6] that the voting strength of minority populations not be diluted, by imposing an affirmative obligation to increase the probability of minority representation wherever possible. The 1991 resolutions continued that affirmative obligation.

Subdivision 6 requires that counties, cities, and towns not be divided into more than one district except as necessary to meet equal-population requirements or to form districts that are composed of convenient contiguous territory.

This principle is based on the criterion adopted by the federal court in 1981 that said, "The integrity of existing boundaries of political subdivisions of the state will be respected to the extent practicable to minimize division in the formation of a district." The concurrent resolutions of 1991 identified the political subdivisions that must be respected and specified the reasons that might justify a split. The bill uses the language of those resolutions.

Subdivision 7 requires the districts to attempt to preserve "communities of interest" where that can be done in compliance with the preceding principles.

This principle is based on the federal court's criterion of 1981 that said, "apportionment plans may recognize the preservation of communities of interest in the formation of districts. To the extent any consideration is given to a community of interest, the data or information upon which the consideration is based shall be identified." This bill uses similar language from the concurrent resolutions of 1991.

Subdivision 8 requires that the districts be "politically competitive," where that can be done in compliance with the preceding principles. Where a concentration of third-party supporters makes it possible, a district should increase the probability that the candidate of a third party will be elected.

This principle is new. The first sentence addresses the need for balance between the two largest political parties and the second attempts to create an opportunity for third-party candidates where they have a realistic chance of being elected if given an appropriate district.

Subdivision 9 requires all plans to use the data supplied by the Geographic Information Systems Office of the Legislative Coordinating Commission and specifies that the population counts

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[6]Codified as amended at 42 U.S.C. § 1973.

will be the block counts provided under Public Law No. 94-171.[7]

The federal court's criteria adopted in 1981 set forth detailed requirements for the maps and tables used to present redistricting plans to the court so that the court would have some reasonable way of comparing the plans that were presented to it. The language of this principle is taken from similar language in the concurrent resolutions of 1991. It does not require that a plan be produced on the Legislature's system, but does require that any plan presented to either the Senate or House of Representatives use the same geographic areas and population counts as used by the Legislature.

The second sentence is new. It addresses the problem that may be presented if the U.S. Bureau of the Census provides the State with two sets of population counts. The one determined by the Census Bureau to be the most accurate will be provided to the states under Public Law No. 94-171. That will be the official count. However, if the Bureau decides to arrive at that count by making an adjustment, based on statistical sampling methods, to the raw headcount, another law, Public Law No. 105-119, § 209 (j), 111 Stat. 2480 (1997), requires the Bureau also to provide the raw headcount at the same time. This principle requires the use of the official count to measure a plan's compliance with equal-population requirements and leaves to the U.S. government and the courts to decide whether the official count will be actual or adjusted.

The second sentence specifies the use of the block counts, since the Geographic Information Systems Office has already corrected precinct, city, and town boundaries to agree with our known geography. The new Legislative Coordinating Commission geography will be used to compute the population for higher levels based on the census block counts. The sentence recognizes the possibility that the Census Bureau may acknowledge errors in the block counts, as when housing units have been assigned to the wrong block. The Bureau has said that it will not issue revised counts, but will acknowledge proven errors and confirm what the count should have been.

Subdivision 10 requires the Director of Geographic Information Systems to notify the President of the Senate and the Speaker of the House when the census data has been verified as ready for use in redistricting and prohibits the consideration of plans before the notice has been given. This requirement is taken from the concurrent resolutions of 1991.

Clauses (2) and (3) of the second sentence are new. They require that, before a plan may be considered, it be filed with the Director of Geographic Information Systems and posted on the GIS Office Web site. Their purpose is to insure that all plans are widely available for public inspection before they are voted on.

Section 2 makes the act effective the day following final enactment.

PSW:ph

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[7] Coded as 13 U.S.C. § 141(c).

Document #7

Senator ..... moves to amend S.F. No. 1013 as follows:

Page 2, line 16, after the period, insert "Where a precinct is divided, the division should be along prominent, clearly recognizable physical features, such as a federal, state, or county highway, an arterial municipal street, a railroad track, a power transmission line, or a river, creek, or lakeshore."

Page 2, line 19, after the period, insert "For purposes of this subdivision, "communities of interest" include, but are not limited to, political subdivisions, neighborhoods, or other geographic areas where there are clearly recognizable similarities of social, political, cultural, ethnic, or economic interests."

Document #8

Senators Pogemiller; Moe, R.D. and Johnson, Dave introduced—
S.F. No. 1013: Referred to the Committee on Rules and Administration.

A bill for an act

relating to redistricting; establishing districting principles for legislative and congressional plans; proposing coding for new law in Minnesota Statutes, chapter 2.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. [2.025] [DISTRICTING PRINCIPLES.]

Subdivision 1. [APPLICATION.] The principles in this section apply to legislative and congressional districts.

Subd. 2. [EQUAL POPULATION.] (a) Legislative districts must be substantially equal in population. The population of a legislative district must not deviate from the ideal by more than two percent, plus or minus.

(b) Congressional districts must be as nearly equal in population as practicable.

Subd. 3. [CONTIGUITY; COMPACTNESS.] The districts must be composed of convenient contiguous territory. To the extent consistent with the other principles in this section, districts should be compact. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district.

Subd. 4. [NUMBERING.] (a) The legislative districts must be numbered in a regular series, beginning with house district 1A in the northwest corner of the state and proceeding across the state from west to east, north to south, but bypassing the seven-county metropolitan area until the southeast corner has

been reached; then to the seven-county metropolitan area outside the cities of Minneapolis and St. Paul; then in Minneapolis and St. Paul.

(b) The congressional district numbers must begin with district one in the southeast corner of the state and end with district eight in the northeast corner of the state.

Subd. 5. [MINORITY REPRESENTATION.] The districts must not dilute the voting strength of racial or language minority populations. Where a concentration of a racial or language minority makes it possible, the districts must increase the probability that members of the minority will be elected.

Subd. 6. [PRESERVING POLITICAL SUBDIVISIONS.] A county, city, or town must not be divided into more than one district except as necessary to meet equal-population requirements or to form districts that are composed of convenient contiguous territory.

Subd. 7. [COMMUNITIES OF INTEREST.] The districts should attempt to preserve communities of interest where that can be done in compliance with the preceding principles.

Subd. 8. [POLITICAL COMPETITIVENESS.] The districts should be politically competitive, where that can be done in compliance with the preceding principles. Where a concentration of third party supporters makes it possible, a district should increase the probability that the candidate of a third party will be elected.

Subd. 9. [DATA TO BE USED.] The geographic areas and population counts used in maps, tables, and legal descriptions of the districts must be those used by the geographic information systems office of the legislative coordinating commission. The population counts will be the block population counts provided under Public Law Number 94-171, subject to correction of any errors acknowledged by the United States Census Bureau.

Subd. 10. [DATA READY; PLANS POSTED.] The director of geographic information systems shall notify the president of the senate and the speaker of the house of representatives when the

necessary census data has been received from the United States Census Bureau, loaded into the legislature's computerized redistricting system, and verified as ready for use in redistricting. A redistricting plan must not be considered for adoption by the senate or house of representatives until:

(1) the notice has been given;

(2) a block equivalency file showing the district to which each census block has been assigned, in a form prescribed by the director of geographic information systems, has been filed with the director; and

(3) a copy of the plan has been posted on the Web site of the geographic information systems office.

Sec. 2. [EFFECTIVE DATE.]

This act is effective the day following final enactment.

Document #9

2/25/01

Minnesota Redistricting Process

1. Develop redistricting computer system - LCC Subcommittee on GIS
2. Hire staff to draw redistricting plans - four caucuses, MN Planning
3. Form redistricting committees - Senate, House, Governor
4. Hold background hearings
    a. Traditional districting principles
    b. State redistricting history
    c. Population shifts since 1990
    d. Census issues
    e. Communities of interest
5. Adopt redistricting principles
6. Receive census results - GIS Office (March 2001)
7. Draw plans - Senate and House committees
    a. Senate and House (by March 19, 2002)
    b. Congressional (by March 19, 2002)
    c. Metropolitan Council (2003)
8. Cities redraw precincts and wards (within 60 days after legislative plan, or by April 30, 2002, whichever comes first)
9. Counties, school boards, and others redraw election districts (within 80 days after legislative plan, or by May 28, 2002, whichever comes first)
10. County auditors publish maps of new districts, precincts, wards (by June 17, 2002)
11. Defend plans in court

PSW

Document #10

Minnesota Redistricting 2001

Redistricting Process

- Develop Computer System
- Hire Staff
- Form Redistricting Committees
- Hold Background Hearings
- Adopt Principles to Govern Redistricting
- Receive Census Results
- Draw Plans
- Defend Plans in Court

Develop Computer System

- Web Site
  - Information on Redistricting Law & Technology
  - Maps & Reports on Redistricting Plans
- System for Drawing Plans
  - PCs, Plotters, Printers, Projectors
  - Maptitude for Redistricting
- Census Data
  - Geography - TIGER 2000
  - Population Counts
- Election Data

Hire Staff

- GIS Staff to Develop & Maintain System
- Caucus Staff toDraw Plans

Form Redistricting Committees

- Governor's Advisory Committee
- House Redistricting Committee
- Senate Rules Committee Subcommittee on Redistricting

Hold Background Hearings

- State Redistricting History
- Traditional Districting Principles
- Population Shifts Since 1990
- Census Issues
- Communities of Interest

Minnesota Redistricting History

Before World War I

- An Agricultural State
- Senate Seats Apportioned
  - In Rural Areas - to Counties
  - In Urban Areas - to Cities, Towns, and Wards
- Senators with Staggered Terms
- Representative Seats Apportioned
  - Some to Undivided Senate Districts
  - Some to Counties, Cities, Towns, and Wards
  - One to Four Representatives per Senator
- A Steady Increase in Congressional Seats

World War I to 1957

- Population Moves Toward the Cities
- No Legislative Reapportionment
- Minnesota Loses a Congressional Seat (1930)
  - Congressional Plan Vetoed - 9 Elected At Large (1932)
    - Johnson, Christianson, Knutson, Lundeen, Kvale, Hoidale, Arens, Chase, Shoemaker
    - Three from Minneapolis
  - Congressional Redistricting Enacted (1933)
- Population Inequalities Grow

Courts Enter the Political Thicket

- *Magraw v. Donovan* (1958)
  - Senate Overall Range: 9 to 1 (153,455 to 16,878)
  - House Overall Range: 14.7 to 1 (107,246 to 7,290)
  - Court will Defer to Legislature
- New Legislative Plan Enacted (1959)
- *Baker v. Carr* (1962)

Minnesota Loses Another Congressional Seat (1960)

- Legislature Enacts a New Congressional Plan (1961)

Minnesota's Legislative Plan is Struck Down

- *Honsey v. Donovan* (1964)
  - Senate Overall Range: 4 to 1 (100,520 to 24,428)
  - House Overall Range: 7 to 1 (56,076 to 8,343)
- Legislative Plan Vetoed (1965)
- Veto is Valid - *Duxbury v. Donovan* (1965)
- Legislative Plan Enacted (1966)

The Courts Begin to Draw Plans

- Congressional Plan Enacted (1971)
- Legislative Plan Vetoed (1971)
- Legislative Plan Drawn by Court -*Beens v. Erdahl* (1972)
  - Overall Range: 4%
  - Deviations: Plus or Minus 2%
- 1982 Legislative and Congressional Plans - *LaComb v. Growe*
- 1992 Legislative and Congressional Plans - *Emison v. Growe*

The Federal Court is Rebuked

- Legislature Enacts a Legislative Plan (1991)
- State Court Corrects the Legislative Plan - *Cotlow v. Growe*
- Federal Court Enjoins State Court
- U.S. Supreme Court Vacates Federal Court's Injunction (1992)
- Federal Court Enjoins Secretary of State
- U.S. Supreme Court Reverses Federal Court (1993)

Minnesota's Traditional Districting Principles

- 67 Senators, 134 Representatives
- Single-Member Districts
- House Districts Nested within Senate Districts
- Equal Populations
  - Congressional Districts: Mathematically Equal
  - Legislative Districts: Plus or Minus 2%
- Convenient, Contiguous, Compact Territory
- Numbered in a Regular Series

Traditional Districting Principles, continued

- Not Divide Counties, Cities, or Townships Unless Necessary
- Preserve Communities of Interest
- Increase Minority Representation When Possible

Population Shifts Since 1990

Based on 1998 Estimates

- Continued Shifts
  - From Greater Minnesota to Metro Area
  - From Central Cities & Inner Suburbs to Outer Suburbs
- Smaller than Shown in 1990 Census
- Growth of Regional Centers

Census Issues

- Precinct Boundaries
- Persons Checking More than One Race
- Two Population Counts?
  - Official: Pub. L. No. 94-171
  - Head Count: Pub. L. No. 105-119

Communities of Interest

- Metro Area & Greater Minnesota
- Red River Valley, Minnesota River Valley, Iron Range
- Central Cities, Inner-Ring Suburbs, Outer-Ring Suburbs
- Neighborhoods
  - Phillips, Frogtown, Lake Minnetonka
- Racial & Ethnic Minority Populations

Census Timetable for Redistricting

- Phase 1 - Drawing Census Blocks (1995-98)
- Phase 2 - Aggregating Blocks into Precincts (1998-00)
- Phase 3
  - Report State Populations to Congress (December 31, 2000)
  - Deliver Census Geography to States (March 1, 2001)
  - Report Block Population to States (April 1, 2001)

Redistricting Process - continued

- Adopt Districting Principles
- Draw Plans
- Defend Plans in Court

Document # 11

STATE OF MINNESOTA

COUNTY OF WRIGHT

DISTRICT COURT

TENTH JUDICIAL DISTRICT

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diana V. Bratlie, Brian J. LeClair and Gregory J. Ravenhorst, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota; and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

Court File No. CX-01-116

COMPLAINT

Plaintiffs, for their Complaint against Defendants, state and allege as follows:

JURISDICTION

1. This Court has authority as a court of general jurisdiction to redress Plaintiffs' claims regarding violations of the Minnesota State Constitution ("Minnesota Constitution") and authority to grant declaratory relief under the provisions of Minnesota Statutes Section 555.01 *et. seq.*

2. This Court has jurisdiction under 42 U.S.C. §1983, to redress Plaintiffs' claims of violations of the Constitution of the United States ("United States Constitution").

PARTIES

3. Plaintiffs are citizens and qualified voters of the United States and the State of Minnesota. Plaintiffs reside in the following counties, legislative districts and congressional districts in the State of Minnesota:

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Plaintiff	County	Legislative Dist.	Cong. District
Diana V. Bratlie	Dakota	37B	6
Gregory J. Edeen	Wright	19B	2
Victor L.M. Gomez	Ramsey	64A	4
Jeffrey E. Karlson	Wright	19B	2
Brian J. LeClair	Washington	56B	6
Gregory J. Ravenhorst	Cass	4B	8
Maryland Lucky R. Rosenbloom	Hennepin	61A	5
Susan M. Zachman	Wright	19B	2

4. Plaintiffs bring this action individually and on behalf of themselves and all other citizens and voters who reside in the State of Minnesota, United States of America, and who are similarly situated as having been denied equal protection of the laws as further stated herein. This class is so numerous as to make joinder impossible and impractical; there are common questions of law and fact which predominate over individual questions of law and fact; the claims of the named individuals are typical of the claims of the members of this class; and these Plaintiffs will fairly and adequately represent and protect the interests of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of inconsistency or varying adjudications which would establish incompatible standards of conduct for the named Defendants. The common questions of law which predominate are the constitutionality of the current legislative apportionment system and the current plan of congressional districts established by the three (3) member Special Redistricting Panel (hereinafter the "Panel") in *Cotlow v. Growe*, Civ. File No. C8-91-985 (Orders dated December 9, 1991 and April 15, 1992)(hereinafter "*Cotlow v. Growe*"), both of which are being enforced by the Defendants.

5. The Defendants are each citizens of the United States and of the State of Minnesota, residing in the State of Minnesota. Defendant Mary Kiffmeyer is the duly elected and qualified Secretary of State of the State of Minnesota. In her official capacity, under Chapters 200 through 211 of Minnesota Statutes (the "Minnesota Election Law"), Secretary of State Kiffmeyer is the chief election officer of the State of Minnesota and is responsible for a variety of election duties, including giving notice of offices to be voted on in the next election, accepting affidavits of candidacy from candidates for certain public offices, supervising the preparation and distribution of ballots, receiving election returns, issuing certificates of election to certain successful candidates, distributing information on certain election laws, serving on the State Canvassing Board and other duties necessary for the conduct of elections in the State of Minnesota.

6. Defendant Doug Gruber is the duly qualified and acting Auditor of Wright County, State of Minnesota. As such, Mr. Gruber is the chief election officer for Wright County.

7. This action is brought against Defendant Doug Gruber as Wright County Auditor, individually and as representative of all other county auditors and/or chief county election officers similarly situated in the State of Minnesota, such persons being so numerous as to make it impracticable to bring them all before the Court by way of joinder. Furthermore, there are predominant common questions of law, namely the constitutionality of the current legislative apportionment system and the current plan of congressional districts ordered in *Cotlow v. Growe*. The defenses of the named Defendants will fairly and adequately protect the interests of the class. Finally, the prosecution of separate actions against individual members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for the parties here.

COUNT I
LEGISLATIVE APPORTIONMENT – MINNESOTA CONSTITUTION

8. The above-numbered paragraphs 1-7 are incorporated herein by reference.

9. Article IV, Section 2 of the Minnesota Constitution provides:

> The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses *shall be apportioned equally* throughout the different sections of the state in proportion to the population thereof [emphasis added].

10. Article IV, Section 3 of the Minnesota Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. . . .

11. Through the above provisions, the Minnesota Constitution guarantees to the residents of the State of Minnesota that their vote shall be equally as effective as any other vote cast in an election for members of the Minnesota Legislature. Furthermore, these provisions require that the Minnesota Legislature equally apportion state legislative representation throughout the State of Minnesota by districts of equal population.

12. Plaintiffs as citizens of the United States and residents of the State of Minnesota have the right under the Minnesota Constitution to have the members of the Minnesota Legislature equally apportioned and elected on the basis of the United States Census for the year 2000 (the "2000 Census"). On information and belief, the 2000 Census shows that the state legislative districts ordered in *Cotlow v. Growe* are unequally apportioned. Furthermore, the Minnesota Legislature has not adopted a legislative apportionment system since 1991, when the Panel ordered the current legislative districts. The Minnesota Legislature has failed and neglected to equally apportion the legislative districts in the State of Minnesota and will, on information and belief, continue to fail to

apportion said districts in a manner which reflects the mandate of Article IV, Section 2 of the Minnesota Constitution that they be "equally apportioned."

13. Minnesota's current state legislative districts were established and remain in force by order of the Panel in *Cotlow v. Growe*. The *Cotlow* Panel ordered legislative districts with an average population of 32,694 persons, as set forth on Exhibit A. On information and belief, these districts exaggerate the power of voters in less populated Minnesota legislative districts and unlawfully discriminate against voters in more highly populated Minnesota legislative districts. Attached hereto as Exhibit A are the current populations of certain of Plaintiffs' Minnesota house districts, as estimated for the year 1999 by the Minnesota Planning State Demographic Center. Additionally set forth on Exhibit A is the ideal size legislative district based on the preliminary results of the 2000 Census released by the Department of Commerce on December 28, 2000.

14. The unequal apportionment of Minnesota's legislative districts ordered in *Cotlow v. Growe* deprives Plaintiffs and all other similarly-situated voters in highly-populated Minnesota legislative districts of the rights guaranteed to them under the Minnesota Constitution.

15. The Minnesota Legislature has not and, on information and belief, will not pass a law equally apportioning itself in conformity with the Minnesota Constitution. Plaintiffs further allege, on information and belief, that all of the Defendants intend to and will, unless sooner restrained by an Order of this Court, conduct elections for the 2002 Minnesota Legislature (and future legislatures) on the basis of the legislative districts ordered in *Cotlow v. Growe*. The relief sought against Defendants in their official capacities relates to their respective jurisdictions in carrying out all matters relating to the election of members of the Minnesota Legislature.

16. Plaintiffs further allege that they intend to and will vote in the year 2002 Minnesota primary and general elections and thereafter for candidates for the Minnesota Legislature, and that

said elections conducted in accordance with *Cotlow v. Growe* will continue to deprive Plaintiffs of rights guaranteed under the Minnesota Constitution.

17. In the absence of reapportionment of the legislative districts of the State of Minnesota in conformity with the Minnesota Constitution, any action of these Defendants in conducting an election for members of the Minnesota Legislature in accordance with the districts ordered by *Cotlow v. Growe* has deprived and will continue to deprive Plaintiffs of their constitutional rights under the Rights and Privileges clause (Article I, Section 2) and the Equal Apportionment clause (Article IV, Section 2) of the Minnesota Constitution.

18. By the current and anticipated failure of the Minnesota Legislature to equally apportion the legislative districts of the state in conformity with the Minnesota Constitution, the Minnesota Legislature has and will continue to cause Defendants to violate the constitutional rights of Plaintiffs and all other similarly-situated residents of the State of Minnesota.

COUNT II
LEGISLATIVE APPORTIONMENT – UNITED STATES CONSTITUTION

19. The above-numbered paragraphs 1-18 are incorporated herein by reference.

20. The Fourteenth Amendment, Section 1 of the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21. The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall . . . be deprived of life, liberty or property without due process of law."

22. The above provisions of the United States Constitution guarantee to the citizens of the United States in each state the right to vote in State and Federal elections and guarantees that the

vote of each shall be as equally effective as any other vote cast in such elections. Further, the United States Constitution guarantees that state legislative representation shall be equally apportioned throughout a state in districts in equal population.

23. Article IV, Section 3 of the Minnesota Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of . . . legislative districts.

24. Any plan of Minnesota legislative districts that does not meet constitutional standards unlawfully discriminates against voters in more highly populated districts while exaggerating the power of voters in less populated districts in violation of the rights guaranteed under the Fourteenth Amendment. Any action of Defendants in enforcing or implementing such a plan violates the equal protection and due process rights of Plaintiffs and other similarly-situated United States citizens residing and voting in Minnesota.

25. Minnesota's current state legislative districts were established and remain in force by order of the Panel in *Cotlow v. Growe*. The *Cotlow* Panel ordered legislative districts with an average population of 32,694 persons, as set forth on Exhibit A. On information and belief, these districts exaggerate the power of voters in less populated Minnesota legislative districts and unlawfully discriminate against voters in more highly populated Minnesota legislative districts. Attached hereto as Exhibit A are the current populations of certain of Plaintiffs' Minnesota house districts, as estimated for the year 1999 by the Minnesota Planning State Demographic Center. Additionally set forth on Exhibit A is the ideal size legislative district based on the preliminary results of the 2000 Census released by the Department of Commerce on December 28, 2000. On information and belief, these districts exaggerate the power of voters in less populated Minnesota legislative districts and unlawfully discriminate against voters in more highly populated Minnesota

legislative districts. Attached hereto as Exhibit A are the current populations of certain of Plaintiffs' Minnesota house districts, as estimated for the year 1999 by the Minnesota Planning State Demographic Center. Additionally set forth on Exhibit A is the ideal size legislative district based on the preliminary results of the 2000 Census released by the Department of Commerce on December 28, 2000.

26. On information and belief, the United States Department of Commerce, Bureau of Census will soon issue data from the 2000 Census showing that Minnesota's legislative districts as ordered by the Panel in *Cotlow v. Growe* are no longer equally apportioned.

27. The Minnesota Legislature has failed and will, on information and belief, continue to fail to equally apportion Minnesota's legislative districts in conformity with the Fifth and Fourteenth Amendments to the United States Constitution.

28. The unequal apportionment of Minnesota's legislative districts ordered in *Cotlow v. Growe* deprives Plaintiffs and all other similarly-situated voters of highly-populated Minnesota legislative districts of the rights guaranteed to them under Equal Protection and Due Process clauses of the United States Constitution.

29. The Minnesota Legislature has not and, on information and belief, will not pass a law equally apportioning itself in conformity with the United States Constitution. Plaintiffs further allege, on information and belief, that all of the Defendants intend to and will, unless sooner restrained by an Order of this Court, conduct elections for the 2002 Minnesota Legislature (and future legislatures) on the basis of the legislative districts ordered in *Cotlow v. Growe*. The relief sought against Defendants in their official capacities relates to their respective jurisdictions in carrying out all matters relating to the election of members of the Minnesota Legislature.

30. Plaintiffs further allege that they intend to and will vote in the year 2002 Minnesota primary and general elections and thereafter for candidates for the Minnesota Legislature, and that said elections conducted in accordance with *Cotlow v. Growe* will continue to deprive Plaintiffs of rights guaranteed under the United States Constitution.

31. In the absence of reapportionment of Minnesota's legislative districts in conformity with the United States Constitution, any action of these Defendants in conducting an election for members of the Minnesota Legislature in accordance with the districts ordered by *Cotlow v. Growe* has deprived and will continue to deprive Plaintiffs of their constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

32. By the current and anticipated failure of the Minnesota Legislature to equally apportion the legislative districts of the state in conformity with the United States Constitution, the Minnesota Legislature has and will continue to cause Defendants to violate the constitutional rights of Plaintiffs and all other similarly-situated residents of the State of Minnesota.

COUNT III
CONGRESSIONAL DISTRICTS – UNITED STATES CONSTITUTION

33. The above-numbered paragraphs 1-33 are incorporated herein by reference.

34. Article I, Section 2 of the United States Constitution provides that:

> The House of Representatives shall be composed of members chosen every second Year by the People of the several States. . . .
>
> ****
>
> Representatives. . . .shall be apportioned among the several States. . . .according to their respective Numbers. . . .

35. The Fourteenth Amendment, Section 1 of the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

36. The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall . . . be deprived of life, liberty or property without due process of law."

37. The above provisions of the United States Constitution guarantee to the citizens of the United States in each state that their vote shall be as equally effective as any other vote cast in an election and that congressional representatives shall be elected on the basis of equal representation of the individual voters in the state. Furthermore, these provisions guarantee that congressional representation shall be equally apportioned throughout a state in districts of equal population.

38. Article IV, Section 3 of the Minnesota Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional . . .districts.

39. Any plan of Minnesota congressional districts that does not meet constitutional standards unlawfully discriminates against voters in more highly populated districts while exaggerating the power of voters in less populated districts in violation of the rights guaranteed under the Fourteenth Amendment. Any action of Defendants in enforcing or implementing such a plan violates the equal protection and due process rights of Plaintiffs and other similarly-situated United States citizens residing and voting in Minnesota.

40. Minnesota's current state congressional districts were established and remain in force by order of the Panel in *Cotlow v. Growe*. The *Cotlow* Panel ordered legislative districts with an average population of 546,887 people, as set forth on Exhibit A. On information and belief, these districts exaggerate the power of voters in less populated Minnesota congressional districts and unlawfully discriminate against voters in more highly populated Minnesota congressional districts.

Attached hereto as Exhibit A are the current populations of certain of Plaintiffs' Minnesota congressional districts, as estimated for the year 1998 by the Minnesota Planning State Demographic Center. Additionally set forth on Exhibit A is the ideal size congressional district based on the preliminary results of the 2000 Census released by the Department of Commerce on December 28, 2000.

41. On information and belief, the United States Department of Commerce, Bureau of Census will soon issue data from the 2000 Census showing that Minnesota's congressional districts as ordered by the Panel in *Cotlow v. Growe* are no longer equally apportioned.

42. The Minnesota Legislature has failed and will, on information and belief, continue to fail to equally apportion Minnesota's congressional districts in conformity with the Fifth and Fourteenth Amendments to the United States Constitution.

43. The unequal apportionment of Minnesota's congressional districts ordered in *Cotlow v. Growe* deprives Plaintiffs and all other similarly-situated voters of highly-populated Minnesota congressional districts of the rights guaranteed to them under Equal Protection and Due Process clauses of the United States Constitution.

44. The Minnesota Legislature has not and, on information and belief, will not pass a law equally apportioning Minnesota's congressional districts in conformity with the United States Constitution. Plaintiffs further allege, on information and belief, that all of the Defendants intend to and will, unless sooner restrained by an Order of this Court, conduct elections for the 2002 United States House of Representatives (and future congressional elections) on the basis of the congressional districts ordered in *Cotlow v. Growe*. The relief sought against Defendants in their official capacities relates to their respective jurisdictions in carrying out all matters relating to the election of members of the United States House of Representatives.

45. Plaintiffs further allege that they intend to and will vote in the year 2002 Minnesota primary and general elections and thereafter for candidates for the United States House of Representatives from Minnesota, and that said elections conducted in accordance with *Cotlow v. Growe* will continue to deprive Plaintiffs of rights guaranteed under the United States Constitution.

46. In the absence of reapportionment of Minnesota's congressional districts in conformity with the United States Constitution, any action of these Defendants in conducting an election for members of the United States House of Representatives in accordance with the congressional districts ordered by *Cotlow v. Growe* has deprived and will continue to deprive Plaintiffs of their constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

47. By the current and anticipated failure of the Minnesota Legislature to equally apportion the congressional districts of the state in conformity with the United States Constitution, the Minnesota Legislature has and will continue to cause Defendants to violate the constitutional rights of Plaintiffs and all other similarly-situated residents of the State of Minnesota.

WHEREFORE, plaintiffs pray for the following relief:

1. That this Court declare that the plan of legislative and congressional districts ordered in *Cotlow v. Growe* violates the rights of Plaintiffs and the class as follows:

(a) the present legislative district boundaries in the State of Minnesota violate Plaintiffs' rights of equal representation and equal apportionment of legislative districts mandated by the Minnesota Constitution;

(b) the present legislative district boundaries in the State of Minnesota violate Plaintiffs' rights to due process and equal protection guaranteed by the United States Constitution; and

(c) the present congressional district boundaries in the State of Minnesota violate Plaintiffs' rights to due process and equal protection guaranteed by the United States Constitution.

2. That this Court issue a permanent injunction and judgment decreeing that Minnesota's current legislative and congressional districts are not now valid plans of state legislative and congressional apportionment.

3. That this Court issue a permanent injunction enjoining Defendants and the class of persons they represent from taking any action related to carrying out their official duties in conducting primary or general elections for Minnesota state legislators and members of the United States House of Representatives from the State of Minnesota based on the legislative and congressional districts ordered in *Cotlow v. Growe*.

4. That this Court retain jurisdiction of this action to determine if the Legislature has passed and the Governor has signed legislation forming new Minnesota legislative and congressional districts in conformity with the Minnesota and United States Constitutions; that should the Legislature and Governor fail to enact such legislation, the Court will consider evidence, determine and order valid plans for Minnesota legislative and congressional districts.

5. That this Court consider evidence, determine and order valid plans for new Minnesota legislative and congressional districts in the event the Minnesota Legislature and the Governor of the State of Minnesota fail to enact legislation establishing such districts in accordance with constitutional requirements.

6. That this Court order Defendants to pay to Plaintiffs' reasonable attorneys' fees and expenses, expert fees and costs and other expenses incurred in this action pursuant to 42 U.S.C. Section 1988.

7. That this Court order such other and future relief as is just in the circumstances.

Dated: January 4, 2000

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Dated: January 4, 2000

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ACKNOWLEDGMENT

Attorneys for Plaintiffs in the above matter hereby acknowledge, pursuant to Minnesota Statutes §549.211 that sanctions may be awarded to Defendants if it is found that claims contained in this pleading are not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law and/or that the allegations and other factual contentions do not have evidentiary support.

Thomas B. Heffelfinger

EXHIBIT A

Estimated Population Change

	Average 1990 Population[1]	Est. 1998/1999 Population[1],[2]	Est. Net Change	Est. % Change
HD 19B	32,694	46,268	13,574	41.51%
HD 37B	32,694	58,933	26,239	71.08%
HD 56B	32,694	46,983	14,289	43.71%
HD 4B	32,694	38,015	5,321	16.28%
HD 12A	32,694	37,438	4,744	14.5%
CD 1	546,887	570,317	23,443	4.3%
CD 2	546,887	576,198	29,324	5.4%
CD 3	546,887	623,235	76,361	14.0%
CD 4	546,887	558,569	11,685	2.1%
CD 5	546,887	535,039	– 11,835	– 2.2%
CD 6	546,887	682,032	135,158	24.7%
CD 7	546,887	564,438	17,564	3.2%
CD 8	546,887	593,839	46,963	8.5%

Estimated Ideal District Population

Ideal 2000 congressional district: 614,935 (preliminary number of 4,919,479[3] ÷ 8)
Ideal 2000 state senate district: 73,245 (4,919,479 ÷ 67)
Ideal 2000 state house district: 36,713 (4,919,479 ÷ 134)

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[1]Source: Minnesota Planning State Demographic Center. According to the United States Department of Commerce, U.S. Census Bureau, Minnesota's actual 1990 population was 4,375,099.

[2]For comparison purposes, the estimated 1998 statewide population was 4,703,760; the estimated 1998 ideal Minnesota congressional district was 587,970.

[3]Source: Preliminary number released by U.S. Department of Commerce, Census Bureau.

STATE OF MINNESOTA

COUNTY OF WRIGHT

DISTRICT COURT

TENTH JUDICIAL DISTRICT

Case Type: Other Civil

Court File No. CX-01-116

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diana V. Bratlie, Brian J. LeClair and Gregory J. Ravenhorst, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota, and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

MEMORANDUM OF STATE OF MINNESOTA IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiffs bring this action seeking to have this Court assume jurisdiction over the redistricting process underway in the Minnesota Legislature. They allege that the legislature has "failed and neglected to equally apportion" legislative and congressional districts by not adopting a legislative apportionment plan since 1991, and that "on information and belief" the legislature will fail in the future to pass laws equally apportioning such districts. Plaintiffs seek a declaratory judgment that the current districts are unconstitutional and an injunction preventing the current plans from being used again. They also ask that the Court retain jurisdiction to determine if the legislature enacts and the Governor signs appropriate constitutional legislation; and, if they fail to do so, that the Court establish districts that comply with constitutional

requirements. Both defendants have now brought motions to dismiss on the grounds that the claims are not ripe for adjudication.

Subsequent to the filing of this suit, plaintiffs requested that the Chief Justice of the Minnesota Supreme Court appoint a three-judge special panel to hear all redistricting matters, including this case. They have requested that this motion be heard by that panel. As of this date, no panel has been appointed.

FACTS

The legislative district plan currently in effect was enacted into law in 1994. Act of May 9, 1994, ch. 612, 1994 Minn. Laws 1308, codified as Minn. Stat. §§ 2.043-2.703 (2000). The congressional redistricting plan that is currently in effect was also passed in 1994. Act of April 11, 1994, ch. 406, 1994 Minn. Laws 94, codified as Minn. Stat. §§ 2.742-2.812 (2000).[1]

Both houses of the Minnesota Legislature and the Governor have begun the process of preparing for redistricting legislative and congressional district lines pursuant to figures in the 2000 census. Specifically, the State Senate has formed a Subcommittee on Redistricting within the Committee on Rules and Administration, the House of Representatives has established a Committee on Redistricting, and Governor Ventura has established an Advisory Committee on Redistricting. Affidavit of Peter S. Wattson, ¶¶ 2-4. The Governor's advisory committee is composed of representatives of the political parties and of public groups such as Common Cause and the League of Women Voters. *Id.* ¶ 4. In preparation for the redistricting process, the Legislature has purchased sophisticated software designed to enable the process to go more

[1] The 1994 laws are based in substantial part on decisions rendered in *Cotlow v Growe*, No. C8-91-985 (Minn. Spec. Redist. Panel). The decisions of December 9, 1991, and April 15, 1992 in that case are attached hereto, and are discussed *infra* at 8.

smoothly, and staff of the Legislature, Governor, and Secretary of State are being trained in how to use that software. *Id.* ¶ 7.

The only official 2000 census figures available at this time are for the State of Minnesota as a whole. *Id.* ¶ 6. There are no official census figures for counties, cities, towns, or any other geographic area in the State. *Id.* The Census Bureau has informed the Legislature that official census figures will not be available until sometime in March, 2001. *Id.*[2]

ARGUMENT

Plaintiffs' claims are not ripe for adjudication. There may be no need for adjudication at all, or the issues to be adjudicated may be substantially changed after the legislature has had an opportunity to act. The need for this Court (or any court) to be involved in the redistricting process is contingent upon the occurrence of an event in the future, namely, that the legislature and the Governor fail in efforts to enact constitutional districting plans to replace the current plans. If they succeed in those efforts, courts will not have to be involved at all. Furthermore, even if the legislature and Governor enact new plans which Plaintiffs or other voters believe to be unconstitutional, the current plans would no longer exist and there would be no need for litigation involving the current plans. Any litigation involving new plans would by necessity be substantially different than the current litigation.

Plaintiffs may claim that certain portions of their case are ripe at this time: the issues of the constitutionality of the current plans and the need for an injunction to enjoin their use in the future. However, these issues are no more ripe than Plaintiffs' request for this Court to draw

---

[2] There are also no estimates available upon which to draw accurate redistricting lines. As explained in more detail in the affidavit of Senate counsel Peter S. Wattson, the lack of estimates of how population has shifted within larger cities makes it impossible to draw accurate legislative lines within such cities. Wattson Aff., ¶ 8.

plans itself. Plaintiffs' constitutional rights cannot be violated until the legislature has had an adequate opportunity to redistrict and has failed to do so.

As explained below, both federal and state courts are well aware that redistricting is a function left to the other branches of government, and courts should insert themselves into the process only when absolutely necessary. It is an affront to those branches of government for this Court to take jurisdiction and render any decisions at this time before the legislature and Governor have had an adequate opportunity to act.

I. THE STANDARD FOR RIPENESS.

A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States,* 523 U.S. 296, 300, 118 S. Ct. 1257, 1259 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 580-81, 105 S. Ct. 3325, 3333 (1985), which in turn quotes 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)). The Minnesota Supreme Court has held that "a justiciable controversy must exist before the courts have jurisdiction to render a declaratory judgment regarding the constitutionality of statutes." *Baertsch v. Minnesota Department of Revenue,* 518 N.W.2d 21, 25 (Minn. 1994) (quoting *St. Paul Area Chamber of Commerce v. Marzitelli,* 258 N.W.2d 585, 587 (Minn. 1977)). There must be a "substantial and real controversy between the parties before a case will be considered by this court." *State v. Murphy,* 545 N.W.2d 909, 917 (Minn. 1996) (quoting *State v. Brown,* 216 Minn. 135, 138, 12 N.W.2d 180, 181 (1943)). For a real, justiciable controversy to exist, the plaintiff must "show that the statute is, or is about to be, applied to his disadvantage." *Baertsch,* 518 N.W.2d at 25 (quoting *Marzitelli,* 258 N.W.2d at 588), and show that there is a "direct and imminent injury which results from the alleged unconstitutional

[statute]." *Murphy,* 545 N.W.2d at 917. Finally, "[i]ssues which have no existence other than in the realm of the future are "'purely hypothetical and are not justiciable. Neither the ripe nor the ripening seeds of controversy are present.'" *Id.* (quoting *Lee v. Delmont,* 228 Minn. 101, 110, 36 N.W.2d 530, 537 (1949)).

Ripeness "requires [the] court to evaluate both the fitness of the issues for a judicial decision and the hardship to the parties of withholding court consideration." *Texas v. United States,* 523 U.S. at 300-01, 118 S. Ct. at 1260 (quoting *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149, 87 S. Ct. 1507, 1515 (1967)); *In the matter of the Quantification of Environmental Costs,* 578 N.W.2d 794, 798 (Minn. Ct. App. 1998), *rev. den'd* (Minn. August 18, 1998) (quoting *Abbott Laboratories*). In *Texas,* the Supreme Court upheld the district court's refusal to issue a declaratory judgment that the pre-clearance provisions of Section 5 of the Voting Rights Act of 1965 do not apply to implementation of certain sections of the Texas Education Code permitting the state to sanction local school districts for failure to meet state-mandated educational achievement levels. 523 U.S. at 300-01, 118 S. Ct. at 1260. The Court held that the case was "not fit for adjudication" because it was not established that such a sanction would be ordered. *Id.* The Court further held that, even if there were greater certainty regarding ultimate implementation of such a sanction, the case would still not be ripe because the State of Texas was suffering no hardship in that no current state activities were being effected by the pre-clearance provisions. *Id.* at 301, 118 S. Ct. at 1260.

In *Murphy,* the Minnesota Supreme Court held to be not ripe the propriety of a particular condition of probation imposed upon a convicted defendant until he was actually released from prison and had the conditions imposed. 545 N.W.2d at 918. On the other hand, in *Baertsch,* the Minnesota Supreme Court held to be ripe plaintiffs' claims that certain statutory provisions were

unconstitutional because plaintiffs had shown that they satisfied the factors which triggered the particular tax being challenged, and because the Department of Revenue, by letter, expressed its intent to enforce the statute against plaintiffs. 518 N.W.2d at 25.

II. PLAINTIFF'S CLAIMS ARE NOT RIPE.

The claims in this case are not ripe. First, under both state and federal law, state legislatures are not required to redistrict any more frequently than every ten years, and state legislatures must be given an opportunity to redistrict before courts take action. It has not been ten years since the last redistricting in Minnesota, and the legislature has been given no opportunity at all to redistrict.

Second, the claimed unconstitutionality of the current apportionment plans may never have to be adjudicated at all, because such issues will be moot if the legislature passes any redistricting plan to replace the current plans. Finally, there is no significant hardship to the Plaintiffs in having to wait to file suit until the legislature has had an opportunity to redistrict.

In *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), the Supreme Court made it clear that the Equal Protection Clause does not require:

> [d]aily, monthly, annual or biennial reapportionment, so long as a state has a reasonably conceived plan for periodic readjustment of legislative representation. **While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.**

Id. at 583-84, 84 S. Ct. at 1392-93. (emphasis added). *Accord, Klahr v. Williams*, 339 F. Supp. 922, 925 (D. Ariz. 1972) (under *Reynolds*, the state cannot be required to make periodic determinations of state population between decennial censuses or required to make redistricting and reapportionment decisions promptly following such determinations); *Pohoryles v. Mandel*, 312 F. Supp. 334, 338-39 (D. Md. 1970) (increase in population alone is insufficient to require

immediate redistricting when the last plan had been adopted in 1965 and held constitutional in 1966).

In *MacGovern v. Connolly,* 637 F. Supp. 111 (D. Mass. 1986) (three-judge panel), plaintiffs sought reapportionment of legislative districts before the 1986 primary and general elections. Under Commonwealth of Massachusetts law, state census figures were compiled in 1975 and every ten years thereafter, and the legislature was required to enact new redistricting plans by January 1988. Plaintiffs argued that the existing plans (drawn up in 1977 based on 1975 figures) were unconstitutional under the 1985 state census figures, and also under the 1980 federal census figures. The court held that the claims based upon the 1985 census were premature in that the Commonwealth could not be said to have "failed to reapportion . . . in a timely manner" based on the 1985 census when that reapportionment was not due to be completed until January 1988. 637 F. Supp. at 114 (quoting *Reynolds,* 377 U.S. at 586, 84 S. Ct. at 1394).

The court held that:

> [Plaintiffs] have failed to uncover any reason that this Court should intrude into a census and reapportionment process that is presumably preceding apace. To force a breathless reapportionment based on 1985 census figures when there is no reason to doubt that that reapportionment will happen, and happen constitutionally, in due course is plainly beyond the reasonable authority of this or any federal court. It would likewise be lawless to compel reapportionment based on the 1980 federal census figures, when they are not an aspect of the Commonwealth's "reasonably conceived" and therefore presumptively valid -- periodic reapportionment plan.

Id. at 114-15 (quoting *Reynolds*, 377 U.S. at 583, 84 S. Ct. at 1392-93). [3]

[3] Two circuit courts of appeals have upheld state schemes which permitted elections to be held in such a way that redistricting plans based on a new federal census were not used for elections until approximately five years after the census was taken. *French v. Boner,* 963 F.2d 890 (6th Cir. 1992); *Political Action Conference of Illinois v. Daley,* 976 F.2d 335 (7th Cir. 1992).

Thus, it is clear that under federal case law the current redistricting lines are not unconstitutional. There is no requirement that the legislature have redistricted at this time. The current redistricting plans are not yet ten years old, and the legislature and Governor have begun the process of redistricting.

During the last redistricting cycle, state courts were also cognizant of the fact that redistricting is, in the first instance, a legislative function. A judicial action was filed early in 1991. *See Cotlow,* decision of December 9, 1991, at 2. However, the Supreme Court did not appoint a three-judge panel until June 4, 1991, subsequent to the legislature's adjournment after having passed Chapter 246, which was a legislative redistricting plan. *Id.; see* Act of May 29, 1991, ch. 246, 1991 Minn. Laws 741. The *Cotlow* panel continued to give deference to the legislature. Despite being strongly urged by the parties to proceed as rapidly as possible to draw legislative lines, the court proceeded to do so in December 1991 only because the legislature represented to the court that it only intended to make technical corrections to its former plan when it met in January 1992, and because the Governor represented that he would veto such a bill. *Cotlow,* decision of Dec. 9, 1991, memorandum at 8.

Further evidence of the deference paid to the legislature by the *Cotlow* panel is evident in the court's handling of redistricting of congressional district lines. Even as late as December 9, 1991, the panel declined to adopt a congressional plan because the legislature and Governor had not yet acted. *Id.* at 8-9. The court did not intend to act on a congressional plan until after the legislature met in January 1992 to consider congressional redistricting. It was only after the legislature enacted a bill in January which was vetoed by the governor did the court put into effect its own congressional districting plan. *Cotlow,* decision of April 15, 1992, at 2.

The legislature has obviously not had any opportunity to redistrict this year. The state Senate, the state House of Representatives, and the Governor have all established committees to work on redistricting. Affidavit of Peter Wattson, ¶¶ 2-4. In preparation for the redistricting process, the Legislature has purchased sophisticated software designed to enable the process to go more smoothly, and staff of the Legislature, Governor, and Secretary of State are being trained in how to use that software. *Id.* ¶ 7.

The only official 2000 census figures available at this time are for the State of Minnesota as a whole. *Id.* ¶ 6. There are no official census figures for counties, cities, towns, or any other geographic area in the State. *Id.* The Census Bureau has informed the Legislature that official census figures will not be available until sometime in March, 2001. *Id.*

If this lawsuit is permitted to continue, a major function of the legislature will be taken away. There will be no limit to how early similar lawsuits may be filed in the future. Permitting such premature lawsuits will subvert the orderly process of redistricting and subvert the intention of the Minnesota Constitution. Art. IV, § 3 of the Minnesota Constitution provides in part that:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts.

The first session of the legislature has barely begun. Certainly, the legislature is not in violation of the Minnesota Constitution at this time.

CONCLUSION

For the reasons stated above, Defendant State of Minnesota requests that this Court dismiss this action on the grounds that it is not ripe for adjudication at this time.

Dated: Feb. 13, 2001

Respectfully submitted,

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MARY KIFFMEYER

AG: 454090,v. 01

STATE OF MINNESOTA

COUNTY OF WRIGHT

DISTRICT COURT

TENTH JUDICIAL DISTRICT

Case Type: Other Civil

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diana V. Bratlie, Brian J. LeClair and Gregory J. Ravenhorst, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota, and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

Court File No. CX-01-116

AFFIDAVIT OF PETER S. WATTSON

STATE OF MINNESOTA)
)ss.
COUNTY OF RAMSEY)

PETER S. WATTSON, being first duly sworn, deposes and states as follows:

1. I am the Senate Counsel for the Minnesota State Senate. I have worked in the office of the counsel for state Senate since January 1971.

2. I am the counsel for the Senate's Committee on Rules and Administration. That Committee has formed a Subcommittee on Redistricting, for which I am also the counsel. As part of my duties as counsel to the Rules and Administration Committee and its Subcommittee on Redistricting, I have been and will continue to be heavily involved in the process of redistricting in this legislative session.

3. From conversations with my counterparts in the Minnesota House of Representatives, I am aware of what the House is doing concerning redistricting this year. The House has formed a separate Committee on Redistricting.

4. I am also aware of the activities of Governor Ventura's Advisory Committee on Redistricting. That advisory committee is composed of representatives of the political parties and of public groups such as Common Cause and the League of Women Voters. At that advisory committee's first meeting, I made a presentation on the law governing redistricting.

5. Ten years ago I was heavily involved in the legislative process of redistricting. Throughout the past decade, I have written numerous articles on redistricting law and the redistricting process. I recently made a presentation on redistricting as part of a Continuing Legal Education seminar on redistricting sponsored by the Office of the Reviser of Statutes.

6. The only official United States census 2000 figures provided to Minnesota so far are those for the state as a whole. There are no official 2000 census figures for counties, cities, towns, or any other geographic area. The census bureau has informed the legislature that official census 2000 figures will be available sometime in March 2001.

7. The House of Representatives Committee on Redistricting, the Senate Subcommittee on Redistricting, and the Governor's Advisory Committee on Redistricting are all in the process of planning for the redistricting process. As part of that process, the legislature has purchased sophisticated software designed to enable the process to go more smoothly, and staff of the legislature, the Governor, and the Secretary of State are being trained on how to use that software.

8. The U.S. census bureau has made estimates in 1998 and 1999 of the population of each county. The state demographer has gone further and has made estimates of the population of cities and towns. The legislature's Office of Geographic Information Systems has disaggregated the state demographer's estimates of city and town populations to the block level.

However, the disaggregation is based simply on the 1990 population of each block, so these block estimates do not show how population has shifted within cities over the last ten years. For example, in the Ford Town area of Richfield, where we know houses have been removed to make way for construction of a new runway at the Minneapolis-St. Paul International Airport, the block estimates show the population of those blocks increasing at the rate of the city as a whole. The effect of this lack of data on population shifts within a city is that, even using the most recent estimates, it would be impossible to draw accurate legislative lines for any city that is estimated to have a population larger than that of the average state representative district because there would be no basis for deciding where to draw legislative lines within the city. Such cities include Minneapolis, St. Paul, numerous suburbs, and a number of cities not in the metropolitan area, including Duluth, Rochester, and St. Cloud.

FURTHER AFFIANT SAYETH NOT.

PETER S. WATTSON

Subscribed and sworn to before me
this 13th day of February, 2001.

Notary Public

ROBYN E. RUMPCA
NOTARY PUBLIC - MINNESOTA
My Commission Expires 1-31-2005

AG: 454[illegible]

Document #12

ARTICLE II
NAME AND BOUNDARIES

Section 1. **Name and boundaries; acceptance of organic act.** This state shall be called the state of Minnesota and shall consist of and have jurisdiction over the territory embraced in the act of Congress entitled, "An act to authorize the people of the Territory of Minnesota to form a constitution and state government, preparatory to their admission into the Union on equal footing with the original states," and the propositions contained in that act are hereby accepted, ratified and confirmed, and remain irrevocable without the consent of the United States.

Sec. 2. **Jurisdiction on boundary waters.** The state of Minnesota has concurrent jurisdiction on the Mississippi and on all other rivers and waters forming a common boundary with any other state or states. Navigable waters leading into the same, shall be common highways and forever free to citizens of the United States without any tax, duty, impost or toll therefor.

ARTICLE III
DISTRIBUTION OF THE POWERS OF GOVERNMENT

Section 1. **Division of powers.** The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.

ARTICLE IV
LEGISLATIVE DEPARTMENT

Section 1. **Composition of legislature.** The legislature consists of the senate and house of representatives.

Sec. 2. **Apportionment of members.** The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

Sec. 3. **Census enumeration apportionment; congressional and legislative district boundaries; senate districts.** At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.

Sec. 4. **Terms of office of senators and representatives; vacancies.** Representatives shall be chosen for a term of two years, except to fill a vacancy. Senators shall be chosen for a term of four years, except to fill a vacancy and except there shall be an entire new election of all the senators at the first election of representatives after each new legislative apportionment provided for in this article. The governor shall call elections to fill vacancies in either house of the legislature.

Sec. 5. **Restriction on holding office.** No senator or representative shall hold any other office under the authority of the United States or the state of Minnesota, except that of postmaster or of notary public. If elected or appointed to another office, a legislator may resign from the legislature by tendering his resignation to the governor.

Sec. 6. **Qualification of legislators; judging election returns and eligibility.** Senators and representatives shall be qualified voters of the state, and shall have resided one year in the state and six months immediately preceding the election in the district from which elected. Each house shall be the judge of the election returns and eligibility of its own members. The legislature shall prescribe by law the manner for taking evidence in cases of contested seats in either house.