

EVERYTHING YOU ALWAYS WANTED TO KNOW
ABOUT REDISTRICTING
BUT WERE AFRAID TO ASK



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INTRODUCTION

This is the second edition of our pamphlet which attempts to answer some of the questions most frequently asked about redistricting. The law in the voting area is always evolving and different courts often interpret the same laws differently. If you have a specific question about redistricting or a problem not adequately covered in this pamphlet, you should seek legal advice.

Redistricting is not something best left to the politicians and the experts. Every voter has a vital stake in redistricting because it determines the composition of districts that elect public officials at every level of government. Given the advances in modern map drawing technology, it is now possible for everyone to participate directly in the redistricting process. But to be an effective player, you need to know the rules of the game which are discussed in this pamphlet.

For more information or assistance in redistricting, contact the ACLU's Voting Rights Project or the other organizations listed in the appendix at the end of this pamphlet.

I. REDISTRICTING AND REAPPORTIONMENT

Q: What is redistricting?

Redistricting refers to the process of redrawing the lines of districts from which public officials are elected.¹ Redistricting typically takes place after each census and affects all jurisdictions that use districts, whether for members of Congress, state legislatures, county commissions, city councils, school boards, etc.

Q: Is redistricting different from reapportionment?

Technically, yes, but as a practical matter, no. Reapportionment in its most narrow, technical sense refers to the allocation of representatives to previously established voting areas, as when Congress allocates, or “apportions,” seats in the U.S. House of Representatives to the several states following the decennial census.² But the terms reapportionment and redistricting are generally used interchangeably and refer to the entire process, at whatever level it takes place, of redrawing district lines after the census.³

II. ONE PERSON, ONE VOTE

Q: Why bother to redraw district lines?

The U.S. Constitution and the federal courts require it. It's also the fair and equitable thing to do. Historically many states did not redistrict to reflect shifts and growth in their populations. As a consequence, the voting power of residents of heavily populated areas was often significantly diluted. In Georgia statewide contests, for example, a vote in 45 sparsely populated rural counties had 45 times the weight of a vote in urban Fulton County.⁴ The voters from the 103 smallest counties in the state, which had only 22% of the population, also elected a majority of the members of the house.⁵ In a series of cases in the 1960s, one of which coined the phrase "one person, one vote," the Supreme Court held that the Fourteenth Amendment guaranteed "equality" of voting power and that the electoral systems in states which failed to allocate voting power on the basis of population were unconstitutional.⁶

Q: Who draws district lines?

In most states the state legislature is responsible for drawing district lines. However, 13 states (Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Missouri, Montana, New Jersey, Ohio, Pennsylvania, Washington) use special redistricting commissions to draw state legislative districts. Six of these states (Arizona, Hawaii, Idaho, Montana, New Jersey, Washington) also use a board or commission to draw congressional plans, while seven states (Maine, Vermont, Connecticut, Illinois, Mississippi, Oklahoma, Texas) use an advisory or remedial commission in the event the legislature is unable to pass new plans. Iowa is different from all others in that district plans are developed by nonpartisan legislative staff with limited criteria for developing plans.⁷ In some instances commissions are not entirely independent since they may be composed of elected and/or appointed officials. California, however, created the first fully independent redistricting commission with passage of Proposition 11 in 2008.⁸

Q: As far as state and local offices are concerned, how does one person, one vote work?

For state and local offices one person, one vote requires the jurisdiction to make "an honest and good faith effort" to construct districts with as near to equal population as is practicable.⁹ Population equality is determined by calculating a district's deviation from ideal district size. Ideal district size is determined by dividing the total population by the number of seats involved. Deviation is determined by calculating the extent to which an actual district is larger (has a "+" deviation) or smaller (has a "-" deviation) than the ideal district

size. Plans with a total population deviation (the sum of the largest plus and minus deviations) under 10% are presumptively regarded as complying with one person, one vote.¹⁰ Plans with deviations between 10% and 16.4% are acceptable *only* if they can be justified “based on legitimate considerations incident to the effectuation of a rational state policy.”¹¹ Plans with deviations greater than 16.4% are regarded as unconstitutional and are probably never justifiable.¹²

Q: How can a jurisdiction justify a total deviation among districts of greater than 10%?

A state can justify a deviation greater than 10% based on a rational state policy, such as drawing districts that are compact and contiguous (all parts connected and touching), keeping political subdivisions intact, protecting incumbents, preserving the core of existing districts, and complying with the Voting Rights Act.¹³ Given the ease with which districts of equal population can be drawn using modern redistricting technology, and the fact that a plan with an excessive deviation is an invitation to a lawsuit, a jurisdiction has every incentive to draw a plan with a deviation of less than 10%.

Q: Do the same deviation rules apply to congressional redistricting?

No. The duty to reapportion Congress is imposed by Article I, Section 2 of the U.S. Constitution rather than the Fourteenth Amendment.¹⁴ The courts have interpreted Article I as imposing a much stricter population equality standard in congressional redistricting. Congressional districts must be “as mathematically equal as reasonably possible.”¹⁵ Deviations from ideal district size can in theory be justified by a consistently applied state policy. However, in a case from New Jersey, the Supreme Court invalidated a congressional plan that contained a total deviation of only 0.6984% on the grounds that it was possible to draw a plan with a smaller deviation and the state’s asserted policy had not been consistently applied.¹⁶

Given modern technology and the large size of congressional districts, it is generally possible to draw plans that accommodate a state’s policies with virtually no deviations at all. A number of states drew plans after the 1990 and 2000 censuses with a deviation of only one person from ideal district size.

Q: What other factors are considered when drawing districts?

Aside from population equality, jurisdictions are required to comply with the provisions of the Voting Rights Act and the Constitution prohibiting discrimination. Jurisdictions also apply “traditional redistricting principles” which include: compactness (related to district shape), contiguity (all parts of a district touching or connected), preservation of county and municipal lines, maintaining communities of interest (specific groups with shared

interests/identity), maintaining cores of existing districts, and incumbency protection or competitiveness. States may add to or prioritize the traditional redistricting principles.¹⁷

Q: How often must a state redistrict?

As a matter of federal law, redistricting is required only once a decade following release of the census, and only then if districts are malapportioned.¹⁸ States are free to redistrict more often if they wish. As the Supreme Court has held: “With respect to a mid-decade redistricting to change districts drawn earlier in conformance with a decennial census, the Constitution and Congress state no explicit prohibition.”¹⁹ Mid-decade redistricting has often been driven by partisanship or to protect a shift in political power, but in general redistricting is time consuming, disruptive, and incumbents are disinclined to change the districts from which they were elected. Indeed, some states have enacted laws prohibiting redistricting more frequently than once every ten years.²⁰

Q: How does the Census Bureau count people?

The Census Bureau counts persons based on a “usual residence” rule, which has been defined as the place where the person lives and sleeps most of the time. Thus, incarcerated persons, members of the military, students, and persons in other institutions are counted as members of the population where their institutions are located.²¹ Many, however, contend that this practice provides an unfair advantage in redistricting to such communities by inflating their populations with individuals likely to return to their actual home areas upon release from prison, the military, or other institution.²²

III. MINORITY VOTE DILUTION

Q: What is minority vote dilution?

Vote dilution, as opposed to vote denial, refers to the use of redistricting plans and other voting practices that minimize or cancel out the voting strength of racial and other minorities. In the words of the Supreme Court, the essence of a vote dilution claim “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”²³

Q: What are some of the techniques used in redistricting plans to dilute minority voting strength?

Three techniques frequently used to dilute minority voting strength are “cracking,” “stacking,” and “packing.” “Cracking” refers to fragmenting concentrations of minority population and dispersing them among other districts to ensure that all districts are majority white. “Stacking” refers to combining concentrations of minority population with greater concentrations of white population, again to ensure that districts are majority white. “Packing” refers to concentrating as many minorities as possible in as few districts as possible to minimize the number of majority-minority districts. All of these techniques may result in a districting plan that violates the Voting Rights Act, as well as the Fourteenth Amendment.²⁴ Other techniques have also been used to affect a group’s voting strength: questionable purging of registration rolls; moving polling places; administering difficult registration procedures; annexing areas; decreasing the number of voting machines in minority areas; and threatening reprisals for voting.²⁵

Q: Is vote dilution prohibited by the Constitution?

Yes. A reapportionment plan that dilutes minority voting strength is unconstitutional if it was conceived or operated as a *purposeful* device to further racial discrimination.²⁶ Race need not be the sole or main purpose, but only a motivating factor in the decisionmaking process.²⁷

Q: Does the Voting Rights Act prohibit vote dilution in redistricting?

Yes. Two provisions of the Voting Rights Act, Section 2²⁸ and Section 5,²⁹ prohibit the use of voting practices or procedures, including redistricting plans, that dilute minority voting strength.

Q: Who is protected by the Voting Rights Act?

When it was first enacted, the Voting Rights Act targeted southern states which had systematically discriminated against African-Americans in voting. The Act prohibited discrimination based on “race or color.”³⁰ In 1975 Congress extended the protection of the act to language minorities, defined as American Indians, Asian-Americans, Alaskan Natives, and persons of Spanish Heritage.³¹

IV. SECTION 2 OF THE VOTING RIGHTS ACT

Q: What does Section 2 provide?

Section 2 provides that a voting practice is unlawful if it “results” in discrimination, *i.e.*, if, based on the totality of circumstances, it provides minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”³² Although Section 2 does not require proof of racial purpose, practices which were enacted or are being maintained for the purpose of discriminating on the basis of race or language minority status would also be unlawful under the statute.

Q: Why did Congress dispense with the requirement of proving racial purpose under Section 2?

Congress did not require proof of racial purpose for a statutory violation for several reasons, the most important of which was that whether or not public officials acted out of bias or intended to discriminate against a minority group asked the “wrong question.” The relevant inquiry, according to Congress, was whether minorities “have equal access to the process of electing their representatives.” The intent requirement was also “unnecessarily divisive” because it required plaintiffs to allege and prove that local officials, or indeed entire communities, were racists. Finally, the requirement of proving the subjective motives of a legislative body imposed an “inordinately difficult” burden of proof on minority plaintiffs.³³ As Judge John Minor Wisdom wrote in an early voting case, to require proof of an unconstitutional legislative purpose was “to burden the plaintiffs with the necessity of finding the authoritative meaning of an oracle that is Delphic only to the court.”³⁴

Q: How do you prove a violation of the results standard of Section 2?

The most important case interpreting Section 2 is *Thornburg v. Gingles*³⁵, in which the Supreme Court invalidated multi-member legislative districts in a redistricting plan adopted by North Carolina after the 1980 census. The Court identified three factors, known as the “*Gingles* factors,” that are of primary importance in determining a violation of the statute: (1) whether “the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;” (2) whether “the minority group . . . is politically cohesive,” *i.e.*, tends to vote as a bloc; and (3) whether “the majority votes sufficiently as a bloc to enable it - in the absence of special circumstances . . . usually to defeat the minority’s preferred candidate.”³⁶

The legislative history further provides that “a variety of factors, depending upon the kind of rule, practice, or procedure called into question” are also relevant in determining a

violation.³⁷ Typical factors identified in the Senate report include: the extent of any history of discrimination in the jurisdiction that touched the right of the members of the minority group to participate in the democratic process; the extent to which the jurisdiction uses devices that may enhance the opportunity for discrimination, such as majority vote requirements or anti-single shot provisions; whether the members of the minority group bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; and, the extent to which members of the minority group have been elected to public office in the jurisdiction.³⁸ A court's ultimate duty is to determine whether, in light of the *Gingles* factors and the totality of circumstances, a challenged practice dilutes minority voting strength.³⁹

Q: How compact must a district be to satisfy Section 2 and the first *Gingles* factor?

The Supreme Court has said that a district need not be the winner “in endless ‘beauty contests’” to meet the compactness standard of Section 2.⁴⁰ Instead, a district complies with Section 2 if it “is *reasonably* compact and regular, taking into account traditional redistricting principles such as maintaining communities of interest and traditional boundaries.”⁴¹

There are various social science measures of compactness, such as the perimeter measure and the dispersion measure,⁴² but most courts have applied an intuitive, “eyeball” test, *i.e.*, if a district looks reasonably compact and is similar in shape to other districts drawn by the jurisdiction it is deemed compact within the meaning of Section 2 and the first *Gingles* factor.⁴³ Some courts have placed more emphasis on how a district would function in the political process, rather than on how it looks. The functional approach takes into account such things as transportation networks, media markets, the existence of recognized neighborhoods, *etc.*, to determine whether it is possible to organize politically and campaign effectively in the district.⁴⁴

Q: What is the test for determining if a minority is a “majority” in a district?

Most courts have held that, to be a majority, the minority must make up 50% plus 1 of the voting age population (VAP) in a district on the theory that only those of voting age have the potential to elect candidates of their choice within the meaning of Section 2.⁴⁵ The Supreme Court affirmed this view in *Bartlett v. Strickland* by holding that: “Only when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met.”⁴⁶

Q: If a minority population is too small to be a majority, but large enough to elect candidates of choice with help from voters who are members of the majority, does Section 2 require the drawing of such “crossover” or “coalition” districts?

No. The Supreme Court also held in *Bartlett v. Strickland* that “§ 2 does not mandate creating or preserving crossover districts.”⁴⁷ The Court was careful to note, however, that while not required by § 2, “in the exercise of lawful discretion States could draw crossover districts as they deemed appropriate.”⁴⁸

Q: How does a court determine whether a minority is politically cohesive within the meaning of the second *Gingles* factor?

The Supreme Court held in *Gingles* that political cohesion can be shown by evidence “that a significant number of minority group members usually vote for the same candidates.”⁴⁹ Elsewhere in the opinion the Court said that racial bloc voting and political cohesion could be established “where there is ‘a consistent relationship between [the] race of the voter and the way in which the voter votes.’”⁵⁰ Most courts have applied a common sense rule that if a majority of minority voters vote for the same candidates a majority of the time the minority is politically cohesive.

Q: How pervasive must white bloc voting be to satisfy the third *Gingles* factor?

The third *Gingles* factor (whether white bloc voting is “legally significant”) is satisfied if the majority votes sufficiently as a bloc to enable it “usually” to defeat the minority’s preferred candidate.⁵¹ The fact that some minority candidates may have been elected does not foreclose a Section 2 claim. Instead, in the words of the Supreme Court, where a challenged scheme “generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters.”⁵²

Q: Can two minority groups, such as African-Americans and Hispanics, ever be combined for purposes of Section 2?

The Supreme Court hasn’t resolved this issue,⁵³ but most courts have held that different minority groups can be combined provided they satisfy the *Gingles* factors.⁵⁴

Q: Since we have a secret ballot, how is it possible to show racial bloc voting?

In *Gingles* the Court approved two widely used methods of proving racial bloc voting: extreme case (or homogeneous precinct) analysis, and ecological regression analysis.⁵⁵ Homogeneous precinct analysis looks at precincts predominantly (90% or more) of one

race. If, for example, a black candidate gets most of the votes in the predominantly black precincts but few votes in the predominantly white precincts, the voting in those precincts is necessarily along racial lines. Ecological regression analysis, which is generally performed by experts in the field, looks at all the precincts to determine if there is a correlation between the racial makeup of the precincts and how votes are cast. It generates estimates of the percentages of members of each race who voted for minority candidates. Courts have now accepted a third approach, Ecological Inference (EI), which also estimates racial bloc voting.⁵⁶

Q: Is it necessary to prove that voters are voting *because of race*?

No. The Supreme Court has held that “the reasons black and white voters vote differently have no relevance to the central inquiry of ‘ 2. . . . [O]nly the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.”⁵⁷

Q: Which elections are the most important in proving racial bloc voting and in determining whether it is legally significant?

Every election in which a voter votes, *e.g.*, a presidential preference primary, a statewide contest, a local school board election, tells us something about voter behavior and is therefore theoretically relevant in a vote dilution challenge. However, elections for the particular office at issue and those which give the voters a racial choice are generally considered the most important in determining a Section 2 violation.⁵⁸ In *Gingles*, for example, the only elections analyzed by the Court were black-white legislative contests.⁵⁹

Defendants in some voting cases have argued that minority voters were often able to elect candidates of their choice in white-white contests and that therefore there was no dilution of minority voting strength. The courts have generally rejected these arguments on the grounds that Section 2’s guarantee of equal opportunity is not met when “candidates favored by blacks can win, but only if the candidates are white.”⁶⁰

Q: What is “proportionality” and does it play a role in the *Gingles* analysis?

The term “proportionality,” as used by the Supreme Court, “links the number of majority-minority voting districts to minority members’ share of the relevant population.”⁶¹ Whether a challenged plan provides proportionality is a factor to be considered by a court in its totality of circumstances analysis under Section 2, but proportionality does not insulate a plan, or provide it a safe harbor, from a vote dilution challenge. According to the Court, “[n]o single statistic provides courts with a short-cut to determine whether a [redistricting plan] unlawfully dilutes minority voting strength.”⁶²

Q: If a plan drawn to remedy a Section 2 violation were to exceed proportionality, would it for that reason be unacceptable?

No, particularly where the remedial plan has less disparity and more closely approximates proportionality than the existing plan. As one court put it, “[t]here is no reason why the . . . minority in this case should continue to bear the burden of under-representation under the current scheme while the white majority enjoys over-representation.”⁶³

Q: Does the *Gingles* analysis also apply to challenging existing single member district plans?

Yes. The Court has held that the analysis in *Gingles* applies to single member redistricting plans as well as multi-member plans and at-large elections.⁶⁴

V. SECTION 5 OF THE VOTING RIGHTS ACT

Q: How does Section 5 work?

Section 5 requires certain “covered” states, *i.e.*, those which historically used discriminatory tests for voting and had low levels of voter participation, to get federal approval, or pre-clearance, of their new voting laws or practices before they can be implemented.⁶⁵ Section 5 was designed to prohibit states from replacing their discriminatory tests for voting with other, equally discriminatory voting practices.

Q: What states are covered by Section 5?

Section 5 covers nine states in their entirety (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and parts of seven others (California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota).

Q: What voting changes are covered by Section 5?

The courts have interpreted Section 5 broadly to cover practices that alter the election laws of a covered jurisdiction in even a minor way.⁶⁶ Covered changes have run the gamut from redistricting plans,⁶⁷ to annexations,⁶⁸ to setting the date for a special election,⁶⁹ to moving a polling place.⁷⁰

Q: Is Section 5 permanent?

No. Unlike Section 2, Section 5 was originally enacted as a temporary, five year measure.⁷¹ Section 5 was extended and expanded by amendments in 1970, 1975, 1982, and 2006. Pursuant to the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Section 5 is now set to expire in 2032.

Q: Can jurisdictions “bail out” from Section 5 coverage?

Yes. In *Northwest Austin Municipal Utility District Number One v. Holder*, the Supreme Court held that all covered jurisdictions, including political subdivisions, can escape or bail out from Section 5 by showing that for the preceding ten years they have had clean voting rights records and have implemented affirmative measures to increase minority political participation.⁷²

Q: Do we still need Section 5?

Yes. Some have argued that since Bull Connor and other segregationists are dead, and since we elected an African American President, Barack Obama in 2008, we no longer need Section 5. Congress, however, passed the 2006 extension and amendments of the Voting Rights Act by a vote of 390 to 33 in the House and by a unanimous vote in the Senate. It held a total of 21 hearings, heard from more than 80 witnesses, and compiled a comprehensive record of more than 16,000 pages of evidence. The legislative history, which details continuing Section 5 objections, Section 5 enforcement actions, the use of Federal observers, and Section 2 litigation in the covered jurisdictions, strongly supports Congress' considered finding that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."⁷³

One of the most sobering facts to emerge from the congressional record is the continuing presence of racially polarized voting. As Congress concluded, "[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act."⁷⁴

Q: How is preclearance obtained?

Preclearance can only be granted by the United States District Court for the District of Columbia in a lawsuit, or by the U.S. Attorney General in an administrative submission. Local federal courts have the power, and duty, to enjoin the use of unprecleared voting practices, but they have no jurisdiction to determine whether a change should be approved.⁷⁵ That decision is reserved exclusively for the District of Columbia court or the Attorney General. Section 5 also places the burden of proof on the jurisdiction to show that a proposed voting change does not have a discriminatory purpose or effect.⁷⁶ The statute was thus designed to shift the advantages of inertia and the delay associated with litigation from the victims of discrimination to the jurisdictions which practiced it.

Q: What if a jurisdiction refuses to submit a voting change for preclearance?

Congress placed the initial burden of "voluntary" compliance with the statute on the covered jurisdictions,⁷⁷ but it also authorized the Attorney General and private citizens to bring suit in local federal court to block the use of unprecleared voting practices.⁷⁸ It also made it a crime to fail to comply with the statute.⁷⁹

Q: What standards do the District of Columbia Court and the Attorney General use in determining whether a proposed change has a discriminatory effect?

The Supreme Court has construed the discriminatory effect standard of Section 5 narrowly to mean retrogression.⁸⁰ That is, only those voting changes that make minorities worse off than they were under the preexisting practice or system (known as the “benchmark” for determining retrogression)⁸¹ are objectionable under the effect standard. The Court has even held that if a voting change clearly violates the results standard of Section 2, it would still be objectionable under Section 5 only if it caused a retrogression in minority voting strength.⁸²

In *Georgia v. Ashcroft*, the Court held that a redistricting plan that diminished the ability of minorities to elect candidates of their choice was not necessarily objectionable under the effect standard if it provided them the ability to “influence” the election of candidates “sympathetic to the interests of minority voters.”⁸³ Congress remedied the decision by amending Section 5 in 2006 to provide that the statute’s purpose “is to protect the ability of such citizens to elect their preferred candidates of choice.”⁸⁴

Q: Can an intervening court decision alter the benchmark for determining retrogression under Section 5?

Yes. In the event that an existing practice or plan were held to be unconstitutional, the benchmark for determining retrogression of any proposed practice or plan would normally be the last legally enforceable practice or plan used by the jurisdiction.⁸⁵ However, a court ordered remedial redistricting plan would itself become the benchmark for determining retrogression in a subsequent Section 5 submission rather than the last legally enforceable plan.⁸⁶

Q: What is the standard for determining whether a proposed change has a discriminatory purpose under Section 5?

As with the effect standard, the Supreme Court construed the purpose standard of Section 5 narrowly to mean a purpose to retrogress. Thus, a voting change enacted with the express purpose of abridging minority voting strength would be objectionable only if the jurisdiction intended to make minorities worse off than they were before. Congress remedied this narrow interpretation by amending the Voting Rights Act in 2006 to provide that the term “purpose” as used in Section 5 “shall include any discriminatory purpose.”⁸⁷

Q: Can minorities participate in the Section 5 preclearance process?

Yes. The Attorney General's regulations allow, and encourage, minorities to participate in the preclearance process and submit information concerning the possible discriminatory purpose or effect of voting changes. In practice, the Attorney General is heavily dependent on information received from citizens in the communities affected by proposed voting changes in administering the statute.

Q: What is the procedure for making a Section 5 comment?

Section 5 comment letters can be mailed to the Chief, Voting Section, Civil Rights Division, Department of Justice, P.O. Box 66128, Washington, D.C. 20035-6128. The envelope and first page should be marked: Comment under Section 5 of the Voting Rights Act. Comments can also be made by phone by calling 1-800-253-3931 or (202) 307-2767, or by e-mail at: vot1973c@usdoj.gov. To learn more about the Section 5 process, you can log on to the voting section website at www.usdoj.gov/crt/voting.

Q: If a voting change has been precleared under Section 5 can it still be challenged under Section 2?

Yes. Even if a redistricting plan has been precleared under Section 5, it can still be challenged under Section 2 by a lawsuit in the local federal district court.⁸⁸

VI. THE *SHAW/MILLER* CASES of the 1990's

Q: What was the significance of the *Shaw/Miller* cases?

In *Shaw v. Reno*,⁸⁹ decided in 1993, the Court held that white voters, who alleged that North Carolina's two majority black congressional districts were so bizarre in shape that they could only be understood as an attempt to assign or segregate voters on the basis of race, stated a claim under the equal protection clause of the Fourteenth Amendment.

In *Miller v. Johnson*,⁹⁰ the Court held that Georgia's majority black Eleventh Congressional District was unconstitutional, not because of its shape, but because race was the "predominant" factor in drawing district lines and the state "subordinated" its traditional redistricting principles to race without having a compelling reason for doing so, such as remedying or avoiding a violation of federal law. According to the Court, a bizarre shape was not required for an equal protection challenge but was simply one way of proving a predominant racial motive and subordination of traditional redistricting principles.

The *Shaw/Miller* cases allowed white voters to challenge the constitutionality of majority-minority districts based solely on their shape, while in voting cases brought by blacks the Court has required the plaintiffs to prove that a challenged practice was adopted or was being maintained with a discriminatory purpose to establish a constitutional violation.⁹¹ In the *Shaw/Miller* cases, the plaintiffs did not attempt to prove, or even claim, that the state's redistricting plans were enacted for the purpose of discriminating against them or other white voters.⁹² In civil rights cases brought by blacks the Court had held that the plaintiffs were required to show a personal, concrete injury.⁹³ In the *Shaw/Miller* cases, however, the Court dispensed with any requirement that the plaintiffs allege or prove that the challenged plans had diluted their voting strength or personally injured them in any way.⁹⁴ These cases transformed the Fourteenth Amendment from a law designed to prohibit discrimination against racial minorities,⁹⁵ to one that can now be used to challenge majority-minority districts and allow whites to seek to maximize their control of the redistricting process. That this should be done in the name of "equal protection" is one of the great ironies of the Court's modern redistricting cases.

Q: Is it still permissible to draw majority-minority districts?

Yes. The Court has invalidated majority black and Hispanic districts in some states,⁹⁶ but it has rejected challenges to such districts in others.⁹⁷ States are not only permitted to draw majority-minority districts, but may be required to do so to comply with the Voting Rights Act.

According to the Court, a legislature “will . . . almost always be aware of racial demographics,” but it may not allow race to predominate in the redistricting process.⁹⁸ A state “is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interest.”⁹⁹ Redistricting may be performed “with consciousness of race.”¹⁰⁰ Indeed, it would be “irresponsible” for a state to disregard the racial fairness provisions of the Voting Rights Act.¹⁰¹ A state may therefore “create a majority-minority district without awaiting judicial findings” if it has a strong basis in evidence for avoiding a Voting Rights Act violation.¹⁰² Admittedly, it may be difficult to steer a median course between these competing principles articulated by the Court, but it is clear that the Court has not banned the use of majority-minority districts.

Q: Are majority-minority districts a suspect form of gerrymandering?

No. Majority black or Hispanic districts are no more “gerrymandered” than majority white districts. One leading expert has said that “[a]ll districting is ‘gerrymandering.’”¹⁰³ Indeed, districts are always designed to give, or try to give, an advantage to somebody, some group, or some interest, and to that extent can be called “gerrymandered.” Incumbents try to “gerrymander” districts in which they can get elected; Democrats try to “gerrymander” districts that protect their party, suburbanites try to “gerrymander” districts to include the suburbs, and so on. As the Court noted in *Davis v. Bandemer*,¹⁰⁴ “[a]n intent to discriminate in this sense may be present whenever redistricting occurs.”

Q: Do majority-minority districts segregate voters?

No. The majority-minority districts in the South created after the 1990 census, far from being segregated, were the most racially *integrated* districts in the country. They contained an average of 45% of non-black voters. Georgia’s two current congressional majority-minority districts created mid-decade had an average black population of 54.57%.¹⁰⁵ No one familiar with Jim Crow could ever confuse highly integrated redistricting plans, or plans that provide minorities with a realistic opportunity to elect candidates of choice, with racial segregation under which blacks were not allowed to vote or run for office. Moreover, the notion that majority black districts are “segregated,” and that the only integrated districts are those in which whites are the majority, is itself a racist concept. A constitutional doctrine that can tolerate only what is majority white in redistricting is surely a perversion of the equal protection standard of the Fourteenth Amendment.

Q: Is race simply a stereotype that should be avoided in redistricting?

Race is not a scientific or genetic fact, but race remains an important social and political fact. Most scientists and social scientists today recognize that race is a social construct—that is, a way of looking at people based on tradition, custom, prevailing attitudes, and

the law. Various groups of individuals in this country have been singled out at one time or another for discriminatory treatment because of their skin color or their ancestry, including, for example, the Irish and the Chinese. But discrimination against blacks, including slavery, Jim Crow, and political disfranchisement, has been particularly harsh and persistent. In the states where majority-minority districts were challenged, race was not just an “assumption” or “stereotype,” as the Supreme Court maintained. Race, or more precisely racial discrimination, was real. In the congressional case from Georgia, for example, *Miller v. Johnson*, racial discrimination in every aspect of life in the state was so apparent that the trial court took judicial notice of it and dispensed with any requirement that it be proved. The lower court also acknowledged that, on the basis of existing state-wide racial bloc voting patterns, the Voting Rights Act required the creation of a majority black congressional district in the Atlanta metropolitan area.

Q: Do majority-minority districts stigmatize or harm voters?

No. There is no empirical evidence that majority-minority districts have in fact stigmatized voters or caused them harm. The witnesses in the Georgia case testified at trial without contradiction that the challenged plan had not increased racial tension, caused segregation, imposed a racial stigma, deprived anyone of representation, caused harm, or guaranteed blacks congressional seats. The district court concluded that “the 1992 congressional redistricting plans had no adverse consequences for ... white voters.”¹⁰⁶ None of the plaintiffs in the *Shaw* type cases argued that they were directly harmed by the challenged plans. Their claimed injury was entirely theoretical and abstract.

Q: Have majority-minority districts increased political opportunities for minorities?

Yes. In 1964 there were only about 300 black elected officials nationwide. By 1998 the number had grown to more than 8,858.¹⁰⁷ This increase was the direct result of the increase in majority-minority districts since passage of the Voting Rights Act in 1965.¹⁰⁸ By 2000, the number of black elected officials had increased to 9,040, a gain of over 600 percent since 1970.¹⁰⁹ By 2002, the number of black elected officials had grown to 9,430.¹¹⁰ The number of Hispanic elected officials grew from 3,147 in 1985 to 5,240 in 2008.¹¹¹

Q: Are majority-minority districts still needed?

Yes. Although some black incumbents drawn into new majority white districts as a result of the *Shaw* cases were reelected, *e.g.*, Cynthia McKinney and Sanford Bishop in Georgia, voting in their elections was still racially polarized.¹¹² A 2006 report by the National Commission on the Voting Rights Act found that black candidates are unlikely to be elected when non-Hispanic whites are the majority of the electorate.¹¹³ This is likely for other minority

groups as well. The report further indicates that in 2000 only four of thirty-eight black congressmen were elected from majority-white congressional districts, and no Latino U.S. Representatives holding office in 2000 had been elected from majority-white districts.

Prior to the 1996 elections, the only black candidate in this century to win a seat in Congress from a majority white district in the deep South states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas was Andrew Young. He was elected in 1972 from the Fifth District in metropolitan Atlanta, in which blacks were 44% of the population. A pattern of minority office holding similar to that in Congress exists for southern state legislatures. Throughout the 1970s and 1980s, only about 1% of majority white districts elected a black candidate. As late as 1988 no blacks were elected from majority white districts in Alabama, Arkansas, Louisiana, Mississippi, or South Carolina.¹¹⁴ The number of blacks elected to state legislatures increased after the 1990 redistricting, but the increase was the result of the increase in the number of majority black districts.¹¹⁵ Prior to 2006, 402 state house and senate black legislators were elected from black majority districts, while 140 Hispanic state legislators were elected from Hispanic majority districts.¹¹⁶

Given the persistent patterns of racial bloc voting over time in the South, the destruction of majority-minority districts, whether at the congressional or state and local levels, would inevitably lead to a decline in the number of minority office holders. It is premature to claim that the electorate is suddenly color-blind or that majority-minority districts are no longer necessary to counter the effects of racial bloc voting.

Q: Is there any way to avoid a *Shaw/Miller* challenge?

Probably not, but during the past decade there was a notable decrease in *Shaw/Miller* voting rights cases. However, there will always be voters who are disgruntled over being put in a majority-minority district and who will be willing to go to court to challenge the plan. But there are things a legislative body can do to defeat a *Shaw/Miller* challenge if one is brought. They include: drawing districts that are reasonably compact; observing traditional redistricting principles; and establishing a record showing that the minority community has common interests, needs, and concerns.

A jurisdiction can also draw majority-minority districts if it has a reasonable basis in evidence for avoiding a Section 2 violation. That evidence would consist of the factors identified in *Gingles* and the legislative history of Section 2: geographic compactness; political cohesion; legally significant white bloc voting; a history of discrimination; the use of devices that enhance the opportunity for discrimination, such as majority vote requirements or anti-single shot provisions; whether the minority bears the effects of discrimination in such areas as education, employment and health, which hinders its ability to participate

effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; and the extent to which minorities have been elected to public office in the jurisdiction. A jurisdiction should make it clear, moreover, that it considered these factors *at the time* it adopted its redistricting plan. After-the-fact attempts to establish a basis in evidence for complying with Section 2 might be dismissed as being unrelated to the decisionmaking process.

Q: Are minorities better off influencing the election of white candidates, rather than electing minority candidates whom they might prefer?

When it amended Section 2 of the Voting Rights Act in 1982, Congress provided that the right protected by the statute was the equal right of minorities “to elect” candidates of their choice.¹¹⁷ As Congress recognized, a system in which the majority can freely elect candidates of its choice but in which minorities can only influence the outcome of elections is not a true democracy. Congress reaffirmed this position when it amended Section 5 of the Voting Rights in 2006 to provide that the statute’s purpose “is to protect the ability of [minority] citizens to elect their preferred candidates of choice.”¹¹⁸

Touting minority influence as a substitute for equal voting power is also paternalistic, for it assumes that minorities are better off being represented by officials (mainly white) chosen from white majority districts. If influence were such a great idea, white voters would certainly promote the creation of as many districts as possible in which they were the minority so that they could maximize their influence over elections. But the white voters who have challenged majority-minority districts would scoff at such a suggestion.

Q: Shouldn’t redistricting be color blind?

In an ideal world where people didn’t vote on the basis of race, perhaps. In the real world, states may and should consider race in redistricting for a variety of reasons—to overcome the effects of prior and continuing discrimination, to comply with the Fourteenth Amendment and the Voting Rights Act, or simply to recognize communities that have a particular racial or ethnic makeup to account for their common, shared interests. The Supreme Court has acknowledged that legislators are always aware of racial information and the relationship between race and voting behavior. Modern technology and more sophisticated census data have also increased access by legislators and the general public to race and electoral behavior information. It is far more honest to discuss and consider race openly than to pretend it is not a factor in reapportionment decisionmaking.

VII. PARTISAN GERRYMANDERING

Q: Can the party in control enact a plan to limit the political opportunities of another party?

In theory, no. The Supreme Court held for the first time in 1986 that a plan which discriminated against a political party could be challenged under the Fourteenth Amendment.¹¹⁹ Although the Court rejected the plaintiffs' claim, it indicated that a violation could be established by proof of intentional discrimination, an actual discriminatory effect, and that the system would "consistently degrade" the group's influence on the political process as a whole.¹²⁰

Q: Have the courts invalidated many redistricting plans on the basis that they were partisan gerrymanders?

No. As a practical matter the standard of proof announced by the Court has proved to be almost impossible to meet. Only one reported case has invalidated an election plan on the basis that it was a partisan gerrymander, a plan involving judicial elections in North Carolina. The case, however, was ultimately dismissed as moot.

Claims of partisan gerrymandering in three states—Pennsylvania, Texas, and Georgia—following the 2000 census were dismissed despite conclusive evidence that the redistricting was driven by partisan bias.¹²¹ Four of the Justices who decided those cases concluded that political gerrymandering claims were nonjusticiable.

Q: Are there any judicially manageable standards to adjudicate partisan gerrymandering claims?

Although the courts are deeply fractured and divided over the issue, plaintiffs—at least in theory—should be able to show partisan gerrymandering by evidence that: (1) partisanship was the predominant purpose in adopting the plan; (2) there is an actual history or a projection of disproportionate electoral results under the plan; and (3) an alternative plan could be drawn which complied with traditional redistricting principles and remedied the dilution of a party's voting strength.¹²²

VIII. THE 2010 CENSUS

Q: Why do we need a fair and accurate count?

The census is used in redistricting at the congressional, state, county, and other local levels. If the count is not accurate some districts will be overpopulated and thus underrepresented, while other districts would be underpopulated and overrepresented. The concept of political equality means one person, one vote. Members of Congress are also apportioned to the states according to their respective numbers based on the census count. If the census undercounts the residents of a state it may lose representation in the U.S. House to which it would otherwise be entitled. The census is also used to allocate \$400 billion in federal funds for public health, neighborhood improvement, new construction, transportation, education, and other services. If the census undercounts residents in a state, it may lose federal funds. Census data is also critical in assessing the fairness of employment practices, and in monitoring racial disparities in health and education programs.

Q: What has The Census Bureau done to ensure a fair and accurate count?

The Census Bureau has worked diligently over the past decade to address the undercount and overcount in previous censuses. The 2000 census missed approximately 16 million people.¹²³

Unfortunately, minorities account for most of the undercounted population. To help ensure an accurate count the Census Bureau has partnered with many organizations nationwide to form Complete Count Committees. Complete Count Committees are volunteer teams consisting of community representatives including government agencies, education, business, and religious organizations, and the media working together to increase awareness and encourage individuals to respond to census questioners.¹²⁴ The Census Bureau also helped in identifying “Hard To Count” areas to assist the Complete Count Committees with their public education, outreach, and mobilization efforts.

Q: What is Public Law 94-171 data?

In 1975 Congress enacted Public Law 94-171 which allowed states to provide the census with physical descriptions of geographic areas, such as voting precincts, that they intended to use in drawing district lines.¹²⁵ The PL 94-171 data makes it easier for states to comply with one person, one vote and minimizes the need to split precincts when drawing district lines. The Census Bureau is required to provide states with data on voting age population and race at the block level by April 1 of the year following the census.

Q: What is The American Community Survey?

The American Community Survey (ACS) is “one component of a reengineered decennial census and is designed to address the nation’s need for more current information on the characteristics of its population and housing.”¹²⁶ ACS replaces the census long form and provides period estimates: 1-year estimates for areas with populations of 65,000 or more; 3-year estimates for areas with populations of 20,000 or more; and 5-year estimates for all areas. ACS does not replace the decennial census, but instead provides continuous measurement and rolling sample data more useful in reflecting current population trends.

Q: Can a jurisdiction redistrict using data other than the census data?

A jurisdiction must utilize accurate and reliable population and racial composition data in any redistricting plan. The U.S. Department of Justice refused to preclear a 2007 City of Calera, Alabama redistricting plan partly on the grounds that the city used certificate of occupancy data to estimate population, and used no reliable data to estimate the racial composition of newly annexed areas. According to the U.S. Department of Justice: “In failing to provide adequate numbers to evaluate the annexations and concomitant redistricting plan, the city fails to meet its burden of proof.”¹²⁷

The American Community Survey data provides more current estimates, but the extent to which it can be used for redistricting purposes has not been fully determined. Though some aspects of ACS data may prove useful in redistricting plans, to date census data continues to be the most reliable.

Q: What can we do to ensure fairness in redistricting?

We all need to be involved in the process. We should stay informed of plans to redraw federal, state, and local district lines; attend meetings where plans are presented and evaluated; contact organizations willing to evaluate proposed plans and offer alternatives; write letters of support or opposition to elected officials and the Department of Justice; and seek needed legal advice. The goal of redistricting is to provide fair and effective representation for all. We can help achieve that goal by actively participating in the redistricting process.

ENDNOTES

- 1 Johnson v. Miller, 929 F. Supp. 1529, 1535 n.12 (S.D. Ga. 1996).
- 2 See U.S. Const. art. I, § 2 (“Representatives . . . shall be apportioned among the several states . . . according to their respective numbers”).
- 3 Kilgarlin v. Martin, 252 F. Supp. 404, 410 n.1 (S.D. Tex. 1966); Johnson v. Miller, 929 F. Supp. at 1535 n.12.
- 4 South v. Peters, 339 U.S. 276, 278 (1950) (Douglas, J., dissenting).
- 5 Toombs v. Fortson, 205 F. Supp. 248, 251 (N.D. Ga. 1962).
- 6 Gray v. Sanders, 372 U.S. 368, 380-81 (1963); Reynolds v. Sims, 377 U.S. 533 (1964).
- 7 Tim Storey, *READY, SET, DRAW*, STATE LEGISLATURES, Dec 2009, at 14-17; National Conference of State Legislatures, Redistricting Commissions: Legislative Plans, *available at* <http://www.ncsl.org/?tabid=16617> (last visited June 22, 2010).
- 8 Douglas Johnson, Ian Johnson, & David Meyer, REDISTRICTING IN AMERICA: A STATE-BY-STATE ANALYSIS. (Rose Institute of State and Local Government, Claremont McKenna College. April 21, 2010), <http://rosereport.org/redistricting-america.pdf>.
- 9 Reynolds v. Sims, 377 U.S. at 577; Brown v. Thomson, 462 U.S. 835, 842 (1983).
- 10 White v. Regester, 412 U.S. 755, 764 (1973); Brown v. Thomson, 462 U.S. at 842-43; Cox v. Larios, 542 U.S. 947 (2004).
- 11 Mahan v. Howell, 410 U.S. 315, 325 (1973).
- 12 Connor v. Finch, 431 U.S. 407, 420 (1977). *But see* Brown v. Thomson, 462 U.S. 835 (1983), and Gorin v. Karpan, 775 F. Supp. 1430 (D. Wyo. 1991).
- 13 Mahan v. Howell, 410 U.S. at 325; DeWitt v. Wilson, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994).
- 14 U.S. Const. art. I, § 2 provides that “Representatives . . . shall be apportioned among the several states . . . according to their respective numbers.”
- 15 White v. Weiser, 412 U.S. 783, 790 (1973); Karcher v. Daggett, 462 U.S. 725, 730 (1983).
- 16 Karcher v. Daggett, 462 U.S. at 729, 741.
- 17 For a complete discussion of traditional redistricting principles see Fred McBride & Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 349-60 (Aug. 2005).
- 18 Reynolds v. Sims, 377 U.S. at 583-84.
- 19 LULAC v. Perry, 548 U.S. 399, 415 (2006).
- 20 See, e.g., S.D. Const. Art. III, § 5 (prohibiting redistricting by the legislature except “by December first of the year in which apportionment is required”).
- 21 U.S. Census Bureau, Residence Rules: Facts About Census 2000 Residence Rules (2000), http://www.census.gov/population/www/censusdata/resid_rules.html (last visited July 6, 2010).
- 22 For more information pertaining to the issue of prison-based gerrymandering see The Prison Policy Initiative at <http://www.prisonpolicy.org/> (last visited July 6, 2010).
- 23 Thornburg v. Gingles, 478 U.S. 30, 47 (1986).
- 24 See Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983); Voinovich v. Quilter, 507 U.S. 146, 153-54 (1993); Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1990).
- 25 Chandler Davidson, *Minority Vote Dilution: An Overview in* MINORITY VOTE DILUTION 3, (Chandler Davidson ed., Howard Univ. Press 1989).

26 Rogers v. Lodge, 458 U.S. 613 (1982).
27 Hunter v. Underwood, 471 U.S. 222 (1985).
28 42 U.S.C. § 1973 (2006).
29 42 U.S.C. § 1973c (2006).
30 42 U.S.C. § 1973 (2006).
31 42 U.S.C. § 1973aa-1a(e) (2006).
32 42 U.S.C. § 1973(b) (2006).
33 S. Rep. No. 417, 97th Cong., 2d Sess. 36 (1982). See Thornburg v. Gingles, 478 U.S. at 43 n.8.
34 Nevett v. Sides, 571 F.2d 209, 238 (5th Cir. 1978).
35 Thornburg v. Gingles 478 U.S. 30 (1986).
36 Id. at 50.
37 S. Rep. No. 417 at 28-29.
38 Thornburg v. Gingles, 478 U.S. at 36-37.
39 Johnson v. De Grandy, 512 U.S. 997 (1994).
40 Bush v. Vera, 517 U.S. 952, 977 (1996); See also Clark v. Calhoun County, 21 F.3d 92, 95 (5th Cir. 1994) (*Gingles* “does not require some aesthetic ideal of compactness”).
41 Bush v. Vera, 517 U.S. at 977.
42 See, e.g., Richard H. Pildes & Richard G. Niemi, *Expressive Harms, ‘Bizarre Districts,’ and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich.L.Rev. 483, 554 & n.200, 555 & n.203 (1993).
43 See, e.g., Houston v. Lafayette County, 56 F.3d 606, 611 (5th Cir. 1995); Cuthair v. Montezuma-Cortez, Colo. Sch. Dist., 7 F. Supp. 2d 1152, 1167 (D. Colo. 1998).
44 See, e.g., Clark v. Calhoun County, 21 F.3d at 95; Sanchez v. Colorado, 97 F.3d 1303, 1312 (10th Cir. 1996).
45 See, e.g., McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988); Magnolia Bar Ass’n, Inc. v. Lee, 994 F.2d 1143, 1150 (5th Cir. 1993).
46 Bartlett v. Strickland, 129 S. Ct. 1231, 1249 (2009).
47 Id. at 1248.
48 Id. at 1248.
49 Thornburg v. Gingles, 478 U.S. at 56.
50 Id. at 53 n.21.
51 Id. at 51, 56.
52 Id. at 76.
53 Growe v. Emison, 507 U.S. 25, 41 (1993).
54 See Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996); Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988).
55 Thornburg v. Gingles, 478 U.S. at 52-53.
56 For a discussion of Ecological Inference see Gary King, *A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data*, Princeton University Press (1997). Ecological Inference eliminates estimates that are greater than 100% or less than 0%.

- 57 Thornburg v. Gingles, 478 U.S. at 63.
- 58 Clark v. Calhoun County, 21 F.3d at 97 (“elections involving the particular office at issue will be more relevant than elections involving other offices”); Rural West Tennessee African American Affairs Council v. Sundquist, 29 F. Supp. 2d 448, 457 (W.D. Tenn. 1998) (“[b]ecause of the prevalence of endogenous [legislative] data, the court does not find the exogenous [county] elections to be particularly useful or necessary”).
- 59 Thornburg v. Gingles at 478 U.S. at 80-2.
- 60 Smith v. Clinton, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988); Clarke v. City of Cincinnati, 40 F.3d 807, 812 (6th Cir. 1994); Rural West Tennessee African American Affairs Council v. Sundquist, 29 F. Supp. 2d at 456. *Contra*, Lewis v. Alamance County, 99 F.3d 600 (4th Cir. 1996); Solomon v. Liberty County Comm’rs, 221 F.3d 1218 (11th Cir. 2000) (*en banc*).
- 61 Johnson v. De Grandy, 512 U.S. at 1014 n.11.
- 62 *Id.* at 1020-21.
- 63 Stabler v. County of Thurston, 129 F.3d 1015, 1022 (8th Cir. 1997). *See also* Harvell v. Blythville Sch. Dist. No. 5, 71 F.3d 1382, 1389 (8th Cir. 1995) (“the white majority has no right under Section 2 to ensure that a minority group has absolutely no opportunity to achieve greater than proportional representation in any given race”).
- 64 Voinovich v. Quilter, 507 U.S. at 158.
- 65 42 U.S.C. § 1973c (2006). The determination of Section 5 coverage is made by the Attorney General and the Director of the Census. 42 U.S.C. § 1973b(b) (2006).
- 66 Allen v. State Bd. of Elections, 393 U.S. 544, 566-67 (1969).
- 67 Beer v. United States, 425 U.S. 130 (1976).
- 68 City of Richmond v. United States, 422 U.S. 358 (1975).
- 69 Henderson v. Harris, 804 F. Supp. 288 (M.D. Ala. 1992).
- 70 Perkins v. Matthews, 400 U.S. 379, 387-90 (1971).
- 71 S. Rep. No. 295, 94th Cong., 2d Sess. 12 (1975).
- 72 Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (2009).
- 73 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, § 2(b)(2)(2006).
- 74 *Id.* at § 2(b)(3).
- 75 Allen v. State Bd. of Elections, 393 U.S. at 555 n.19.
- 76 McCain v. Lybrand, 465 U.S. 236 (1984). A voting change has a discriminatory effect under Section 5 if it leads to a “retrogression” in minority voting rights, *i.e.*, makes them worse off. Beer v. United States, 425 U.S. at 141.
- 77 Perkins v. Matthews, 400 U.S. at 396.
- 78 42 U.S.C. §§ 1973j(d) and (f).
- 79 42 U.S.C. § 1973j(a) (2006). Despite numerous court decisions finding that Section 5 had been violated, no one has ever been charged with the crime of failing to comply with the act.
- 80 Beer v. United States, 425 U.S. at 141.
- 81 Holder v. Hall, 512 U.S. 874, 883-84 (1994) (the baseline for comparison in determining retrogression “is the existing status”).
- 82 Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 485 (1997).
- 83 Georgia v. Ashcroft 539 U.S. 461, 482-83 (2003).

- 84 42 U.S.C. § 1973 (5)(3)(d).
- 85 *Abrams v. Johnson*, 521 U.S. 74, 97 (1997).
- 86 *Texas v. United States*, 785 F. Supp. 201, 205 (D.D.C. 1992).
- 87 42 U.S.C. § 1973 (5)(3)(c).
- 88 *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983).
- 89 *Shaw v. Reno* 509 U.S. 630 (1993).
- 90 *Miller v. Johnson* 515 U.S. 900, 919-20 (1995).
- 91 *City of Mobile v. Bolden*, 446 U.S. 55 (1980).
- 92 *Shaw v. Reno*, 509 U.S. at 641-42.
- 93 *Allen v. Wright*, 468 U.S. 737, 754, 756 (1984).
- 94 *Shaw v. Reno*, 509 U.S. at 641.
- 95 *The Slaughter-House Cases*, 83 U.S. 36, 81 (1872) (the Fourteenth Amendment was adopted to remedy “discrimination against the negroes as a class, or on account of their race”).
- 96 *E.g.*, Districts 2 and 11 in Georgia (*Miller v. Johnson*, 515 U.S. 900 (1995), *Abrams v. Johnson*, 521 U.S. 74 (1997)), District 12 in North Carolina (*Shaw v. Hunt*, 517 U.S. 899 (1996)), and Districts 18, 29, and 30 in Texas (*Bush v. Vera*, 517 U.S. 952 (1996)).
- 97 *E.g.*, in California (*DeWitt v. Wilson*, 515 U.S. 1170 (1995), *aff’d*, 856 F. Supp. 1409 (E.D. Cal. 1994)), and in Illinois (*King v. Illinois Bd. of Election*, 522 U.S. 1087 (1998), *aff’d*, 979 F. Supp. 582, 619 (N.D. Ill. 1996)). In *Lawyer v. Department of Justice*, 521 U.S. 567 (1997), the Court rejected a *Shaw* challenge to a majority black and Hispanic state legislative district in Florida.
- 98 *Miller v. Johnson*, 515 U.S. at 916.
- 99 *Id.* at 920.
- 100 *Bush v. Vera*, 517 U.S. at 958.
- 101 *Id.* at 991 (O’Connor, J., concurring).
- 102 *Id.* at 994.
- 103 Robert G. Dixon, Jr., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 462 (1968).
- 104 *Davis v. Bandemer* 478 U.S. 109, 164 (1986).
- 105 Figure tabulated from 2000 Census PL94-171 Population Counts and the mid-decade Congressional redistricting in Georgia under the Unifiedgeorgia Plan.
- 106 *Johnson v. Miller*, 864 F. Supp. 1354, 1370 (S.D. Ga. 1994).
- 107 Joint Center for Political and Economic Studies, *NUMBER OF BLACK ELECTED OFFICIALS IN THE UNITED STATES, BY STATE AND OFFICE*, (Jan 1998).
- 108 See Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in *QUIET REVOLUTION IN THE SOUTH* 335 (Chandler Davidson & Bernard Grofman eds., 1994) (“the increase in the number of blacks elected to office in the South is a product of the increase in the number of majority-black districts”).
- 109 National Commission on the Voting Rights Act, *Lawyer’s Committee for Civil Rights Under Law, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982-2005* 37 (2006). The National Commission on the Voting Rights Act is a private non-partisan Commission organized in 2005 to determine the extent of discrimination in voting since 1982.
- 110 U.S. Census Bureau, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2010* (129th ed. 2009).

- 111 *Id.*
- 112 David Bositis, *The Persistence of Racially Polarized Voting in the 1996 Elections*, Voting Rights Review 5 (1997).
- 113 National Commission on the Voting Rights Act, at 37, *supra* n.109.
- 114 Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation: Black Officeholding in Southern State Legislatures and Congressional Delegations*, in QUIET REVOLUTION IN THE SOUTH 336-37 (Chandler Davidson & Bernard Grofman eds., 1994).
- 115 David Bositis, Joint Center for Political and Economic Studies, REDISTRICTING AND REPRESENTATION: THE CREATION OF MAJORITY AND MINORITY DISTRICTS AND THE EVOLVING PARTY SYSTEM IN THE SOUTH 46 (1995).
- 116 See David Lublin, *Redistricting in the 2000s*, (American University 2006). <http://www.american.edu/dlublin/redistricting/index.html>. Data is calculated from Tables 4 Number of African-American Legislators Elected in Black-Majority, Black + Latino-Majority, and Other Districts and 8 Number of Hispanic Legislators Elected in Hispanic-Majority, Black + Hispanic-Majority, and Other Districts.
- 117 42 U.S.C. § 1973 (2006).
- 118 42 U.S.C. § 1973 (5)(3)(d).
- 119 *Davis v. Bandemer*, 478 U.S. 109 (1986).
- 120 *Id.* at 132.
- 121 *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *Cox v. Larios*, 542 U.S. 947 (2004).
- 122 For a further discussion of this issue, see Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 Harv. J. Leg. 243 (2009).
- 123 Leadership Conference on Civil Rights Education Fund, IT'S TIME. MAKE YOURSELF COUNT. CENSUS 2010: TRAIN THE TRAINER TOOLKIT (2009).
- 124 *Id.* A more in-depth discussion of Complete Count Communities (CCCs) is available at http://2010.census.gov/2010census/pdf/2010_CCC_Guide_Final.pdf.
- 125 13 U.S.C. § 141(c)(2006).
- 126 U.S. Census Bureau, A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT RESEARCHERS NEED TO KNOW, (2009).
- 127 Letter from Grace Chung Becker, Acting Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Dan Head, Esq., Wallace, Ellis, Fowler, and Head, Columbiana, Alabama, (August 25, 2008) (on file with author).

APPENDIX A

Organizations that work with redistricting and other voting rights issues

There are many national or regional organizations that may be able to assist you with redistricting and other voting rights issues. Many of them have state and local offices as well.

Advancement Project

1220 L Street, NW, Suite 850
Washington, DC 20005
<http://www.advancementproject.org>
(202)728-9557
(202) 728-9558 (fax)

American Civil Liberties Union

125 Broad Street
New York, NY 10004-2400
<http://www.aclu.org>
(202)549-2500

Southern Regional Office
230 Peachtree Street, NW, Suite 1440
Atlanta, GA 30303
<http://www.aclu.org/votingrights>
(404)523-2721
(404)653-0331 (fax)

Asian American Justice Center

Member of Asian American Center for Advancing Justice
1140 Connecticut Avenue NW, Suite 1200
Washington, DC 20036
<http://www.aajc.advancingjustice.org>
(202) 296-2300
(202) 296-2318 (fax)

Asian American Legal Defense and Education Fund

99 Hudson Street, 12th Floor
New York, NY 10013
<http://aaldef.org>
email: info@aaldef.org
(212)966-5932
(212)966-4303 (fax)

Brennan Center for Justice at NYU School of Law

161 Avenue of the Americas
New York, NY 10013
<http://www.brennancenter.org>
(212)998-6730
(212)995-4550 (fax)

Center for Constitutional Rights

666 Broadway, 7th Floor
New York, NY 10012
<http://ccrjustice.org>
(212)614-6464
(212)614-6499 (fax)

Demos

220 Fifth Avenue, 5th Floor
New York, New York 10001
<http://www.demos.org>
(212) 633-1405
(212) 633-2015 (fax)

LatinoJustice PRLDEF

99 Hudson Street, 14th Floor
New York, NY 10013-2815
<http://latinojustice.org>
(212)219-3360
(212) 431-4276 (fax)

Lawyers Committee for Civil Rights Under Law

1401 New York Avenue NW, Suite 400
Washington, DC 20005
<http://www.lawyerscommittee.org>
(202)662-8600
(888)299-5227 (toll free)
(202)783-0857 (fax)

League of Women Voters

1730 M Street NW, Suite 1000
Washington, DC 20036-4508
<http://www.lwv.org>
(202)429-1965
(202)429-0854 (fax)

Mexican American Legal Defense & Educational Fund

Western Regional Office
634 S. Spring Street
Los Angeles, CA 90014
Phone: (213) 629-2512

Southwest Regional Office
110 Broadway, Suite 300
San Antonio, TX 78205
Phone: (210) 224-5476

Midwest Regional Office
11 East Adams, Suite 700
Chicago, IL 60603
Phone: (312) 427-0701

National Public Policy Office
1016 16th Street NW, Suite 100
Washington, D.C. 20036
Phone: (202) 293-2828

NAACP Legal Defense and Educational Fund, Inc.

99 Hudson Street, Suite 1600
New York, NY 10013
www.naacpldf.org
Tel: (212) 965-2200
(800) 221-7822 (toll free)
Email: vote@naacpldf.org

Washington, D.C. Office:
1444 Eye Street, 10th Floor
Washington, DC 20005
Tel: (202) 682-1300

National Association for the Advancement of Colored People

4805 Mt. Hope Drive
Baltimore, MD 21215
<http://www.naacp.org>
(410)580-5777
(877)NAACP-98 (toll free)

Native American Rights Fund

1506 Broadway
Boulder, CO 80302-6296
<http://www.narf.org>
(303)447-8760
(303)443-7776 (fax)

Southern Coalition for Social Justice

115 Market Street, Suite 470
Durham, NC 27701
<http://southerncoalition.org>
(919)323-3380
(919)323-3942 (fax)

Southern Regional Council

1201 West Peachtree Street, NE, Suite 2000
Atlanta, GA 30309
<http://www.southerncouncil.org>
email: info@southerncouncil.org
(404)522-8764
(404)522-8791 (fax)

Southwest Voter Registration Education Project

Kelly USA, Building 1670

206 Lombard Street, 2nd Floor

San Antonio, TX 78226

<http://www.svrep.org>

(210)922-0225

(800)404-VOTE (toll free (210)932-4055 (fax)

APPENDIX B

District Maps from *Bush v. Vera*

The following maps come from the *Bush v. Vera* decision. The maps on this page are from the majority opinion of the Court:



TEXAS CONGRESSIONAL DISTRICT 18
Majority Black and Unconstitutional



TEXAS CONGRESSIONAL DISTRICT 29
Majority Hispanic and Unconstitutional

The maps on this page come from the dissenting opinion of Justice Stevens:



TEXAS CONGRESSIONAL DISTRICT 6
Majority White and Constitutional



TEXAS CONGRESSIONAL DISTRICT 25
Majority White and Constitutional