SENATE REDISTRICTING WORK GROUP

Tuesday August 28, 2001
St. Cloud City Hall
400 2nd Street South, St. Cloud
Conference Room 3
11:00 a.m.

Members Present
Senator Pogemiller
Senator Belanger
Dean Barkley, Director MN Planning
Senator Kleis
Representative Schumacher
Representative Gray

Members Absent
Senator Orfield
Senator Hottinger
Senator Scheid

Staff Present
Peter Wattson, Senate Counsel
Vic Thorstenson, Senate Redistricting
Michael Brodkorb, Republican Redistricting Staff
Joe Mansky, Governor's Staff

Senator Pogemiller called the meeting to order at 11:01 a.m.

Senator Pogemiller introduced members.

Senator Pogemiller went over the maps.

The following people offered testimony:

1. Penny Zook, St. Cloud School Board
2. John Ellenbecker, President of the St. Cloud City Council
3. Carol Lewis, President, St. Cloud District 742 School Board/Chair, Board of Education
4. John Selander, resident
5. Cindy Jameson, Deputy Clerk, Sauk Rapids
6. Jane Brown, Administrative Secretary, City of Melrose
7. Duane Cekalla, Benton County Commissioner
8. Lori Long, St. Cloud City Council
9. Earl Bukowski, Benton County Commissioner
10. Mike Landy, St. Cloud City Council
11. Sonja Berg, St. Cloud City Council

Members asked questions and held discussion.

Senator Pogemiller adjourned the meeting at 12:55 p.m.

Respectfully submitted by:

Mary Harrison, Legislative Assistant

Senator Lawrence J. Pogemiller, Chair

HOW TO FIND THE MAPS ONLINE —

LEGISLATIVE WEB SITE —

http://www.commissions.leg.state.mn.us/gis/html/newplans.html

SENATE CONGRESSIONAL PLAN – C0004-2
SENATE LEGISLATIVE PLAN – L0001-3

HOUSE CONGRESSIONAL PLAN – C0001-1
HOUSE LEGISLATIVE PLAN – L0002-0

GOVERNOR'S REDISTRICTING PLAN —

http://www.mnplan.state.mn.us

CLICK: GOVERNOR'S REDISTRICTING PLAN

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

How to Draw Redistricting Plans

That Will Stand Up in Court

Peter S. Wattson
Senate Counsel
State of Minnesota

National Conference of State Legislatures

Redistricting Task Force

Annual Meeting
Chicago, Illinois
July 17, 2000

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I. Introduction

The purpose of this paper is to acquaint you with the major federal cases that will govern the way you draw your legislative and congressional redistricting plans following 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

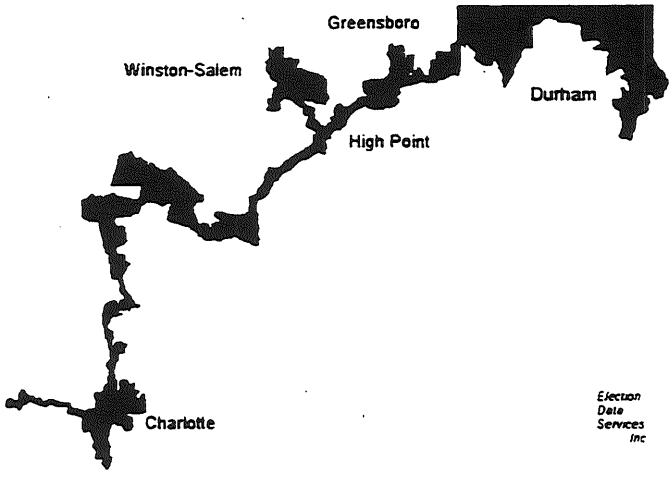
But, when a state creates a majority-minority district without regard to "traditional districting principles," the district will be subject to strict scrutiny and probably thrown out. *Shaw v. Reno*, 509

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):

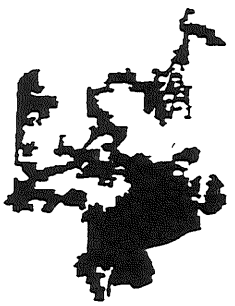
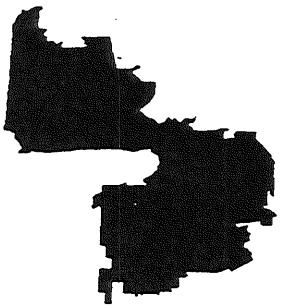
> A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless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

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

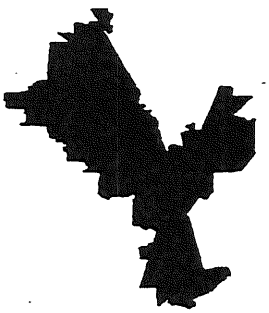
To give you some idea of what the lower federal courts have considered to be "reasonably compact," there follows a series of "before and after" pictures of congressional districts first used in the 1992 election and then struck down, and the districts approved by the federal courts to replace them. They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

Texas

Congressional District 30

1992	1996
	

Congressional District 18

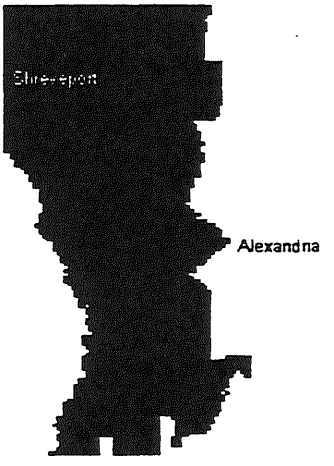
1992	1996
	

Congressional District 29

1992	1996
	

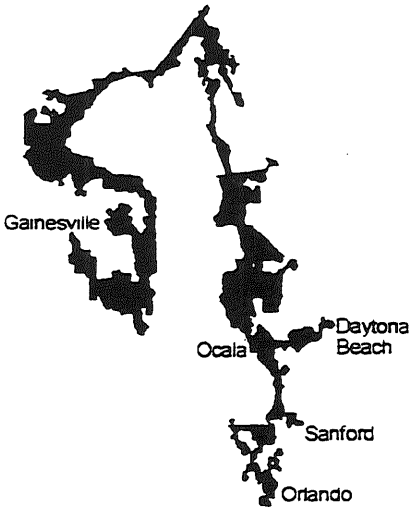
Louisiana

Congressional District 4

1992	1996
	

Florida

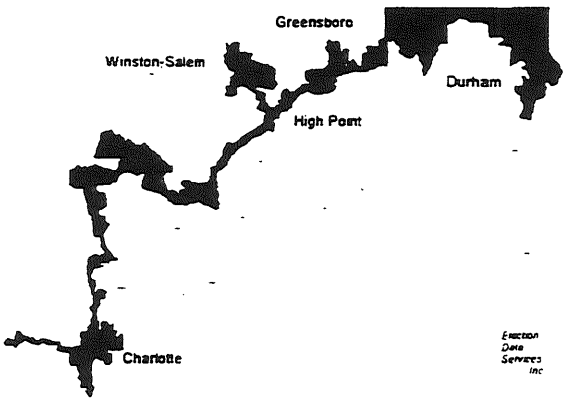
Congressional District 3

1992	1996
	

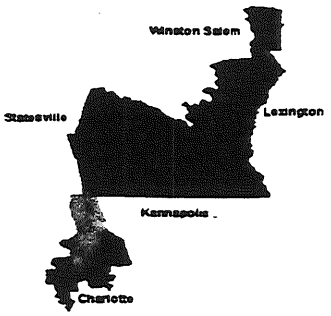
North Carolina

Congressional District 12

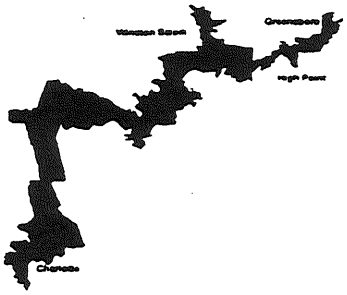
1992



1998



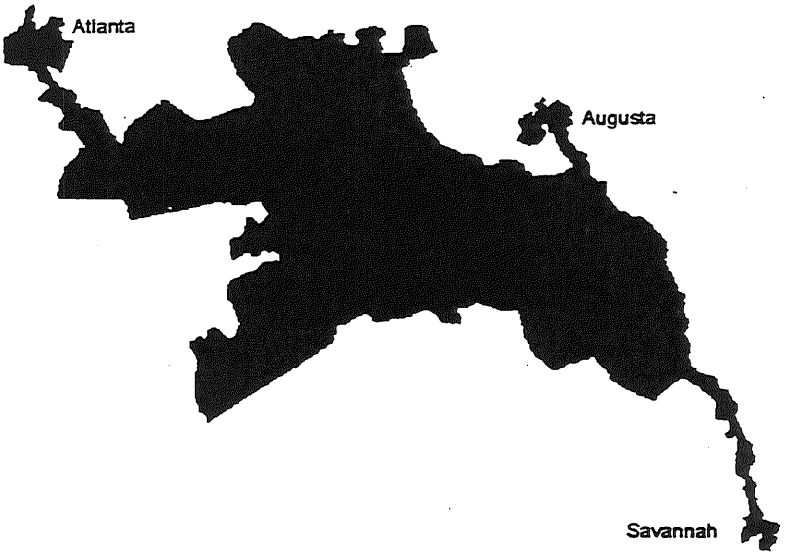
2000



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

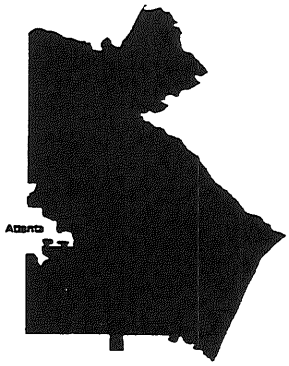
The Supreme Court has assumed, without deciding, that avoiding retrogression in violation of Section 5 of the Voting Rights Act would be a compelling governmental interest.

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).

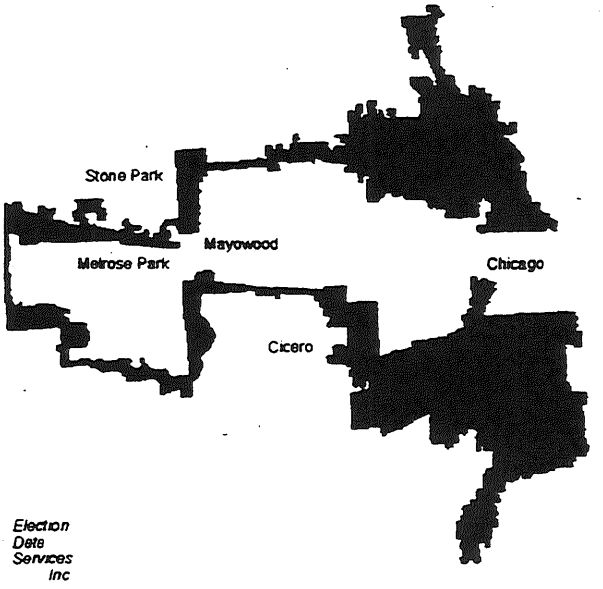
When the case returned to the Court for a second time, after the district court had found the plan to be narrowly tailored to comply with both Section 2 and Section 5, *Shaw v. Hunt*, 861 F. Supp. 408 (E.D. N.C. 1994), the Supreme Court again reversed the district court.

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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Mayor Chuck Canfield
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Phone: (507) 285-8080 Fax: (507) 287-7979

September 13, 2001

Senator Lawrence J. Pogemiller
235 Capital Building
St. Paul, Minnesota 55155

Dear Senator Pogemiller and Honorable Committee Members:

I want to welcome you to the City of Rochester. I sincerely hope you have a rewarding meeting in our community.

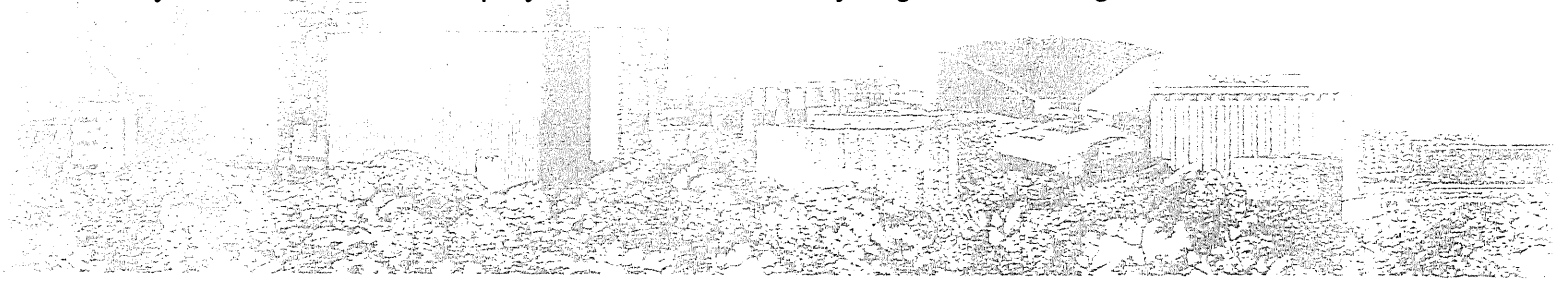
I want to thank you for providing this opportunity for citizens to comment on re-districting plans for Minnesota.

The City of Rochester has previously submitted some comments to the Legislative leaders and to Governor Ventura on the various redistricting plans and how they might impact the City of Rochester.

Our main concern with any re-districting plan is whether it provides our citizenry with common interests with the opportunity to elect individuals who have that same community of interest to the Minnesota Senate or Minnesota House of Representatives. The primary question being – How can the citizenry be most fairly and equitably represented?

With that in mind I would point out some statistics for Rochester and Olmsted County. The City of Rochester was listed as having a population of 85,806 in the 2000 census. That is up over 15,000 persons since the 1990 census population of 70,745. With our growth in 2000 and 2001 Rochester is the third largest city in Minnesota. Over the last 20 years we have averaged a growth of 1400 persons per year to our population. The census 2000 population of Olmsted County, which includes the City, is now up to 124,277 citizens. The total population of Olmsted County approximates the population that is needed for two Senate Districts and four representative districts.

The population in Rochester, Olmsted County and the immediately surrounding area in adjacent counties has an urban focus that revolves around the economy in the City of Rochester. The Mayo Clinic in Rochester is the largest employer in Olmsted County and in all the surrounding adjacent counties. According to the Minnesota Department of Economic Security the number of workers employed in Olmsted County has increased from 65,685 jobs in 1990 to 84,730 in 2000. Over 95% of these jobs are in Rochester. We have almost as many jobs as we have population in the City. Rochester is the employment center for a very large surrounding area.



The population in Rochester and Olmsted County has demographic statistics that differ from the surrounding region. In addition to our higher overall population, our minority population has increased significantly and now comprises 14% of the population in Rochester and 11% of the population in Olmsted. The balance of the region is about 5% minorities, half the proportion of Olmsted County.

The primary and overriding community of interest in the immediate area surrounding Rochester is a diverse urban interest that is dependent upon the Rochester economy. Common sense, equity, and fairness would suggest that this affected population should be concentrated into two Senate Districts so that these citizens of like economic and urban interest are able to have their interests represented most fairly.

The elected City officials are concerned about and opposed to any re-districting plans that would divide the contiguous population in Rochester and Olmsted County into districts that include significantly remote populations that do not share the same interests for this urban area. We, therefore, could not support the House plan for this area. We would strongly recommend that any re-districting plans for Rochester and Olmsted County start in the City and work outward to the most immediate surrounding area that is unquestionably an area of influence of the Rochester economy. The nearest small cities in the adjacent counties have all been affected and influenced by the growth in the economy in Rochester and are some of the fastest growing and best, in my opinion, small cities in Minnesota. They have many of the same urban interests and could be combined with the Olmsted County population to comprise two Senate districts.

Plans, which divide Rochester into small pieces with other areas that are far removed from Olmsted County, would not provide for fair, reasonable, or effective representation for the citizens of Rochester and Olmsted County. We do not believe that having our population divided up to comprise a minority of the population in many far flung districts with citizens who are not as directly affected by the Rochester economy or services would provide for fair representation for our citizens. To date the Senate plan does a much better job in recognizing the similar community of interest in the Rochester/Olmsted County area and in concentrating those interests into two Senate districts. We are not wholeheartedly endorsing the specifics of the Senate plan, as there remains room for adjustments to accommodate the needs of the major political parties within the context of two concentrated Senate districts for the Rochester and Olmsted County area.

We would urge all the major parties and State elected officials involved in this process to have electoral fairness to the citizenry as their primary concern and to avoid political partisanship in establishing the district boundaries for this decade.

Thank you for your attention.

Sincerely,

Charles J. Canfield, Mayor
City of Rochester

DATE OF HEARING: Aug 28, 2001

LOCATION:
400 2nd street S, St. Cloud - CITY HALL
CONF. RM 3

Please provide the following information for our records.

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