Redistricting Litigation

An Overview of Legal, Statistical, and Case-Management Issues

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Contents

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I. The Law of Redistricting

A. Introduction

This monograph has three chapters. Chapter 1, on the law of redistricting, is the major chapter. Section B examines the recurring legal–political issues at play in redistricting cases and comments briefly on evidentiary issues. Section C discusses vote dilution cases brought pursuant to section 2 of the Voting Rights Act of 1965 and then discusses cases involving the "preclearance" requirement in section 5 of that Act. Section D describes cases involving redistricting and the Equal Protection Clause. It first considers racial gerrymandering cases and then provides a brief treatment of one person–one vote issues, which involve both vote dilution and Equal Protection Clause principles, and are likely to arise in either section 2 or racial gerrymandering cases.

Chapter 2 of the monograph discusses statistical evidence of racially polarized voting. Chapter 3 discusses some of the major case-management challenges presented by redistricting cases, including the special problems associated with three-judge district courts.

1. Major provisions

The U.S. Constitution and the Voting Rights Act of 1965 are the principal federal laws that come into play in redistricting litigation.[1]

a. Article 1, section 2 of the U.S. Constitution

Article 1, section 2 of the Constitution provides that members of the House of Representatives shall be chosen "by the People of the Several States." *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that this provision "means that as nearly as practicable one [person's] vote in a congressional

1. The terms *redistricting*, *districting*, and *reapportionment* are used interchangeably in this monograph to refer to the division of each state into districts of equal population, either for the purpose of electing representatives to the U.S. House of Representatives or for the purpose of electing representatives to the state legislature, following each decennial federal census. The terms are also used to refer to the division of local jurisdictions within states, such as cities or school boards, into equally populous subdivisions. The usage of the terms follows that of several of the opinions cited in the monograph. Other publications and decisions, however, refer to the decennial reallocation of the 435 House seats following the census as *reapportionment*, *see* 2 U.S.C. § 2a (1997), and reserve the terms *districting* and *redistricting* for use in discussing the division of individual states, counties, and cities into voting districts.

election is to be worth as much as another's." *Id.* at 7–8. Thus, states must make a good-faith effort to achieve precise mathematical population equality in congressional districting. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969). "Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Id*. at 531. *See also Karcher v. Daggett*, 462 U.S. 725, 734 (1983) ("We thus reaffirm that there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2, without justification.").

b. The Fourteenth Amendment's Equal Protection Clause

i. Population equality in state and local apportionment

"[T]he Equal Protection Clause [of the Fourteenth Amendment] requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).[2] This rule also applies to local governmental units with "general governmental powers over an entire geographic area." *Avery v. Midland County*, 390 U.S. 474, 485–86 (1968).[3] A greater degree of population disparity is permitted in state districting schemes than in congressional districting, given the strong interest of the states in preserving the integrity of local political subdivision lines and thus facilitating voter involvement in local issues. *Mahan v. Howell*, 410 U.S. 315, 323–25 (1973).

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2. Ultimately, equal protection principles protect the right to vote. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665–66 (1966); *Reynolds*, 377 U.S. at 554. Thus, they apply to "more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." Bush v. Gore, 531 U.S. 98, 104–05 (2000) (Equal Protection Clause violated by standardless manual recounts ordered by Florida Supreme Court in presidential election).

3. The holdings of *Wesberry* and *Reynolds* are often referred to more generally as establishing the "one person–one vote" rule in congressional and noncongressional apportionment. The phrase was initially used in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), in the following passage: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."

ii. Racial gerrymandering

The Equal Protection Clause of the Fourteenth Amendment also prohibits racial gerrymandering in congressional and noncongressional redistricting. In *Shaw v. Reno*, 509 U.S. 630, 649 (1993) (*Shaw I*), the Supreme Court held that a plaintiff may state a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race.

c. The Voting Rights Act of 1965

The requirements of the Voting Rights Act of 1965 (VRA), 42 U.S.C. §§ 1973–1973bb (1994), are intended to ensure that the quantitatively equal votes of racial and language minorities, protected by the one person–one vote requirement, are also qualitatively equal. The Act phrases this requirement in terms of the ability of racial or language minorities to have an equal opportunity "to elect representatives of their choice." 42 U.S.C. § 1973(b) (1994).

Section 2(a) of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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 membership in a language minority group]." 42 U.S.C. § 1973(a) (incorporating *id.* § 1973b(f)(2)).

Section 2(b) of the Act provides that a denial or abridgment of the right to vote occurs when,

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a 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.

42 U.S.C. § 1973(b).

"The essence of a § 2 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." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Section 2 of the Act is thus violated by vote dilution, which is the practice of reducing the potential effectiveness of a group's voting

strength by limiting its opportunity to translate that strength into voting power. *See, e.g.*, *Shaw I*, 509 U.S. at 641 (stating that section 2 prohibits legislation that results in the dilution of a minority group's voting strength); *Gingles*, 478 U.S. at 46–51 (explaining basis for claim of vote dilution under section 2).[4]

Section 5 of the VRA also comes into play in redistricting litigation. Congress passed section 5 of the VRA to require states and localities with a history of voting rights discrimination against racial and language minorities to "preclear" with the Department of Justice or the U.S. District Court for the District of Columbia any change in a voting "qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c. The preclearance mechanism of section 5 consequently applies to redistricting plans in covered jurisdictions, *Beer v. United States*, 425 U.S. 130, 133 (1976), and requires that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority group]." 42 U.S.C. § 1973c (incorporating *id.* § 1973b(f)(2)).

d. 28 U.S.C. § 2284

Title 28, section 2284(a) of the United States Code requires that a three-judge district court be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." The court must be composed of the district judge initially receiving the case and two judges designated by the chief judge of the circuit—at least one of whom must be a circuit judge. 28 U.S.C. § 2284(b)(1) (1994).

2. Overview

a. Historical trends in redistricting litigation

In the 1980s and early 1990s, most redistricting litigation took the form of lawsuits filed in federal district courts by minority group plaintiffs who claimed that their right to vote had been diluted in violation of section 2 of the VRA. In these suits, the plaintiffs asked the courts to remedy the asserted violation by requiring states to create additional majority-minority districts.[5]

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4. *See also* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (recognizing that the right to vote can be affected by dilution of voting power).

5. The term *majority-minority district* is used to denote a district in which the mi-

In 1993, however, the Supreme Court held that majority-minority districts drawn deliberately to augment minority voting strength could be subject to challenge under the Equal Protection Clause, *Shaw I*, 509 U.S. at 642, and subsequently it decided a series of cases brought by white plaintiffs claiming that their right to equal protection had been violated by racially motivated redistricting. *Easley v. Cromartie*, 532 U.S. 234, 237–39 (2001) (*Cromartie II*); *Hunt v. Cromartie*, 526 U.S. 541, 543–45 (1999) (*Cromartie I*); *Bush v. Vera*, 517 U.S. 952, 956–57 (1996); *Shaw v. Hunt*, 517 U.S. 899, 901–03 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 909 (1995). The Court also limited the impact of section 5's preclearance requirement in vote dilution litigation. *See Reno v. Bossier Parish School Board*, 520 U.S. 471, 474, 476–85 (1997) (*Bossier Parish I*) (proposed voting change cannot be denied preclearance solely because it violates section 2 of the VRA); *Reno v. Bossier Parish School Board*, 528 U.S. 320, 341 (2000) (*Bossier Parish II*) (proposed voting change can be denied preclearance only on a showing that its purpose or effect is to decrease minority voting power).

In addition, beginning in the 1960s with *Reynolds* and continuing through the subsequent decades, the Court refined its one person–one vote equal protection jurisprudence in a series of cases involving state and local districting schemes that allegedly resulted in districts with substantially unequal populations.

b. Implications of historical trends for the current round of redistricting litigation

As a result of the historical trends in redistricting litigation, federal judges can expect to encounter, in current redistricting litigation, cases based primarily on section 2 of the VRA, the Equal Protection Clause's prohibition of racial gerrymandering, and the one person–one vote principle. Moreover, while these three types of cases seek markedly different objectives, they are interrelated. Most redistricting litigation, for example, involves section 2, either as a claim or as a defense. Section 2 may be asserted either as a cause of action in a vote dilution case or as a defense

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nority population constitutes a "majority" in the sense that it is considered large enough to permit it to elect the candidates of its choice. The Supreme Court has not specified what population base is to be used in determining whether the minority population of a district is sufficiently large to constitute such a majority. See the discussion in sections I.C.1.d.i (section 2 litigation) and I.D.2 (one person–one vote litigation) *infra*.

in an equal protection case—that is, when a state asserts as a defense that its race-based decision making was justified by a compelling need to comply with section 2.

Thus, both section 2 and equal protection issues may arise in the same case. Likewise, one person–one vote issues are likely to arise in section 2 cases, in racial gerrymandering cases, or on their own in entirely separate cases. In addition, all three types of redistricting litigation involve issues of federalism, separation of powers, and party politics, and are likely to involve similar evidence and evidentiary issues.

B. Recurring Issues

1. Recurring legal–political issues: federalism, separation of powers, and partisan gerrymandering

Redistricting litigation takes place within a broader political context and thus calls into play principles of federalism and separation of powers. The partisan nature of redistricting makes case law governing gerrymandering by political parties relevant as well.

a. Federalism

The Supreme Court has stated that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), that "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meir*, 420 U.S. 1, 27 (1975), and that "the States must have discretion to exercise the political judgment necessary to balance competing interests," *Miller*, 515 U.S. at 915.

Thus, "[w]hen a federal court declares an existing apportionment scheme unconstitutional, it is therefore appropriate, whenever practicable, to afford a reasonable opportunity for the [state] legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). The court must afford a state legislature a similar opportunity when it finds a violation of section 2 of the VRA, *e.g.*, *Garza v. County of Los Angeles*, 918 F.2d 763, 766–68 (9th Cir. 1990), and should not rule on the constitutionality of a redistricting plan submitted by the state for preclearance under section 5 of the VRA until clearance has been obtained, *Lipscomb*, 437 U.S. at 542. It becomes the obligation of the federal court to devise a new plan only when the

legislature does not respond to the court's ruling or the imminence of a state election makes it impractical for the legislature to do so. *Id.* at 540.

When a redistricting lawsuit is filed concurrently in federal court and state court, and the state, through either its courts or its legislature, has begun the effort to develop a constitutionally valid plan, the federal court must defer consideration of its suit until such time as the state can reasonably be expected to implement a valid plan. *Growe v. Emison*, 507 U.S. 25, 33–34 (1993); *Scott v. Germano*, 381 U.S. 407, 409 (1965). In this context, deferral means postponing consideration of the merits of the case, not abstention or dismissal. *Growe*, 507 U.S. at 37. Thus, in deferring its suit, the district court should enter an order fixing a reasonable time prior to the next election within which the state (through its legislature, courts, or other agencies) must validly accomplish the redistricting. *Germano*, 381 U.S. at 409–10. If the state accomplishes the task in a timely fashion, further federal court action will be unnecessary. But if it does not, the federal court may then resume active consideration of the case. *Growe*, 507 U.S. at 36.[6]

b. Separation of powers

"The Court also has made clear that the underlying districting decision is one that ordinarily falls within a legislature's sphere of competence." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*). Thus, the Court has held that equal protection principles govern a state's drawing of congressional districts, *see, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 642–52 (1993) (*Shaw I*), and that the Equal Protection Clause is violated when race is proven to be the predominant motive of the legislature in drawing district lines, *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*); *Miller*, 515 U.S. at 916.

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6. *Growe* involved duplicative federal and state court litigation that arose when the Minnesota state legislature failed to develop a valid redistricting plan and adopt new legislative and congressional districts following the 1990 census. The federal district court refused to defer to the state court proceedings, enjoined the state court from issuing new plans for the state legislature, and issued its own plans and permanently enjoined any interference with them. The Supreme Court held that the district court had erred in staying the state proceedings and imposing its own districting plan. *Growe*, 507 U.S. at 32. *See generally* Note, *Federal Court Involvement in Redistricting Litigation*, 114 Harv. L. Rev. 878 (2001). Chapter 3 of this monograph discusses *Growe* from the case-management perspective.

Nevertheless, the Court has cautioned that application of equal protection principles "is a most delicate task," *Miller*, 515 U.S. at 905, and that "until a claimant makes a showing sufficient to support [an allegation of race-based decision-making], the good faith of a state legislature must be presumed." *Id.* at 915. Moreover, courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* at 916. More recently, the Court has stated that "[c]aution is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Cromartie II*, 532 U.S. at 242.

c. Partisan gerrymandering

Gerrymandering has been defined as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). "The term . . . is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls." *Davis v. Bandemer*, 478 U.S. 109, 164 (1986) (Powell, J., concurring in part and dissenting in part).[7]

The Court has held that, in limited situations, political gerrymandering is justiciable under the Equal Protection Clause. *Bandemer*, 478 U.S. at 118–27. *Bandemer* involved an equal protection challenge to the Indiana state legislature's post-1980 districting plan. Indiana Democrats claimed that partisan gerrymandering by the Republican majority in the state legislature resulted in significant underrepresentation of statewide Democratic voting strength in the legislature. As the Court put it, "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group . . . and we decline to hold that such claims are never justiciable." *Id.* at 124.

The Court agreed with the district court that "to succeed the Bandemer plaintiffs were required to prove both intentional discrimination

7. As Justice Powell noted in *Bandemer*, 478 U.S. at 164 n.3, *Webster's Third New International Dictionary* (unabridged ed. 1961) defines *gerrymander* as "to divide (a territorial unit) into election districts in an unnatural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible."

against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 127. Nevertheless, it rejected the equal protection challenge before it, observing that "[o]ur cases . . . clearly foreclose any claim that the Constitution requires . . . that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.* at 130.[8]

In his concurring and dissenting opinion in *Bandemer*, Justice Powell observed that while the Indiana legislature's plan followed the one person–one vote doctrine, it ignored other factors that he considered relevant to the fairness of redistricting. He identified the most significant of these factors as "the shapes of voting districts and adherence to established political subdivision boundaries." *Id.* at 173 (Powell, J., concurring in part and dissenting in part). But the Court has, both before and since *Bandemer*, indicated that these factors are not constitutionally required. *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) (election districts at issue were irregularly shaped but "compactness or attractiveness has never been held to constitute an independent constitutional requirement for state legislative districts"); *Shaw I*, 509 U.S. at 646–47 (traditional districting principles such as compactness, contiguity, and respect for political subdivisions are important not because they are constitutionally required but because they "are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines").

Political gerrymandering is not subject to strict scrutiny. *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (*Cromartie I*). Only when "the legislature subordinate[s] traditional race-neutral districting principles . . .

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8. The *Bandemer* Court stated further:

> As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. . . . [W]ithout specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group. 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.
>
> . . . [A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.

Id. at 132–33.

to racial considerations" does strict scrutiny apply. *Miller*, 515 U.S. at 916.

In addition, gerrymandering that promotes incumbency protection, at least in the limited form of "avoiding contests between incumbent[s]," is a legitimate state redistricting goal. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). *See also Bush v. Vera*, 517 U.S. 952, 959 (1996); *Diaz v. Silver*, 978 F. Supp. 96, 123 (E.D.N.Y. 1997) (role of seniority in functioning of legislature makes incumbency an important factor), *summarily aff'd*, 522 U.S. 801 (1997).

2. Recurring evidentiary issues

Redistricting litigation ordinarily involves a considerable amount of statistical evidence derived from population figures, demographics, and voter behavior. As a result, redistricting cases will often require the court to decide whether the method used by a particular expert is valid, or, even if valid, whether it is better or worse than the method used by an expert presented by the opposing litigant. *See, e.g.*, *Cromartie II*, 532 U.S. at 241; *Sanchez v. Colorado*, 97 F.3d 1303, 1314–26 (10th Cir. 1996); *Page v. Bartels*, 144 F. Supp. 2d 346, 352–62 (D.N.J. 2001).

In congressional and noncongressional reapportionment cases, statistical evidence is used to determine whether different districts are equal in population, so as to satisfy the one person–one vote rule. In equal protection and vote dilution cases, statistical evidence is admitted to show the size and voting patterns of minority and majority populations in the districts at issue. These matters, in turn, are relevant to such questions as whether race or politics predominantly explains a district's shape, whether there is racial bloc voting, and whether the minority population is sufficiently large for a majority-minority district. In addition, redistricting cases may require the court to decide what population base is to be used in the analysis—that is, whether a district's total population, total voting-age population, or total population of eligible voters should be used in making the relevant calculations.[9] Chapter 2 of this monograph discusses statistical evidence of racially polarized voting.

Still other evidentiary and legal issues in the current round of litigation are likely to result from the fact that the raw numerical data used in

9. The Supreme Court has not provided definitive guidance to courts grappling with population-base issues in redistricting cases. See the discussion in sections I.C.1.d.i (section 2 litigation) and I.D.2 (one person–one vote litigation) *infra*.

generating the statistical and population-base evidence involved in these cases will be derived from data collected in the 2000 census. In *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999), the Supreme Court interpreted the Census Act, 13 U.S.C. § 195 (1990),[10] to prevent the use of statistical sampling for purposes of apportioning seats among the states for representation in the U.S. House of Representatives, 525 U.S. at 334–42, but to require its use where feasible in assembling other demographic data collected during the census, *id.* at 339. Statistical sampling is considered by many experts to be a valid means of remedying the undercount that arises when traditional data-gathering means, such as questionnaires and interviews, are used to collect census data, and thus a valid means of adjusting for a differential undercount of a minority population in the census.[11] However, subsequent to the *Department of Commerce* decision, the Census Bureau decided to use unadjusted Census 2000 data to generate *all* numerical data to be used for redistricting purposes. As a result, it is possible that issues involving the accuracy of Census 2000 redistricting data on minority populations will be litigated in the current round of redistricting cases.

C. Redistricting Litigation and the Voting Rights Act

1. Section 2 of the Voting Rights Act

Section 2(a) of the Voting Rights Act, which prohibits any "standard, practice, or procedure . . . 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 membership in a language minority group]," 42 U.S.C. § 1973(a) (1994) (incorporating *id.* § 1973b(f)(2)), provides a cause of action for vote dilution.

a. Vote dilution

The concept of vote dilution surfaces frequently in redistricting litigation. It is therefore important to clarify at the outset what it means.

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10. Title 13 U.S.C. § 195 provides as follows: "Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

11. Statistical sampling issues are discussed in depth in Nathaniel Persily, *2000 Census Data: New Format and New Challenges, in* The Real Y2K Problem: Census 2000 Data and Redistricting Technology (Nathaniel Persily ed., 2000).

Typically, vote dilution issues arise when whites and racial minorities consistently prefer different candidates at the polls—that is, when voting is racially polarized. Racially polarized voting creates an opportunity for states to manipulate district lines in order to dilute the voting strength of politically cohesive minority-group members. *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993). This can be done either "by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994).

A claim of vote dilution is a claim that members of a racial or language group do not have an equal opportunity to participate in the electoral process. Thus, when a state or local governing body draws up electoral districts that allegedly disadvantage minority voters, the affected minority voters may decide to sue under section 2 of the VRA, claiming that their vote has been "diluted" because they would have had more voting power if the districting scheme had been drawn differently. These lawsuits seek to cure the claimed dilution by having the court order implementation of a new, court-approved redistricting plan with one or more additional majority-minority districts.

Conceptually, proof of vote dilution raises the question whether district lines can be drawn so that the minority vote is not diluted. The court, working with the plaintiffs and the legislature, must postulate an undiluted districting scheme with one or more additional majority-minority districts, if necessary. As is discussed below, establishing this hypothetical "baseline" scheme has proved to be a difficult aspect of vote dilution cases.

b. The development of vote dilution law through the 1982 amendments to the Voting Rights Act

Early vote dilution doctrine developed in reaction to states' use of at-large districting schemes, in which more than one representative is elected from a single district—for instance, where all members of a state's House delegation are elected statewide rather than in individual districts. Such a districting scheme makes it likely that even a sizable minority group will be outvoted by whites in a state where voting is racially polarized. Eventually, the Supreme Court upheld the invalidation of at-large districts in instances in which plaintiffs demonstrated that the districts

were "being used invidiously to cancel out or minimize the voting strength of racial groups," and the replacement of them with single-member districting plans that gave minority voters a majority in one or more districts. *White v. Regester*, 412 U.S. 755, 765 (1973); *see also Wise v. Lipscomb*, 437 U.S. 535 (1978) (absent special circumstances, federal courts should use single-member districts when they impose remedial redistricting plans).[12]

In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court ruled that section 2 dilution claims required proof of intent to discriminate, not just harmful effects. The decision prompted Congress to amend section 2 in 1982 to clarify that vote dilution claims may also be based on an effects-based standard, thus providing minority groups with a remedy for vote dilution that does not require a showing of intentional discrimination. 42 U.S.C. § 1973(a) ("in a manner which *results* in a denial or abridgement") (emphasis added).

c. Basic principles of section 2 vote dilution law

i. Discriminatory intent is not required to prove a section 2 violation

As discussed above, section 2, as amended in 1982, can be violated by facially neutral districting that has the effect of diluting minority votes as well as by intentional discrimination in the drawing of district lines. The 1982 amendment also served to distinguish section 2 claims from those brought pursuant to the Fourteenth and Fifteenth Amendments, which also prohibit vote dilution but require a finding of intent to discriminate in order to establish a violation. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (Fourteenth Amendment); *Bolden*, 446 U.S. at 61–66 (plurality opinion) (Fourteenth and Fifteenth Amendments).

12. The Supreme Court has not declared multimember districts unconstitutional per se. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124, 142, 157–60 (1971). However, in addition to invalidating them upon a showing that they have been used to discriminate against minority voters, the Court has stated that the requirement that federal courts use single-member districts when imposing remedial plans reflects recognition of the fact that "the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities." Connor v. Finch, 431 U.S. 407, 415 (1977).

ii. The elements of a section 2 claim

The 1982 amendment set the stage for the Supreme Court to reexamine the doctrinal framework for analyzing section 2 vote dilution claims in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, which involved a challenge to a multimember districting plan, the Court set out three preconditions that minority plaintiffs asserting a vote dilution claim under amended section 2 must prove. They are summarized here and examined in more detail in section I.C.1.d *infra*. Under *Gingles*, minority plaintiffs must show that

1. their minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, and thus that the state could have drawn an additional majority-minority district (the *Gingles* district) in its districting plan but did not do so;
2. the minority group is politically cohesive, in the sense that its members vote in a similar fashion; and
3. the white electorate votes as a bloc, thus enabling whites usually to defeat the minority group's preferred candidates at the polls.

Id. at 50–51. In *Growe v. Emison*, 507 U.S. 25, 41 (1993), the Court applied the three *Gingles* preconditions to a section 2 dilution challenge to a single-member districting scheme.

To prove the second and third preconditions, plaintiffs ordinarily employ a statistical analysis that uses census race data and election-return data to demonstrate how the districting system operates to prevent minorities from exercising an equally effective vote. The *Gingles* Court essentially validated the statistical method used in the lower court to prove these preconditions. *See Gingles*, 478 U.S. at 52–61.[13]

13. In *Gingles*, the plaintiff's expert, Dr. Bernard Grofman, subjected data to two methods of statistical analysis—extreme case analysis (also called homogeneous precinct analysis) and bivariate ecological regression analysis—in order to determine whether there was racial bloc voting in the contested districts. *Id.* at 52–53. Both of these methods are discussed in Chapter 2 *infra*. Bivariate ecological regression analysis is frequently presented in section 2 cases, having been "approved in *Gingles* and most of the § 2 case law." Sanchez v. Colorado, 97 F.3d 1303, 1321 (10th Cir. 1996). However, depending on the nature and extent of the data available to them, plaintiffs may decide they need to make use of a range of statistical methods in attempting to meet their burden of proof. *See, e.g.*, Jenkins v. Red Clay Consol. School Dist. Bd. of Educ., 4 F.3d 1103, 1119–20 (3rd Cir. 1993).

While the three *Gingles* preconditions are necessary to establish a vote dilution claim under section 2, they are not sufficient. The statute itself, 42 U.S.C. § 1973(b), requires that denial or abridgment of the right to vote be shown "based on the totality of circumstances," and the *Gingles* Court listed as relevant to the statute's totality-of-circumstances test the factors put forward in the Senate report on the 1982 amendment to section 2.[14] Moreover, in *Johnson v. De Grandy*, another seminal section 2 case, the Court emphasized that the trial court's examination of relevant factors is not complete even if the three *Gingles* preconditions are found to exist and that establishment of the three in combination does not necessarily and in all circumstances demonstrate dilution. *De Grandy*, 512 U.S. at 1011. Rather, "courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Id.* at 1011–12.

De Grandy also makes clear that, in evaluating the *Gingles* preconditions and the totality of the circumstances, a court must consider the relationship between the number of majority-minority districts and the minority group's share of the population. *De Grandy*, 512 U.S. at 1020. The Court held there was no violation of section 2 in the challenged state districting scheme: In spite of continuing discrimination and bloc voting, minority voters formed effective voting majorities in a number of districts roughly proportional to their respective shares in the voting-age population. In holding that there was no section 2 violation, the Court made clear that proportionality is always relevant evidence in determining vote dilution, but is never itself dispositive.

It should also be noted that section 2 does not require the creation or retention of majority-minority districts in every instance in which it is

14. S. Rep. No. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07. The Senate report includes such factors as the extent of any history of official discrimination in the state or subdivision affecting the right to vote, 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. The report is summarized in *Gingles*, 478 U.S. at 44–45. The *Gingles* Court noted that the factors in the report "were derived from the analytical framework in *White v. Regester*, 412 U.S. 755 (1973), as refined and developed by the lower courts, in particular by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam)." *Gingles*, 478 U.S. at 36 n.4.

possible to do so. "Section 2 contains no *per se* prohibitions against particular types of districts . . . . Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2 . . . ." *Voinovich*, 507 U.S. at 155 (pointing out that majority-minority districts provide both benefits and detriments to the protected class). Majority-minority districts are not always necessary to ensure that minority groups are able to elect the candidates of their choice, *De Grandy*, 512 U.S. at 1017, and a redistricting plan that disperses the minority population of an existing majority-minority district does not violate section 2 if it does not have the effect of decreasing minority political opportunity, *see Voinovich*, 507 U.S. at 154–55; *Page v. Bartels*, 144 F. Supp. 2d 346, 365 (D.N.J. 2001). Recognizing these principles, minority-group members in states where there is substantial white crossover voting have recently begun supporting redistricting plans that disperse the minority population of majority-minority districts, on the theory that their candidates do not need a majority-minority constituency to be elected and "unpacking" the safe district will increase their political opportunity in neighboring districts.[15]

iii. Remedying section 2 violations

The remedy for a section 2 violation in a single-member districting scheme is to redraw district lines to create one or more additional districts in which minority voters are able to exercise electoral control. *See Bush v. Vera*, 517 U.S. 952, 977 (1996); *Shaw v. Hunt*, 517 U.S. 899, 914–15 (1996) (*Shaw II*); *De Grandy*, 512 U.S. at 1008. As Justice O'Connor stated in her concurring opinion in *Vera*,

> [W]here voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority

15. This phenomenon is discussed in Gregory L. Giroux, *New Twists in the Old Debate on Race and Representation*, Cong. Q. Wkly., Aug. 11, 2001, at 1966. *See also Page*, 144 F. Supp. 2d at 363–65, in which the court upheld a redistricting plan that reduced the African-American voting-age population of a "safe" minority district from 53% to 27%, by "unpacking," or dispersing, it into two districts. Even though the resulting African-American population in each new district was substantially below 50%, the court found that the plan did not violate section 2. Instead, the court concluded that because the Hispanic and African-American communities in the two districts often voted as a bloc, and the white majority did not vote sufficiently as a bloc to defeat minority candidates, the plan actually increased the opportunities for minorities to be elected. *Id.* at 364–66.

> voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice." § 2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present . . . .

Vera, 517 U.S. at 993 (first alteration in original).[16]

Nevertheless, *De Grandy* makes clear that compliance with section 2 does not require states to maximize the number of districts in which minority voters may elect their candidates of choice. 512 U.S. at 1009–22. In *De Grandy*, the Supreme Court rejected claims that Florida's reapportionment plan violated section 2 by unlawfully diluting the voting strength of Hispanics and blacks in the Dade County area. The district court had found a section 2 violation, but the Supreme Court concluded that this finding was the result of "the rule of thumb apparently adopted by the District Court, that anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2, at least where societal discrimination against the minority had occurred and continued to occur." *De Grandy*, 512 U.S. at 1016. The Court observed that

> reading the first *Gingles* condition in effect to define dilution as a failure to maximize in the face of bloc voting . . . causes its own dangers, and they are not to be courted.
>
> . . . [R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose.

Id. at 1016–17.

Still, as mentioned in section I.C.1.a *supra*, remedying a section 2 violation requires the establishment of a hypothetical baseline for determining how many additional majority-minority districts the state must create to cure the violation. *See Holder v. Hall*, 512 U.S. 874, 880 (1994). The *De Grandy* Court implicitly suggested that using proportionality as

16. *See also* Ketchum v. Bryne, 740 F.2d 1398, 1412 (7th Cir. 1984) (citing the following language from the Senate report on the 1982 amendment to section 2 of the Voting Rights Act: "The court should exercise its traditional equity powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 97-417, at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208).

the criterion for establishing such a baseline would be appropriate. The Court said that the district court in that case should have been more

> critical . . . in asking whether a history of persistent discrimination reflected in the larger society and its bloc-voting behavior portended any dilutive effect from a newly proposed districting scheme, *whose pertinent features were majority-minority districts in substantial proportion to the minority's share of voting-age population.* The court failed to ask whether the totality of facts, *including those pointing to proportionality*, showed that the new scheme would deny minority voters equal political opportunity.

De Grandy, 512 U.S. at 1013–14 (emphasis added, footnote omitted).[17]

d. A closer look at the three Gingles preconditions

Much section 2 litigation after *Gingles* has focused on the meaning and requirements of the three preconditions established in *Gingles* itself. Some of the issues posed by the Court's phrasing of the preconditions have been fleshed out in subsequent appellate and district court decisions; others remain unresolved. The following discussion examines the elements of the three preconditions and notes important issues still to be resolved.

i. A sufficiently large and geographically compact minority group

The requirement of a sufficiently large and geographically compact minority group basically asks whether a remedy is possible:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

Gingles, 478 U.S. at 50 n.17.

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17. Section 2 has a proviso concerning class membership of elected representatives, as opposed to voters: "*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). *De Grandy* discusses proportionality not as a right but as a consideration in deciding the question of equal political opportunity. The Court has not decided what population base should be used as the baseline for assessing proportionality—total population, voting-age population, or citizen voting-age population. *De Grandy*, 512 U.S. at 1017 n.14.

In other words, "if the minority group is small and dispersed, no single member district could be created to remedy its grievance." *Sanchez v. Colorado*, 97 F.3d 1303, 1311 (10th Cir. 1996).

But the first *Gingles* precondition may also be seen as containing two interrelated elements. First, it requires that the minority group be "sufficiently large . . . to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Second, it requires a geographically compact minority population. *Id.*

a. What constitutes a majority in a single-member district? Gingles does not define with precision what kind of majority in a single-member district the minority group must constitute. The Court observed in *De Grandy* that "the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with *a sufficiently large minority population to elect candidates of its choice*." 512 U.S. at 1008 (emphasis added). Nevertheless, the question remains: Does "majority" in this context mean a majority of the total population, the voting-age population, the voting-age population eligible to vote, or the registered voters? Indeed, because minority groups often can differ from the white majority in terms of their eligibility to vote (for example, because of their citizenship status), registration patterns, and voter turnout rates, the question has surfaced frequently and courts have answered it in different ways.

Some courts have used voting-age population as the criterion, as opposed to overall population. *See, e.g.*, *Solomon v. Liberty County*, 899 F.2d 1012, 1018 (11th Cir. 1990); *McNeil v. Springfield Park District*, 851 F.2d 937, 944–45 (7th Cir. 1988) (plaintiffs established that blacks constituted 50.4% of total population but only 43.7% of voting-age population); *Romero v. City of Pomona*, 883 F.2d 1418, 1425–26 (9th Cir. 1989); *Page v. Bartels*, 144 F. Supp. 2d 346, 353 (D.N.J. 2001).[18] Others have used total population as the criterion. *Garza v. County of Los Angeles*, 918 F.2d 763, 773–76 (9th Cir. 1990) (using total population figures to determine districts' sizes).

Courts have also differed on whether the criterion should be refined even further, for example to include only the voting-age population eligi-

18. *See also* Growe v. Emison, 507 U.S. 25, 38 n.4 (1993) (observing that some courts have "looked to a district's minority population of voting age in determining whether a Section 2 violation has occurred" and noting that *Gingles* refers to "the voting population").

ble to vote. *Compare Romero*, 883 F.2d at 1425–26 (only eligible voters should be counted), *with Solomon*, 899 F.2d at 1018 (all voting-age residents should be counted). *Cf. Easley v. Cromartie*, 532 U.S. 234, 244–46 (2001) (*Cromartie II*) (equal protection case expressing preference for use of voting behavior data rather than voter registration data in determining whether race or politics was predominant factor in selection of district boundaries).

This issue may arise at the remedy stage of a dilution case, when the court is reviewing a proposed plan designed to create a safe minority district. Largely because some groups may have lower voter registration and turnout rates than other groups, some courts have required districts with "super-majorities" of as much as 65% of the voting-age population to ensure that the district is "safe." *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1413–17 (7th Cir. 1984); *Hastert v. State Board of Elections*, 777 F. Supp. 634, 647 n.20 (N.D. Ill. 1991).[19]

Yet another aspect of the majority requirement of the first *Gingles* precondition is whether different minority populations can be combined to meet the *Gingles* precondition that the minority group asserting the vote dilution claim must constitute a "majority" in a single-member district. This issue surfaces in cases in which no one group can meet the majority requirement independently. *Compare Concerned Citizens v. Hardee County Board*, 906 F.2d 524, 526 (11th Cir. 1990) ("Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner.") *and Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) ("There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."), *with Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) ("The language of the Voting Rights Act does not support a conclusion that coalition suits are part of Congress' remedial purpose . . . .").[20] *Cf. Page v. Bartels*, 144 F. Supp. 2d 346

19. This issue is discussed in Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 Law & Pol'y 43 (1988).

20. Another question not yet resolved by the Supreme Court is whether minority voters who are not numerous enough to constitute an electoral majority may bring a section 2 claim challenging the state's failure to create what has been called an "influence district," that is, a district in which minority voters may be able to influence an election outcome without being a controlling electoral majority. The Court reserved this question in *De Grandy*, 512 U.S. at 1008–09; *Voinovich*, 507 U.S. at 154; and *Growe*, 507 U.S. at 41 n.5.

(D.N.J. 2001) (court used combined population figures from three minority groups in determining that minority voting power was not diluted by "unpacking" majority-minority district into neighboring districts).

b. What constitutes a geographically compact minority population? Courts have been flexible in assessing the showing that must be made to establish that the minority group at issue is geographically compact:

> The first *Gingles* precondition does not require some aesthetic ideal of compactness, but simply that the black population be sufficiently compact to constitute a majority in a single-member district. Moreover, plaintiffs' proposed district is not cast in stone. It was simply presented to demonstrate that a majority-black district is feasible in Calhoun County. If a § 2 violation is found, the county will be given the first opportunity to develop a remedial plan.

Clark v. Calhoun County, 21 F.3d 92, 95 (5th Cir. 1994) (citation omitted). *See also Sanchez v. Colorado*, 97 F.3d 1303, 1311 (10th Cir. 1996) (quoting *Clark*); *Houston v. Lafayette County*, 56 F.3d 606, 611 (5th Cir. 1995) ("Compactness . . . is not as narrow a standard as the district court construed it to be.").

The courts have used several different statistical measures of compactness.

> Researchers have developed three principal measures of compactness.
>
> The three measures . . . are: the geographical dispersion measure, the perimeter measure and the population score measure. The geographical dispersion measure attempts to quantify a district's diffuseness. The perimeter measure uses the total length of a district's perimeter, presuming that the smaller the total length, the more compact the district. And the population score measure focuses on where people actually live, rather than strictly on geography to determine the differences in residential patterns. All of these measures use a scale from 0.0 to 1.0, designating 1.0 as most compact.

Diaz v. Silver, 978 F. Supp. 96, 114 (E.D.N.Y. 1997), *summarily aff'd*, 522 U.S. 801 (1997).

Courts also have expressed cautions about quantifying compactness.

> The mathematical models generally used attempt to quantify departures from compactness by, for example, drawing a circle around the district's center or connecting the district's borders with an imaginary string. The district's deviation from this benchmark is then analyzed. Such techniques may or may not be probative when applied to areas in

> which external boundaries play a minor role. However, they certainly would need adjustment before being accepted when applied to a case such a[s] Houston, or for that matter possibly Rhode Island. If not, the report will reflect massive deviations from compactness caused by factors beyond the legislature's control.

Chen v. City of Houston, 206 F.3d 502, 508 n.3 (5th Cir. 2000).

It should be noted that there necessarily will be a relationship between the relative geographic compactness of the minority group and the resulting shape of a district, and that the latter is a factor in the Court's equal protection analysis in racial gerrymandering cases. *Vera*, 517 U.S. at 958, 962; *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). See the discussion in section I.D.1 *infra*. Thus, while a precondition to establishing a section 2 violation under *Gingles* is that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," *Gingles*, 478 U.S. at 50, the Court's more recent equal protection jurisprudence teaches that a district created to remedy a section 2 violation may wind up violating the Equal Protection Clause if race is found to be the legislature's predominant motive in drawing the district's lines, *Shaw II*, 517 U.S. at 905, and that the shape of the district itself may provide circumstantial evidence supporting that finding, *Vera*, 517 U.S. at 958.

Also implicit in the first *Gingles* precondition is the notion that the plaintiffs must come forward with a feasible alternative redistricting plan that cures the section 2 dilution problem they complain of. As the Supreme Court stated in *Reno v. Bossier Parish School Board*, "[b]ecause the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' practice." 520 U.S. 471, 480 (1997) (*Bossier Parish I*), *citing Hall*, 512 U.S. at 881 ("But where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.").

ii. A politically cohesive minority group

The second *Gingles* precondition requires that the minority group demonstrate that it is politically cohesive. "If the minority group is not politically cohesive, it cannot be said that the selection of a multimember

electoral structure thwarts distinctive minority group interests." *Gingles*, 478 U.S. at 51. As the Ninth Circuit observed, "[t]he inquiry is essentially whether the minority group has expressed clear political preferences that are distinct from those of the majority." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988). Thus, evidence of political cohesiveness is shown by voting preferences as demonstrated in actual elections and can be established by using the same statistical evidence plaintiffs must offer to establish racially polarized voting, because political cohesiveness is implicit in racially polarized voting. *Sanchez* v. *Colorado*, 97 F.3d 1303, 1312 (10th Cir. 1996); *Gomez*, 863 F.2d at 1414–15. Minority political cohesion cannot be assumed; it must be specifically proven. *Growe*, 507 U.S. at 41; *Gingles*, 478 U.S. at 46.

iii. Racial bloc voting

The *Gingles* Court adopted the definition of racial bloc voting provided by the expert witness upon whom the district court had relied, Dr. Bernard Grofman. Under that definition, racial bloc voting "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21 (quotation marks and citations omitted). To be legally significant for purposes of *Gingles*, white bloc voting must be shown to enable the white majority to defeat minority-preferred candidates most of the time, thus impairing the minority's ability to elect candidates of its choice. *Id.* at 55–58; *Sanchez*, 97 F.3d at 1319; *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1123 (3d Cir. 1993) ("The correct question is not whether white voters demonstrate an unbending or unalterable hostility to whoever may be the minority group's representative of choice, but whether, as a practical matter, the usual result of the bloc voting that exists is the defeat of the minority-preferred candidate.")

The inquiry is basically whether whites vote sufficiently as a bloc to enable them usually to defeat the minority candidate. *Sanchez*, 97 F.3d at 1313; *Page v. Bartels*, 144 F. Supp. 2d 346, 362, 364–65 (D.N.J. 2001) (third *Gingles* precondition is not satisfied where white bloc voting is insufficient to defeat minority candidates). The isolated success of a minority candidate in a district that usually exhibits bloc voting will not alone negate the plaintiff's showing. *Gingles*, 478 U.S. at 57. As is the case with minority political cohesion, "the results test [of section 2] does

not assume the existence of racial bloc voting; plaintiffs must prove it." *Id*. at 46.

2. Section 5 of the Voting Rights Act

a. Overview of section 5

Pursuant to the provisions of section 5 of the VRA, a covered jurisdiction, as defined in section 4(b), 42 U.S.C. § 1973b(b), may not implement any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the U.S. District Court for the District of Columbia. 42 U.S.C. § 1973c.

To obtain preclearance under section 5, a jurisdiction must establish that the proposed change "does not have the *purpose* and will not have the *effect* of denying or abridging the right to vote on account of race or color [or membership in a language minority group]." *Id.* (emphasis added) (incorporating *id.* § 1973b(f)(2)). Purpose and effect are separate criteria in the statute, and the covered jurisdiction bears the burden of persuasion on both of them. *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 (2000) (*Bossier Parish II*); *City of Rome v. United States*, 446 U.S. 156, 172 (1980).

b. Background

Section 5 of the VRA was enacted as "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976) (citing H.R. Rep. No. 94-196, at 57–58 (1975)). In crafting section 5, Congress decided to freeze election procedures in jurisdictions with a history of discriminatory voting practices until proposed changes were shown to be nondiscriminatory.[21] As the Court stated in *Bossier Parish I*, "[s]ection 5

21. Section 4, 42 U.S.C. § 1973b contains the formula used to determine whether a jurisdiction is covered by section 5. *Id.* § 1973c. Under the formula, section 5 applies to nine states (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). 28 C.F.R. pt. 51 app. (2001).

. . . imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect." 520 U.S. at 480.

c. Relationship between section 5 and section 2

In *Bossier Parish I*, the Supreme Court discussed the relationship between sections 2 and 5 of the VRA, and held that a voting change cannot be denied preclearance under section 5 solely on the ground that it violates section 2. 520 U.S. at 474, 476–85. As discussed in section I.C.2.e *infra*, however, a voting change that has been precleared under section 5 is not, by the fact of preclearance and enactment into law, immune from challenge in a section 2 proceeding.

The litigation in *Bossier Parish I* began after the Attorney General denied section 5 preclearance to the Bossier Parish School Board's post-1990 census redistricting plan, which redrew the board's twelve single-member districts but left the number of majority-minority districts at zero. Thus, there were no majority-minority districts in the preexisting plan and none in the post-census plan, despite an overall 20% black population in the jurisdiction. The Attorney General's denial was based on the conclusion that an alternative plan, drafted by the NAACP, had shown it would have been possible to create two compact majority-black districts in the redistricting plan, and that the school board's failure to do so diluted minority voting strength in violation of section 2 of the VRA. In response, the board filed for section 5 preclearance with the district court. That court rejected the contention that a voting change's failure to satisfy section 2 provides an independent reason to deny preclearance under section 5.

On appeal, the Supreme Court also held that preclearance under section 5 may not be denied solely on the basis that a covered jurisdiction's new voting "qualification, prerequisite, standard, practice, or procedure" violates section 2. *Id*. In doing so, the Court distinguished section 5 and section 2, which it explained were designed to combat different evils and accordingly imposed very different duties on the states. Section 5 is concerned with retrogression, explained the Court, which requires a comparison of a covered jurisdiction's new voting plan with its existing plan and "implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured," *Id.* at 478.

In contrast, section 2's broader mandate applies to all states and requires a plaintiff to postulate a reasonable alternative voting practice to serve as the benchmark "undiluted" voting practice. The Court expressed concern that denial of preclearance under section 5 because a redistricting plan violates section 2 would "shift the focus of § 5 from nonretrogression to vote dilution, and . . . change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan," *id.* at 480, and inevitably make compliance with section 5 contingent upon compliance with section 2.[22]

The Court nevertheless disagreed with the district court's conclusion that all evidence that the jurisdiction's redistricting plan diluted the voting power of minorities under section 2 was irrelevant to the question whether the Board had enacted the plan with a discriminatory purpose under section 5. *Id.* at 486.[23]

The Court concluded that evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities ("§ 2 evidence") is relevant in a section 5 proceeding, because while it is not dispositive of the issue, it may tend to prove a jurisdiction's intent to retrogress under section 5. The Court vacated the district court's decision and remanded the case for further proceedings as to the board's purpose in adopting its plan. It also left for the district court the question whether section 2 evidence is relevant to other types of discriminatory intent or if the section 5 purpose inquiry ever extends beyond the search for retrogressive intent. 520 U.S. at 486.[24]

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22. The Court also observed that incorporating a section 2 inquiry into the section 5 preclearance process would raise federalism concerns. "To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive 'result' before it can implement that plan—even if the Attorney General bears the burden of proving that 'result'—is to increase further the serious federalism costs already implicated by § 5." 520 U.S. at 480.

23. As Justices Stevens and Souter noted in dissent, one judge on the three-judge district court found that the evidence demonstrated overwhelmingly that the school board adopted its redistricting plan with a discriminatory purpose: "The history of discrimination by the Bossier School System and the Parish itself demonstrates the Board's continued refusal to address the concerns of the black community in Bossier Parish." 520 U.S. at 500 (Stevens, J., dissenting in part and concurring in part) (quoting the concurring and dissenting opinion of District Judge Kessler, 907 F. Supp. 434, 463 (D.D.C. 1995)).

24. The Supreme Court advised, 520 U.S. at 488, that in considering their inquiry into a jurisdiction's motivation in enacting voting changes, district courts should look for guidance to its decision in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), which sets forth a framework for analyzing whether discrimi-

d. Prohibition on preclearance of retrogressive changes only

Section 5 has been held to prohibit preclearance only of proposed voting changes that either have a retrogressive effect on minority representation, *Beer*, 425 U.S. at 141, or are enacted for a retrogressive purpose, *Bossier Parish II*, 528 U.S. at 328. The *Beer* Court construed the language of section 5 in a vote abridgment claim. It held that the term *effect* in the phrase "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" is limited to retrogressive effects. Thus, a proposed districting plan does not have a prohibited "effect" under section 5 unless it worsens the position of minority voters.

In *Bossier Parish II*, the Court held that the term *purpose* in the same phrase is limited to a retrogressive purpose. Accordingly, section 5 does not prohibit preclearance of a redistricting plan enacted with a nonretrogressive purpose, even if it is discriminatory. Retrogression, the Court established in *Beer*, occurs when minority voting power decreases in comparison with a preexisting plan, for example, by virtue of a new districting plan that eliminates a majority-minority district or otherwise reduces the voting power of a minority community. Thus, for purposes of section 5, a showing of an intent to discriminate is not enough to warrant denial of preclearance to a proposed voting change in a covered district; either an intent to retrogress or an actual retrogressive effect must be shown instead. *Bossier Parish II*, 528 U.S. at 328–41.

e. Section 5 and vote dilution litigation

In light of the construction given section 5 in *Beer* and in the *Bossier Parish* cases, section 2 of the VRA is the sole statutory vehicle that can be used in attacking a claimed discriminatory (because dilutive) redistricting plan. As the Supreme Court noted in *Bossier Parish I*, "[o]f course, the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted voting [practice] may violate that section. All we hold today is that preclearance under § 5 may not be denied on that basis alone." 520 U.S. at 485.

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natory intent is a motivating factor in a government body's decision.

D. Redistricting and the Equal Protection Clause of the Fourteenth Amendment

1. Racial gerrymandering claims

a. The equal protection overlay on vote dilution law

In 1993, the Supreme Court applied its equal protection jurisprudence to the redistricting context, holding that majority-minority districts drawn deliberately to augment minority voting strength could be subject to challenge under the Equal Protection Clause of the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*).[25] In *Shaw I*, the Court held that a plaintiff may state a claim for relief under the Equal Protection Clause by alleging that a state redistricting plan, while race-neutral on its face, has no rational explanation save as a deliberate "effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." 509 U.S. at 649.

For there to be an equal protection violation, race must not simply have been "*a* motivation for the drawing of a majority-minority district," *Bush v. Vera*, 517 U.S. 952, 959 (1996), but instead "the 'predominant factor' motivating the legislature's districting decision," *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999) (*Cromartie I*).

The plaintiff bears the burden of proving that race was the predominant factor in the challenged districting decision, *Vera*, 517 U.S. at 959, and may do so through circumstantial evidence of a district's shape and demographics or through direct evidence of the legislature's purpose. *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916 (1995). A plaintiff who claims that a legislature has

25. Essentially, the Court's equal protection jurisprudence holds that racial classifications are antithetical to the Fourteenth Amendment, whose "central purpose was to eliminate racial discrimination emanating from official sources in the states." McLaughlin v. Florida, 379 U.S. 184, 192 (1964); *see also* Shaw v. Hunt, 517 U.S. 899, 907 (1996) (*Shaw II*) (citing *McLaughlin*). The Court has recognized that drawing racial distinctions may be permissible under circumstances in which a governmental body is pursuing a compelling state interest. *E.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995). A state is, however, constrained in how it may pursue that interest: "[T]he means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986).

unconstitutionally used race as a criterion in creating a majority-minority district "must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations,'" *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (*Cromartie II*) (quoting *Miller*, 515 U.S. at 916) (alteration in original).

If the plaintiff demonstrates that race predominated in the drawing of district lines, the state's redistricting legislation will be subject to the same strict scrutiny given to other state laws that classify citizens by race. *Shaw I*, 509 U.S. at 644. In the redistricting context, strict scrutiny means the state must show not only that its districting legislation was passed in pursuit of a compelling state interest, but also that the legislation was narrowly tailored to achieve that interest. *Vera*, 517 U.S. at 976; *Shaw II*, 517 U.S. at 911; *Miller*, 515 U.S. at 921.

The holding in *Shaw I* pointed up a tension between section 2 of the VRA and the Fourteenth Amendment: On the one hand, the remedy for vote dilution in a single-member districting scheme is for the state to redraw district lines to create one or more additional districts in which minority voters have an opportunity to exercise electoral control, thus making race a substantial factor in redrawing district lines. On the other hand, the Equal Protection Clause of the Fourteenth Amendment prohibits states from making race the *predominant* factor in drawing district boundaries. This tension came to the fore in *Shaw II* and *Vera*. In both of these cases, the Supreme Court found that majority-minority districts created by state legislatures following the 1990 census constituted racial gerrymanders in violation of the Equal Protection Clause. In doing so, it conducted a strict scrutiny analysis and rejected the states' contentions that the racial classifications embodied in the districts were narrowly tailored to further their asserted compelling interest in avoiding liability under section 2 of the VRA.

b. Major racial gerrymandering cases

An examination of the facts and holdings of the *Shaw* cases and *Vera* is helpful in understanding the nature of the relationship they forged between the Equal Protection Clause of the Fourteenth Amendment and the equal opportunity goals of section 2 of the VRA.

i. Shaw v. Reno (Shaw I)

Shaw I, 509 U.S. 630, was the first of a series of four Supreme Court decisions reviewing post-1990 census redistricting plans drawn by the

North Carolina General Assembly. The state's first redistricting plan contained one majority-black district, District 1, located in the northern coastal plain region of the state. Because the General Assembly's reapportionment plan affected counties covered by section 5 of the VRA, the state sought preclearance of its plan from the Attorney General. The Attorney General objected to the plan, noting that the General Assembly could have created a second majority-minority district in the south-central to southeastern region of North Carolina using boundary lines no more irregular than those found elsewhere in the plan. The General Assembly responded by enacting a revised redistricting plan in 1991 that included a second majority-black district, District 12, located in the north-central region, not the south central to southeastern part of the state. Both districts, but particularly District 12, were unusually shaped (see Figure 1).The Attorney General did not object to the revised plan.

Shaw and four others then filed suit against the Attorney General. The plaintiffs were white residents of Durham County, North Carolina, who under the revised plan voted for congressional representatives in District 12 and neighboring District 2. They alleged that the plan created a racial gerrymander in violation of the Fourteenth Amendment. They argued that the General Assembly had created two congressional districts in each of which a majority of black voters was concentrated arbitrarily without regard to any other considerations, such as compactness, contiguity, geographical boundaries, or political subdivisions. They further alleged that the General Assembly had done so in order to create congressional districts along racial lines and to ensure the election of two black representatives to Congress. The state contended the plan was necessary to avoid dilution of black voting strength in violation of section 2, as construed in *Gingles*. The plaintiffs maintained on appeal that the plan could not have been required by section 2 because the state's black population was too dispersed to support geographically compact majority-black districts (required by *Gingles*) and that the bizarre shape of District 12 demonstrated this.

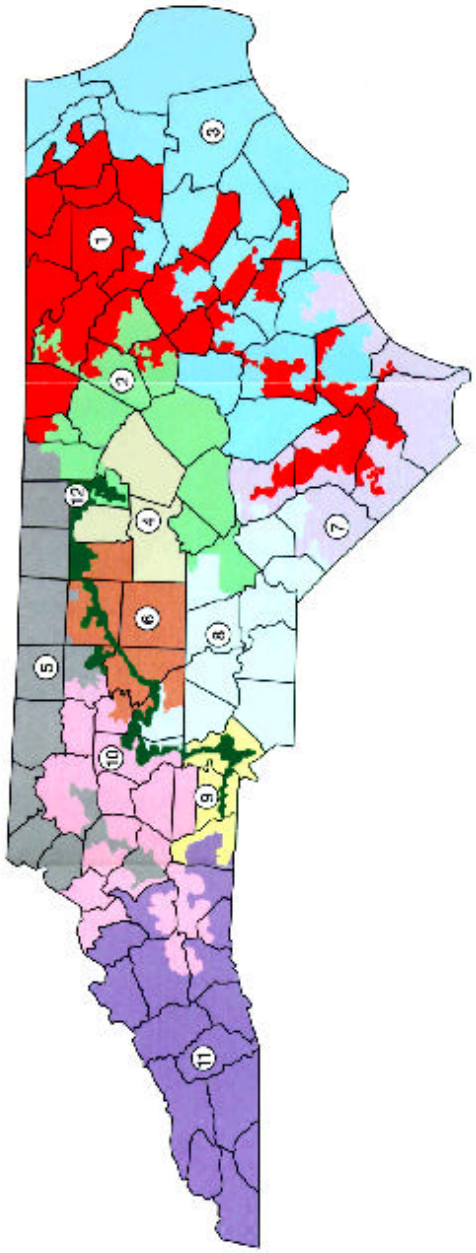


Figure 1. North Carolina Congressional Plan, Appendix to Opinion of the Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*) (Districts 1 and 12 challenged by plaintiffs)

As the Court put it, "[w]hat appellants object to is redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." *Id.* at 642. Noting that "reapportionment is one area in which appearances do matter," *id*. at 647, the Court concluded that "[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." *Id.* The Court noted further that a district so designed reinforces impermissible racial stereotypes and sends elected officials from the district the pernicious message "that their primary obligation is to represent only the members of that group, rather than their constituency as a whole." *Id*. at 648.

The Court concluded that

> a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

Id. at 649. The Court held that if appellants' allegations of racial gerrymandering were not contradicted on remand, the district court would have to determine whether the General Assembly's plan satisfied strict scrutiny.

ii. Shaw v. Hunt (Shaw II)

On remand from *Shaw I*, the district court held that although the North Carolina redistricting plan classified voters by race, the classification survived strict scrutiny because it was narrowly tailored to further the state's compelling interest in complying with sections 2 and 5 of the VRA. But when the case returned to the Supreme Court in *Shaw II*, 517 U.S. 899, the Court reversed the district court's decision, holding that strict scrutiny applied and that the North Carolina plan violated the Equal Protection Clause because it was not narrowly tailored to serve a compelling state interest.

In upholding the district court's finding that race was the predominant factor in drawing the lines of District 12, the Court relied on the "unconventional" boundary lines of the majority-minority districts, the

demographics of the districts, and evidence of the legislature's objective, which was to obtain preclearance of the districting plan from the Justice Department.

The Court then responded to the state's argument that it had drawn District 12 to achieve a compelling state interest—compliance with section 2. The Court assumed, without deciding, that compliance with section 2 constitutes a compelling state interest that justifies creation of a majority-minority district. Thus, the deciding issue was whether District 12 was "narrowly tailored" to achieve compliance with section 2. The Court focused on two key facts in resolving this issue: First, it was not possible to draw a compact majority-minority district in the center of North Carolina. Second, it was possible to draw a compact majority-minority district in the southeastern part of the state, but the legislature had chosen to draw its remedial district elsewhere. The Court then held that District 12, as drawn, was not a remedy narrowly tailored to further the state's interest in avoiding liability under section 2. District 12 could not remedy any potential section 2 violation, since a plaintiff must show that the minority group is "geographically compact" to establish section 2 liability under *Gingles* and District 12 did not contain a geographically compact population of any race. Moreover, because section 2 targets vote dilution injury to individuals in a particular area, and not to the minority as a group, the state's bizarrely shaped remedial district located in the center of the state was not an appropriate remedy for vote dilution suffered by minority voters in the southeastern part of the state.

iii. Bush v. Vera

Vera, 517 U.S. 952, decided the same day as *Shaw II*, concerned an action brought for injunctive and declaratory relief from Texas' redistricting plan adopted after the 1990 census. The plan created three new majority-minority districts (see Figures 2A–2C). A plurality of the Supreme Court cautioned that strict scrutiny does not apply merely because redistricting is performed with consciousness of race, and does not apply to all cases of intentional creation of majority-minority districts. *Id*. at 958 (citing *Shaw I*, 509 U.S. at 646; *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (strict scrutiny did not apply to an intentionally created compact majority-minority district), *summarily aff'd*, 515 U.S. 1170 (1995)). Rather, because "[e]lectoral district lines are 'facially race neutral,' . . . a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based ex-

plicitly on race.'" *Vera*, 517 U.S. at 958 (quoting *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 213 (1995)).

After reviewing the district court's findings, the Court nevertheless held that the new districts were drawn with race as the predominant factor. The plurality agreed with the district court that the districts at issue had "no integrity in terms of traditional, neutral redistricting criteria," *id.* at 960, and found direct evidence of the legislature's racial motivations in designing the districts. The Court also found that the primary tool used to draw the district lines, a computer program called REDAPPL (which contained racial data at the block level) provided further evidence of the importance of race in designing the districts. The Court found the districts subject to strict scrutiny and proceeded to determine whether the racial classifications embodied in any of the three districts were narrowly tailored to further a compelling state interest.

Figure 2A. Texas Congressional District 30, Appendix A to Opinion of the Supreme Court in *Bush v. Vera*, 517 U.S. 952 (1996)

Figure 2B. Texas Congressional District 18, Appendix B to Opinion of the Supreme Court in *Bush v. Vera*, 517 U.S. 952 (1996)

Figure 2C. Texas Congressional District 29, Appendix C to Opinion of the Supreme Court in *Bush v. Vera*, 517 U.S. 952 (1996)

Appellants contended that the racial classifications embodied in the districts were narrowly tailored to further three compelling state interests: avoiding liability under the results test of section 2(b) of the VRA, remedying past and present racial discrimination, and complying with the "nonretrogression" requirement of section 5 of the Act. The plurality rejected each of these in turn. It again assumed without deciding that compliance with the results test of section 2 of the Act can be a compelling state interest, but emphasized that "the district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 979. The plurality then decided that the districts at issue—which it found to be bizarrely shaped and far from compact because of racially motivated gerrymandering—were not narrowly tailored to serve the state's interest in avoiding a violation of section 2. It said that "§ 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.'" *Id.* (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). As it was in *Shaw II*, compactness was the decisive factor in the Court's decision:

> If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district; if a reasonably compact district can be created, nothing in § 2 requires the race-based creation of a district that is far from compact.

517 U.S. at 979.

Nevertheless, the plurality observed that "[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.'" *Id*. at 977.[26]

c. Factors indicating race was a legislature's predominant motive in redistricting

As discussed in section I.D.1.a *supra*, a plaintiff in a racial gerrymandering suit bears the burden of proving that race was the predominant factor

26. As discussed in section I.D.1.f *infra*, the Court also rejected the state's argument that one district was justified by compelling state interest in complying with section 5 of the VRA.

in the legislature's districting decisions. The Court has specified that in order to show that a legislature has improperly used race as a criterion to create a majority-minority district, the plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller,* 515 U.S. at 916. The following discusses the types of circumstantial and direct evidence that might be presented by plaintiffs attempting to meet this burden.

i. Circumstantial evidence of predominantly racial motivation

A plaintiff may demonstrate that race predominated in a districting decision by introducing circumstantial evidence of the district's shape, its failure to apply traditional districting criteria, its demographics, and the voting behavior of the racial groups residing in the district. *See e.g., Shaw II*, 517 U.S. at 905.

a. The district's shape. The Court said in *Shaw I* that "[i]n some exceptional cases, a redistricting plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw I,* 509 U.S. at 646–47 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)) (alteration to *Gomillion* quotation in original).[27] While shape alone has not been found determinative on the motivation issue since then, the Court has assigned great weight to a district's "highly irregular and geographically non-compact" shape in finding that racial motivations predominated in drawing district boundaries, *Shaw II*, 517 U.S. at 905–06. Moreover, if a district's shape alone does not make out a strong circumstantial case, racial gerrymandering may be revealed more clearly when its

27. In *Miller*, the Court reviewed a Georgia redistricting plan, applied the principles it articulated in *Shaw I*, and decided the plan gave rise to a valid Equal Protection Clause claim. Appellants in *Miller* argued that a plaintiff seeking to establish a racial gerrymandering claim is required to demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race. The Court rejected this interpretation of *Shaw I*, explaining that *Shaw I* "was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation." *Miller,* 515 U.S. at 912. Instead, "[s]hape is relevant not because bizarreness is a necessary element of . . . proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913.

shape is linked to demographics and other factors. *See Miller*, 515 U.S. at 917 ("Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer.").

In one case, however, the Court concluded that an "unusually shaped" "snakelike" district passed muster under the Equal Protection Clause because other evidence in the case tended to support the conclusion that politics, not race, predominated. *Cromartie II*, 532 U.S. 234. Specific local history and geographic features may also provide nonracial explanations for a geographically noncompact district. *See, e.g., Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

b. Failure to follow traditional districting criteria. The district's shape is itself the result of another relevant consideration, which is whether the legislature used traditional districting criteria, such as respect for existing political subdivisions, administrative boundaries, and communities of interest, in crafting the district. *See Vera*, 517 U.S. at 963 (maintenance of some county lines showed traditional districting factors were not entirely ignored); *Miller*, 515 U.S. at 918 (plan split several counties and thus violated traditional districting principles). The court can therefore expect plaintiffs to submit maps showing a district's shape, boundary segments, and alleged lack of continuity, as well as statistical evidence reflecting an alleged failure to apply traditional districting criteria, in an effort to show that the legislature's motivation was predominantly racial. *See, e.g., Cromartie I*, 526 U.S. at 547–49; *Vera*, 517 U.S. at 960.

c. District demographics. Not surprisingly, the demographics of the district, including evidence of a large minority population, are also relevant to the issue of legislative intent. *Shaw II*, 517 U.S. at 905–06 (citing predominantly African-American racial makeup of district); *Miller*, 515 U.S. at 917 (district's shape showed that "narrow land bridges" were used to incorporate 80% of district's black population). So too are the demographics of precincts excluded from the district at issue and placed in neighboring districts. *See Cromartie II*, 532 U.S. 234. However, the Court has cautioned that "[s]trict scrutiny does not apply . . . to all cases of intentional creation of majority-minority districts," *Vera*, 517 U.S. at 958, and it stated more recently that

> [e]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Cromartie I, 526 U.S. at 551–52.

d. Race and voter preference. Evidence of a district's "heavily African-American voting population," as distinguished from total population, is also relevant to a showing of predominantly racial motivation. *Cromartie II*, 532 U.S. at 239. In addition, when the decisive question in the case is whether the legislature's primary motivation was racial or political, the court must rely on data reflecting actual voting behavior of the racial groups involved, not mere voter-registration data. *Id.* at 244–45. The court must do so because, in light of the phenomenon of crossover voting, party registration figures and party preference figures do not always correspond. *Id.; cf. Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) (in section 2 case, court considered voting patterns of four voting groups, including white voter crossover patterns).

ii. Direct evidence of predominantly racial motivation

Direct evidence of predominantly racial motives in drawing district lines may take the form of statements of legislative intent. *Cromartie II*, 532 U.S. at 254 (legislator's e-mail referred to racial makeup of voters being moved in and out of district); *Vera*, 517 U.S. at 959 (state conceded that one of its goals was to create a majority-minority district); *Shaw II*, 517 U.S. at 906 (legislator made the statement that creating two majority-black districts was "principal reason" for revised redistricting plan); *Miller*, 515 U.S. at 907 (state set out to create majority-minority districts). Direct evidence of intent may also be found in information the state submitted to the Department of Justice in an effort to obtain section 5 preclearance for its districting plan. *Shaw II*, 517 U.S. at 906. *See also Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (statements in report accompanying plan adopted by legislature indicated predominantly racial motivation), *summarily aff'd*, 522 U.S. 801 (1997).

d. The effect of a high correlation between race and voter preference

The Court reviewed North Carolina's Twelfth Congressional District two more times in *Cromartie I*, 526 U.S. 541, and *Cromartie II*, 532 U.S. 234. In doing so, it altered the redistricting landscape once again by

making it more difficult for a plaintiff to prevail on a claim of racial gerrymandering when the defense is political gerrymandering and the evidence shows a high correlation between race and voter preference. In these two cases, the Court held that plaintiffs had failed to prove that a relatively noncompact congressional district was the result of a racial gerrymander, even though the district had been drawn in such a way that it split cities and towns and resulted in a 47% black voting population. The Court noted that the state had asserted that its intention was to create a "safe seat" for Democrats, and that the evidence demonstrated that its boundary choices reflected political reality: whites often registered Democratic but voted Republican, whereas 95% of African-Americans in the state both registered and voted Democratic.

In essence, these cases stand for the proposition that in districts in which there is a high correlation between voting behavior and race, in the sense that a high percentage of the minority population in the gerrymandered district votes for the same political party in the legislature that engineered the district as a so-called "safe" district for itself, the legislature's motivation may be deemed predominantly political rather than racial. Thus, strict scrutiny does not apply, and there can be no equal protection violation.

i. Hunt v. Cromartie (Cromartie I)

In response to the Court's decision in *Shaw II*, 517 U.S. 899, North Carolina enacted a districting plan that altered District 12 so that blacks no longer constituted a majority of its voting-age population and so that the district was "wider and shorter than it was before [but retained] its basic 'snakelike' shape." *Cromartie I*, 526 U.S. at 544 (see Figure 3).The district was again challenged as the product of an unconstitutional racial gerrymander. The parties filed competing motions for summary judgment, and the district court granted appellees' motion, finding that the uncontroverted facts showed that the districting criteria were race driven and that the state had violated the Fourteenth Amendment. Appellees offered a range of circumstantial evidence to support their claim, including statistical and demographic evidence tending to show that the state had excluded from District 12 several precincts which had lower percent-

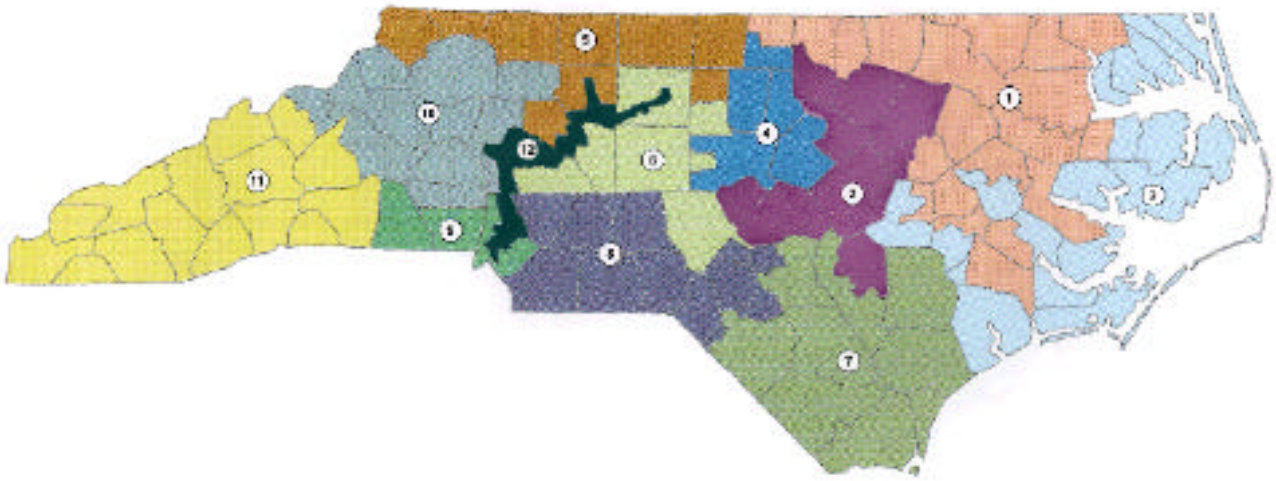
ages of blacks in their populations but which were as Democratic (in terms of registered voters) as the precincts inside District 12.[28]

The Supreme Court observed that viewed in toto, the appellees' evidence tended to support an inference that the state drew its district lines with an impermissible racial motive. Nevertheless, it found summary judgment inappropriate because the appellees' evidence, in the form of affidavits of members of the General Assembly and an expert (Dr. David W. Peterson) who reviewed racial demographics, party registration, and election-result data, tended to show that the legislature's intention was to create a district of strong partisan Democrats. The Court found that Peterson's analysis, displaying a high correlation between race and partisanship in the unusually shaped district, "support[ed] an inference that the General Assembly did no more than create a district of strong partisan Democrats." *Id*. at 550. Moreover, appellees' maps reported only party registration figures, evidence which the Court found inadequate. *Id.* at 550–51. Peterson's analysis used actual voting results, which the Court considered more complete "because it showed that in North Carolina, party registration and party preference do not always correspond." *Id.* at 551.

Reversing the district court, the Supreme Court ruled that the case was not suited for summary disposition because genuine issues of material fact existed with respect to the legislature's motivation and because the lower court was required to accept appellees' asserted political motivation as true in ruling on the motion. The Court stated along the way that "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Id.* at 551.

28. This evidence consisted of maps of District 12 showing its size, shape, and alleged lack of continuity; statistical evidence of the district's low scores with respect to measures of compactness; and expert affidavits explaining that the evidence proved the state had ignored traditional districting criteria in crafting the district's boundaries. *Cromartie I*, 526 U.S. at 547–49.

Figure 3. North Carolina Congressional District Map, Appendix to Opinion of the Supreme Court in *Hunt v. Cromartie*, 526 U.S. 541 (1999) (*Cromartie I*) (District 12 challenged by plaintiffs)



ii. Easley v. Cromartie (Cromartie II)

In *Cromartie II*, 532 U.S. 234, the Court reversed as clearly erroneous the decision of the three-judge district court on remand in *Cromartie I* that the North Carolina General Assembly had used race as the predominant factor in drawing District 12. The Court observed first that the district court's determination rested upon three findings that it had found insufficient to support summary judgment in *Cromartie I*—the district's shape, its splitting of towns and counties, and its high African-American voting population. It then noted that "[g]iven the undisputed evidence that racial identification is highly correlated with political affiliation in North Carolina, these facts in and of themselves cannot, as a matter of law, support the District Court's judgment." *Id.* at 243 (citing *Vera*, 517 U.S. at 968 ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify.")).

The Court also faulted the district court for relying primarily on voter registration, not voting behavior, in reaching its conclusion that race rather than politics predominantly explained the district's boundaries. The district court had found it significant that the legislature excluded heavily white precincts with high Democratic Party registration while including heavily African-American precincts with equivalent, or lower, Democratic Party registration. The problem with this evidence, said the Court, is that voter registration does not accurately predict voting preference in North Carolina. White voters who are registered as Democrats cross over to vote for a Republican candidate far more often than do blacks, who both register and vote Democratic approximately 95% of the time. The Court reasoned that "a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial." *Id.* at 245. The Court concluded that the evidence did not show that racial considerations predominated in drawing the district's boundaries, because "race in this case correlates closely with political behavior," *id.* at 257, and that the appellees had "not successfully shown that race, rather than politics, predominantly accounts for the result." *Id.*

At the end of its opinion, the Court articulated the burden that parties attacking redistricting boundaries must meet in future cases in which race correlates with political affiliation:

> We can put the matter more generally as follows: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance. Appellees failed to make any such showing here.

Id. at 258.

Equal protection challenges to state redistricting plans are quite often cases in which race correlates with political affiliation. Thus, after *Cromartie II*, redistricting plans created to remedy section 2 vote dilution arguably stand a greater chance of surviving racial gerrymandering challenges than those invalidated by the Court in the 1990s.

e. Section 2 in the aftermath of Shaw *and* Vera

In applying its equal protection jurisprudence in the redistricting context, the Supreme Court has limited the extent to which race can be taken into consideration by states in redistricting decisions but has not questioned the constitutionality of section 2 or the holdings of the seminal section 2 cases, *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Johnson v. De Grandy*, 512 U.S. 997 (1994).[29] On the contrary, the court has relied heavily on these cases each time it has found that an equal protection violation has resulted from racial gerrymandering. Thus, in both *Shaw II* and *Vera*, the Court assumed that in racial gerrymandering cases, compliance with section 2 can be a compelling state interest for strict scrutiny purposes, *Vera*, 517 U.S. at 977; *Shaw II*, 517 U.S. at 915, yet in resolving the question whether the districts at issue were narrowly tailored to serve that interest, the Court cited passages from *Gingles* and *De Grandy* as support for its conclusion that they were not.

In essence, the Court has said that if the district at issue does not meet the criteria for section 2 liability as articulated in *Gingles* and *De*

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29. *But see* the opinion of Justice Thomas in *Holder v. Hall*, 512 U.S. 874, 891–946 (1994) (Thomas, J., concurring in the judgment) (arguing that properly construed, section 2 does not prohibit vote dilution practices, that the interpretation of section 2 set out in *Gingles* should be overruled, and that the Court's construction of section 2 has been "so unworkable in practice and destructive in its effects that it must be repudiated").

Grandy, because it is not a reasonably compact majority-minority district, the district is not required by section 2, and thus cannot possibly advance a (presumed) compelling state interest in avoiding section 2 liability. *See Shaw II*, 517 U.S. at 915–16; *Vera*, 517 U.S. at 977–81. Put another way, a district designed for predominantly racial reasons cannot be deemed narrowly tailored to further a compelling state interest in complying with section 2 if it departs substantially from the reasonable compactness requirement.[30]

Justice O'Connor, who wrote the plurality opinion in *Vera*, wrote a separate concurring opinion in that case summarizing how section 2 and the Fourteenth Amendment can "present a workable framework" for the achievement of the twin goals of achieving racial equality and eliminating race-based state action that appears to endorse racial polarization. *Vera*, 517 U.S. at 993 (O'Connor, J., concurring). In her concurrence, she summarized that framework and the rules governing the states' consideration of race in the districting process as follows:

> First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply.
>
> Second, where voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice." § 2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present . . . .
>
> Third, the state interest in avoiding liability under VRA § 2 is

30. Arguably, the only gloss the Court's equal protection decisions have put on its section 2 jurisprudence is that resulting from its holding in *Shaw II*. In that case, the Court held that a bizarrely shaped remedial district located in the center of the state, where a *Gingles* district could not be drawn, was not an appropriate remedy for vote dilution suffered by minority voters in the southeastern part of the state, where the dilution was possible to remedy. Thus, it rejected the argument that a majority-minority district may be drawn anywhere in a state if there is a strong basis in evidence for concluding that a section 2 violation exists somewhere in the state, and it made clear that section 2 liability targets vote dilution injury to minority individuals in a particular geographic area, and not a more general injury to the minority as a group, located anywhere in the state. *Shaw II*, 517 U.S. at 916–18.

> compelling. If a State has a strong basis in evidence for concluding that the *Gingles* factors are present, it may create a majority-minority district without awaiting judicial findings. Its "strong basis in evidence" need not take any particular form, although it cannot simply rely on generalized assumptions about the prevalence of bloc voting.
>
> Fourth, if a State pursues that compelling interest by creating a district that "substantially addresses" the potential liability, and does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons, its districting plan will be deemed narrowly tailored.
>
> Finally, however, districts that are bizarrely shaped and noncompact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, *for predominantly racial reasons*, are unconstitutional.

Vera, 517 U.S. at 993–94 (O'Connor, J., concurring) (alterations in original) (citations omitted).

Despite the optimism inherent in Justice O'Connor's concurrence in *Vera*, a reading of *Shaw I*, *Shaw II*, and *Vera* itself makes clear that crafting a redistricting plan that satisfies the requirements of both section 2 and the Equal Protection Clause is a difficult undertaking. Nevertheless, courts have upheld districting plans in the face of Equal Protection Clause challenges when the plans were fashioned with consciousness of race and the requirements of section 2, but also incorporated such traditional districting principles as compactness, contiguity, and respect for communities of interest and municipal and voting-district boundaries. *See, e.g.*, *Robertson v. Bartels*, 148 F. Supp. 2d 443, 458 (D.N.J. 2001) (finding that strict scrutiny did not apply because the districting plan "carefully was drawn utilizing traditional redistricting principles while seeking to comply with the Voting Rights Act by giving minority candidates the opportunity to be elected to political office"), *summarily aff'd*, 122 S. Ct. 914 (2002); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (concluding that because those charged with redrawing the district map "sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act," strict scrutiny did not apply to the resulting majority-minority district), *summarily aff'd*, 515 U.S. 1170 (1995). *See also King v. State Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997) (district created to remedy anticipated section 2 violation was subjected to strict scrutiny but was found narrowly

tailored to further a compelling state interest), *summarily aff'd*, 522 U.S. 1087 (1998).

f. Equal protection litigation and section 5

Defendants in all of the Court's major racial gerrymandering cases in the 1990s asserted compliance with section 5's administrative preclearance requirement as a compelling state interest in drawing the boundaries of challenged districts. In each case, the Court found that the race-based districting at issue was not required by a proper reading of section 5 and as a result, the district was not narrowly tailored to achieve the asserted state interest. *Vera*, 517 U.S. 952; *Shaw II*, 517 U.S. 899; *Miller*, 515 U.S. 900. As the Court stated in *Miller*, "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 921.

In *Miller* and *Shaw II*, the Court made clear that it thought the challenged districts were designed not to comply with section 5 but instead with Justice Department policy, which was designed to maximize the number of majority-minority districts resulting from redistricting plans. *Shaw II*, 517 U.S. at 912–13; *Miller*, 515 U.S. at 924–25. Pursuant to this policy, the department denied section 5 preclearance to redistricting plans that were not crafted in a manner that maximized the number of majority-minority districts in a jurisdiction. The districting plan challenged in *Miller*, for example—containing three majority-black districts—was adopted by the Georgia legislature after the Justice Department refused preclearance of two earlier plans containing two majority-black districts. *See Miller*, 515 U.S. at 921. The department had also urged North Carolina to create an additional majority-black district before it granted preclearance to the districting plan attacked in *Shaw I* and *Shaw II*. *See Shaw II*, 517 U.S. at 911–12. In both *Miller* and *Shaw II*, the Supreme Court disagreed strongly with the Justice Department's interpretation of section 5. As the Court stated in *Miller*, "[t]he congressional plan challenged here was not required by the [Voting Rights] Act under a correct reading of the statute." *Miller*, 515 U.S. at 921. The Court further explained:

> We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues. . . . Our presumptive skepticism of all racial classifi-

> cations prohibits us as well from accepting on its face the Justice Department's conclusion that racial districting is necessary under the [Voting Rights] Act. Where a State relies on the Department's determination that race-based districting is necessary to comply with the Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest.

Id. at 922 (citation omitted).

In *Vera*, Texas contended that one of the three districts at issue was justified by its compelling interest in complying with section 5. The Court responded that section 5's limited substantive goal is "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," 517 U.S. at 982–83 (quoting *Miller*, 515 U.S. at 926 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976))) (quotation marks omitted). Finding that the state's redistricting plan had substantially increased the African-American population of the district, from 35.1% to 50.9%, the Court observed that "[n]onretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral *success*; it merely mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Vera*, 517 U.S. at 983. Thus, the Court concluded that the state had gone beyond what was necessary to avoid retrogression and that the district at issue, like those in *Miller* and *Shaw II*, was "not narrowly tailored to the avoidance of section 5 liability." *Vera*, 517 U.S. at 983.

g. Recurring legal issues in racial gerrymandering cases

i. Standing

In *Sinkfield v. Kelley*, 531 U.S. 28 (2000), and *United States v. Hays*, 515 U.S. 737 (1995), white plaintiffs who were residents of majority-white districts adjacent to majority-minority districts created under state redistricting plans attempted to challenge their own districts under the equal protection principles announced in *Shaw I*, 509 U.S. 630. In both cases, the Supreme Court held that the plaintiffs lacked standing to maintain the suit because they failed to show a cognizable injury under the Fourteenth Amendment. They were not injured for Fourteenth Amendment purposes because they did not reside in the majority-minority districts

created by the redistricting plans and did not otherwise show they had been personally denied equal treatment. The fact that the racial composition of their own districts might have been changed had the legislature drawn the adjacent majority-minority districts another way did not constitute the requisite injury. In so holding, the Court rejected the argument that an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts. *See also Shaw II*, 517 U.S. at 904 (dismissing appellants who lived outside the challenged district for lack of standing).

ii. Summary judgment

In *Cromartie I*, 526 U.S. 541, the Supreme Court reversed a district court's grant of summary judgment for the plaintiff in a redistricting case involving a claimed Equal Protection Clause violation. In so doing, the Court stressed that given the complex factual nature of the intent requirement in the racial gerrymandering case, summary judgment for the party with the burden of persuasion in the case was inappropriate. It also relied on the traditional presumption that the legislature acted in good faith while districting. In contrast, a grant of summary judgment in favor of the defendant in a racial gerrymandering case was upheld in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), because unlike the situation in *Cromartie I*, "[t]he plaintiffs here bear the burden of persuasion, and the presumption of legislative integrity adds to, rather than lessens, their burden facing summary judgment." *Chen*, 206 F.3d at 506.

2. The Equal Protection Clause and one person–one vote issues

A recurring question since formulation of the one person–one vote principle is how far from mathematical equality an apportionment scheme may deviate before it violates the Constitution. The answer depends in part on whether congressional or noncongressional districting is at issue, and in part on the extent of the deviation. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Supreme Court held that in congressional districting, even slight deviations from population equality were permissible only when unavoidable despite good-faith efforts to achieve absolute equality. *Id.* at 530–31.

In *Mahan v. Howell*, 410 U.S. 315 (1973), however, the Court held that the strict standards of *Kirkpatrick* were inapplicable to state legislative apportionment schemes. *Id.* at 324. Then, in a series of decisions

following *Mahan*, the Court refined its criteria for determining when population differences among noncongressional legislative districts are significant enough to dilute the votes of the members of the larger districts in violation of the Equal Protection Clause. After deciding that "relatively minor" population deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case, *White v. Regester*, 412 U.S. 755, 764 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), the Court established a benchmark for determining whether a legislature's redistricting plan violates the one person–one vote principle in *Brown v. Thompson*, 462 U.S. 835 (1983): "an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Id.* at 842–43 (citations omitted). Thus, if the maximum deviation is greater than 10%, the state must justify the population disparity by showing a rational and legitimate state policy for the districting plan. *See id.* [31]

However, the Supreme Court has never specified with precision who needs to be counted in ensuring compliance with the one person–one vote rule. This is not an issue for congressional apportionment, because the Enumeration Clause in section 2 of article I, and section 2 of the Fourteenth Amendment make total population the appropriate base in that context. But in noncongressional (e.g., state, county, and municipal) redistricting, the Court has not spoken unequivocally on the question whether to use total population or voting-eligible population as a base in crafting electoral districts. Thus, although the Court stated in *Reynolds v. Sims*, 377 U.S. 533, 567 (1964), that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies," it noted in a subsequent decision that *Reynolds* "carefully left open the question what population was being referred to," *Burns v. Richardson*, 384 U.S. 73, 91 (1966). Indeed, while the *Reynolds* Court stated that "[w]eighing the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable," *Reynolds*, 377 U.S. at 563, it also referred to the difficulty of apportioning electoral districts "so that

31. Court-ordered apportionment plans must meet more stringent standards of population equality than reapportionment plans enacted by the legislature. Connor v. Finch, 431 U.S. 407, 414 (1977); Chapman v. Meier, 420 U.S. 1, 26–27 (1975).

each [districting unit] has an identical number of *residents, or citizens, or voters*," *Id.* at 577 (emphasis added). The Court has further complicated the matter by using total population figures as a population base in some cases, *e.g.*, *Reynolds*, but using other bases, such as registered voters, *Burns*, 384 U.S. at 90–93, or eligible voters, *Preisler*, 394 U.S. at 534, in others.

As a result, the Court's decisions have been seen by some as indicating a preference for representational equality (apportionment by raw population) and by others as expressing a preference for electoral equality (apportionment by proportion of eligible voters). *See Garza v. County of Los Angeles*, 918 F.2d 763, 780–85 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). And in such diverse redistricting cases as *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (primarily a racial gerrymandering suit), *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) (a one person–one-vote suit), and *Garza*, 918 F.2d at 773–76 (primarily a vote dilution suit under the VRA), redistricting plans were attacked for violating the *Reynolds* one person–one vote principle because they were crafted to equalize total population in districts rather than citizen voting-age population.

In *Garza*, for example, the district court approved a redistricting plan creating five county voting districts with equal populations but resulting in two districts in which the number of voting-age citizens was markedly lower than the number of such citizens in the other three. Parties opposing the redistricting plan argued that while ordinarily, people ineligible to vote or to register can be assumed to be distributed rather evenly throughout an area to be districted and thus total population can be used as a surrogate for total potential voters, total population should not be used when large numbers of those ineligible to vote, such as minority groups containing large numbers of non-citizens, are disproportionately concentrated in certain areas. Doing this, they contended, would give more weight to the votes of citizens in heavily minority districts than to those of citizens in other districts, and thus would violate the Equal Protection Clause. *Garza*, 918 F.2d at 773. *See also Daly*, 93 F.3d at 1214. As the Fifth Circuit noted in *Chen*, 206 F.3d at 523, this argument is basically a one person–one vote claim focusing on the dilution of votes, on the theory that "it would be improper to allow the votes of two adult citizens to be weighed equally with the vote of a single adult citizen

merely because the latter happened to live in proximity to a noncitizen ineligible to vote."

Nevertheless, the *Daly*, *Garza*, and *Chen* courts each held, after extended discussion, that a one person–one vote analysis should be based on total population rather than on voting-age population. Using that criterion meant the difference in total population between the districts at issue in each case was less than 10%, and thus each court found that there was no equal protection violation.

II. Statistical Evidence of Racially Polarized Voting

As discussed in Chapter 1, to prove a voting-rights violation under section 2 of the Voting Rights Act, plaintiffs must prove two things. First, they must show that they are members of a minority group that could constitute a majority of a compact voting district. Census data are usually the basis for this showing.

Second, plaintiffs must show that they have been assigned to voting districts in which they are outvoted by majority white voters because of polarized voting patterns. The secret ballot prevents using actual votes cast to determine how each person voted. Parties thus seek to draw inferences from other evidence, particularly overall voting tallies analyzed in combination with census data.[32] The statistical process of drawing inferences about individuals from aggregate data is often known as *ecological inference*.

From census data it can be determined how many persons of voting age are members of each racial or ethnic group. From final vote tallies it can be determined how many persons voted for each candidate. The voting precinct usually is the smallest geographic region for which both types of data are available.

Ecological inference of one form or another is frequently presented to courts in voting-rights cases. The rest of this chapter describes various forms of ecological inference. Sections A and B describe homogeneous precinct analysis and ecological regression, which were developed prior to the 1990s and used in that decade's voting-rights cases. A method developed by Harvard Professor of Government Gary King, which is described in section C, incorporates the method of bounds and maximum likelihood estimation. King's method was published in 1997, after most of the voting-rights litigation in the 1990s. King's method probably will be offered in litigation this decade.[33]

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32. It may be possible to use the results of some of the now ubiquitous exit polls to reach conclusions about polarized voting, but the value of exit polls depends upon how closely voters' responses to pollsters match their actual votes. (A voter may or may not answer a poll the same way he or she voted.) *See* Shari Seidman Diamond, *Reference Guide on Survey Research, in* Reference Manual on Scientific Evidence 233–76 (Federal Judicial Center, 2d ed. 2001), for a discussion of the admissibility of survey research and factors in analyzing it.

33. Because it is new, King's method has not been considered in many reported

The ecological regression and King methods described below rely on sophisticated mathematical formulas. In the interests of brevity and simplicity, these formulas are not presented here. Also in the interests of simplicity, this chapter speaks in terms of "white" voters and "black" voters, rather than "majority" and "minority" groups. Of course, members of a minority group may constitute a majority in a given precinct or district, and racial groups other than whites and blacks may challenge voting districts under the VRA.

A. Homogeneous Precinct Analysis

One way to draw inferences about how whites and blacks vote is to look at *homogeneous* precincts, in which nearly all voters are white or nearly all voters are black. This method is called *homogeneous precinct analysis* or *extreme case analysis.* The usefulness of this method depends on how many precincts are homogeneous.

If every precinct is either almost all white or almost all black, it is possible to know how whites and blacks vote by looking at precinct voting data. If Candidate A received 70% of the vote in a 100% black precinct, we know that Candidate A received 70% of the black votes in that precinct. If Candidate B received 70% of the vote in a 98% white precinct, we know that Candidate B received very close to 70% (plus or minus about 2%) of the white votes in that precinct. If most of the precincts in a district are homogeneous, and if they reveal voting patterns as described here, there is a basis for assessing a claim of racially polarized voting. In contrast, the more racially mixed precincts there are, the less conclusive homogeneous precinct analysis can be.

B. Ecological Regression

Usually in voting-rights cases, most of the precincts are racially mixed. To assess racial and ethnic voting patterns, statisticians often examine the statistical association between the percentage of voters in a precinct who are members of a particular racial or ethnic group and the percentage of votes for a particular candidate. A common statistical technique for do-

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cases. Its inclusion here is intended only to make judges aware of it. As with all methods, admissibility and weight in any given case will depend on the qualifications and testimony of the proffered witnesses.

ing this is *ecological regression.* If, for example, the greater the percentage of voters who are black, the greater the percentage of votes there are for Candidate A, it may be reasonable to infer that black voters prefer Candidate A more often than white voters do. This is the logic of ecological regression.

Ecological regression uses the statistical technique of *linear regression* to estimate the proportion of voters of each ethnic group that prefers each choice in an election. For example, suppose there is a large political subdivision containing both white voters and black voters. Suppose the subdivision is divided into seventy-five precincts. For each precinct, census data reveal the proportion of the population that is black. Suppose there are only two choices—Candidate A and Candidate B—and final voting tallies reveal that all voters voted for one or the other. For each precinct, therefore, four numbers are known: the proportion of voters who are black and the proportion who are white, and the proportion of voters who preferred Candidate A and the proportion who preferred Candidate B. Figure 4 is a *scatterplot.* Each point represents one of the seventy-five precincts. The horizontal axis represents the proportion of voters who are black, and the vertical axis represents the proportion of voters who voted for Candidate A. Take, for example, the precinct represented by the point on the far left. In that precinct, 17% of the voters voted for Candidate A. The black population in that precinct is 2%.

If a *least squares regression line*[34] is drawn through these points, as in Figure 5, the proportion of blacks in the whole subdivision who preferred Candidate A can be estimated by identifying the point on the vertical axis that corresponds to the point on the regression line where the horizontal axis equals 100%. The regression line estimates from the data what proportion of voters in a theoretical all-black precinct would prefer Candidate A. The remaining proportion would prefer Candidate B.

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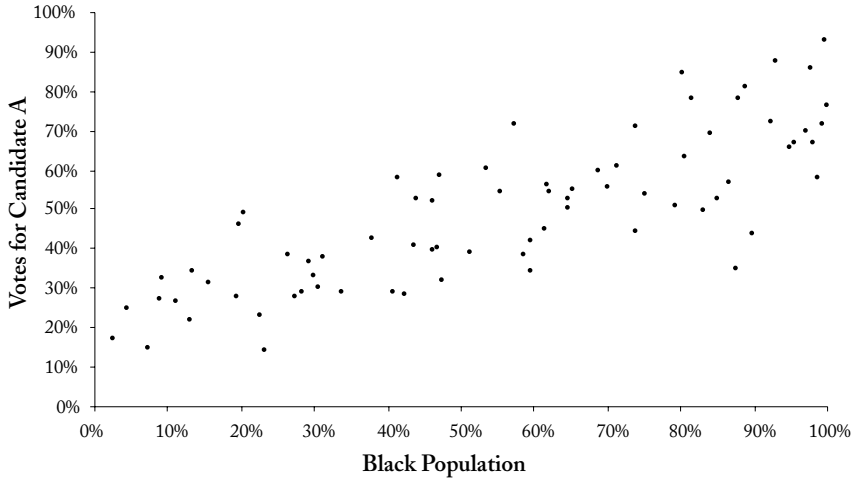
34. A least squares regression line (computed by a formula not shown here) is a straight line through the data that minimizes the points' distances from the line. The distances that are minimized are the sum of squared vertical distances from the data points to the line. The vertical distance is just the difference between the value on the vertical axis for the data point and the value on the vertical axis for the regression line at the same value on the horizontal axis as the data point's. If this difference for each data point is squared and all the squares are added up, the regression line is drawn so that this sum of squares is as small as possible.

Figure 4. How proportion of population that is black is related to proportion of voters who voted for Candidate A in seventy-five hypothetical precincts

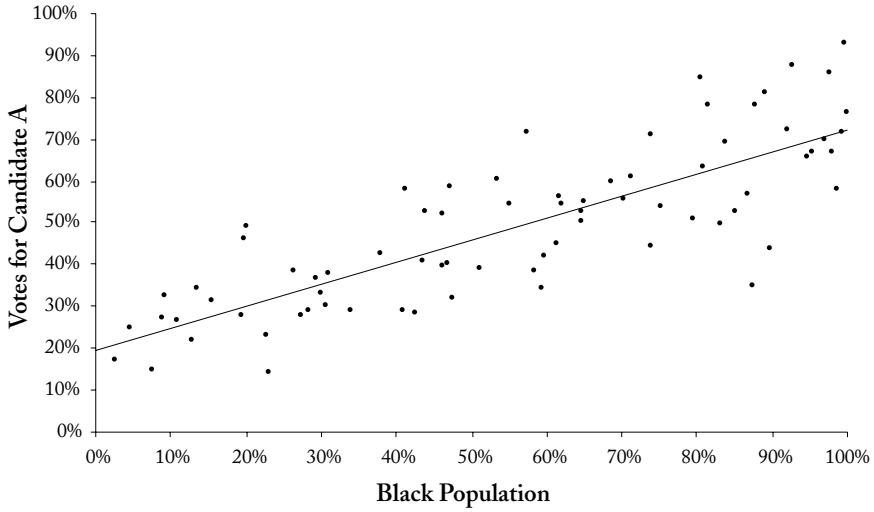


At the point on Figure 5's regression line where the horizontal axis equals 100%—corresponding to a theoretical precinct that is 100% black—the value on the vertical axis for the regression line is 72%. If a precinct were 100% black, then the regression analysis suggests that 72% of the voters would vote for Candidate A. This, in turn, suggests that approximately 72% of black voters throughout the subdivision voted for Candidate A.

Similarly, the point on the regression line where the horizontal axis (the proportion of blacks in the precinct) equals zero is an estimate of the proportion of voters in an all-white precinct who would prefer Candidate A. From the data in Figures 4 and 5, the estimate is 20%.[35]

35. Note that the discussions about all-white or all-black precincts in this and the preceding paragraph project a theoretical all-white or all-black precinct based on the regression line. There may not actually be an all-white or all-black precinct in the district being analyzed. If there are actual all-white or all-black precincts in the data set, then homogenous precinct analysis results may be compared with the endpoints of the regression line.

Figure 5. Least squares regression line showing statistical trend in how proportion of population that is black is related to proportion of voters who voted for Candidate A in seventy-five hypothetical precincts



If the estimates of blacks' preference for Candidate A and whites' preference for Candidate A are sufficiently different, especially if the estimated proportion of blacks who prefer Candidate A is quite large and the estimated proportion of whites who prefer Candidate A is quite small, then racially polarized voting can be inferred.

It may be invalid to assume that the same proportions of whites and blacks turn out to vote, regardless of whom they vote for. For this reason, a technique called *double regression* was developed. This technique estimates both the proportions of whites and blacks who vote at all and the proportions of white and black voters who vote for each candidate. Although double regression is just an extension of common regression techniques, assessing the accuracy of double regression estimates is quite complicated mathematically.

C. Gary King's Method

In 1997, Harvard Professor of Government Gary King published *A Solution to the Ecological Inference Problem: Reconstructing Individual Behavior from Aggregate Data*, which lays out a method that might improve analyses of racial polarization.[36] King's method is complicated and, as yet, not widely tested in litigation. Because it may be offered in some litigation, a very simplified description is provided here.

There are two steps to King's method: (1) using *the method of bounds* to constrain precinct-level inferences to possible values, and (2) based on these bounds, using *maximum likelihood* techniques other than regression to draw inferences about overall patterns from precinct-level data.

1. The method of bounds

Ecological regression estimates one precise value for something unknown. In the example above, it estimated that 72% of the black voters in the hypothetical subdivision voted for Candidate A. The method of bounds determines what various possible values an unknown quantity can have that would be consistent with other known information, rather than estimating one precise value for the unknown quantity. For a voting precinct, the unknown quantities are the percentage of white voters and the percentage of black voters who voted for Candidate A and the percentage of white voters and the percentage of black voters who voted for Candidate B. (Remember that all we *know* is the percentage of *all* voters who voted for Candidate A and for Candidate B, and the percentage of the voters who are white and the percentage who are black.)

The method of bounds determines possible values for the unknown percentages based on the known ones. For example, suppose there are 10,000 votes in a precinct. Suppose also that from census data it is known that 30% of the voters are white and 70% are black. And suppose that Candidate A received 6,000 votes in the precinct, which is 60% of the vote, and Candidate B received 4,000 votes, which is 40% of the vote. This information is summarized in Table 1.

36. *See also* Persily, *supra* note 11.

Table 1. Votes and racial composition of a hypothetical precinct

	White Voters	Black Voters	Total Voters
Candidate A	?	?	6,000
Candidate B	?	?	4,000
Total Votes	3,000	7,000	10,000

In this example, some of the 7,000 black voters must have voted for Candidate B, but the number who did could range from 1,000 to 4,000. Table 2 illustrates one extreme: Assume that all 6,000 votes for Candidate A were from black voters, and thus the other 1,000 black voters voted for Candidate B. In other words, in this hypothetical precinct, with total voting tallies for Candidates A and B as shown, the highest possible proportion of black votes for Candidate A must be 86% (6,000 divided by 7,000), and the lowest percentage of black voters voting for Candidate B must be 14% (1,000 divided by 7,000). (See Table 2.)

Table 2. All of Candidate A's votes were from blacks

	White	Black	Total Votes
Candidate A	0 (0%)	6,000 (86%)	6,000
Candidate B	3,000 (100%)	1,000 (14%)	4,000
Total	3,000 (100%)	7,000 (100%)	10,000

Table 3 shows the other extreme. It assumes that all of the votes for Candidate B were from black voters. This would mean that 57% of the black voters voted for Candidate B (4,000 divided by 7,000) and 43% of the black voters voted for Candidate A (see Table 3). So, the possible values of, or the bounds on, the percentage of black voters who voted for Candidate A are 43% to 86%, and the possible values of, or bounds on, the percentage of black voters who voted for Candidate B are 14% to 57%.

Table 3. All of Candidate B's votes were from blacks

	White	Black	Total Votes
Candidate A	3,000 (100%)	3,000 (43%)	6,000
Candidate B	0 (0%)	4,000 (57%)	4,000
Total	3,000 (100%)	7,000 (100%)	10,000

According to this analysis, it is possible that all of the 3,000 white voters in the hypothetical precinct voted for Candidate B and none voted for Candidate A (Table 2), or that all 3,000 voted for A and none voted for B (Table 3). The possible values of, or bounds on, the percentage of white voters who voted for Candidate A are 0% to 100%, and the possible values of, or bounds on, the percentage of white voters who voted for Candidate B are also 0% to 100%.

The heavy line in Figure 6 illustrates the bounds in this hypothetical precinct. In a precinct in which 30% of the voters are white and 60% of the voters voted for Candidate A, the proportion of white voters who voted for Candidate A could be anywhere from 0% to 100%, so the bounds line in Figure 6 extends from 0 to 1 on the vertical axis. If 30% of the voters are white, then 70% of the voters are black, and the proportion of black voters who voted for Candidate A must be in the range from 43% to 86%, so the bounds line in Figure 6 extends from 0.43 to 0.86 on the horizontal axis.

The bounds line, therefore, represents a range of values within which must lie the actual percentage of votes for a particular candidate by a racial group.

2. Maximum likelihood estimation

King describes how maximum likelihood techniques can be used to estimate from the bounds for each precinct how many white voters areawide voted for Candidates A and B and how many black voters areawide voted for Candidates A and B. Maximum likelihood techniques

determine for what value of an unknown quantity observed results would be most likely.[37]

Figure 6. Method of Bounds: Possible values for proportion of blacks who voted for Candidate A and proportion of whites who voted for Candidate A in a hypothetical precinct, if 60% of the voters voted for Candidate A and 30% of the voters are white

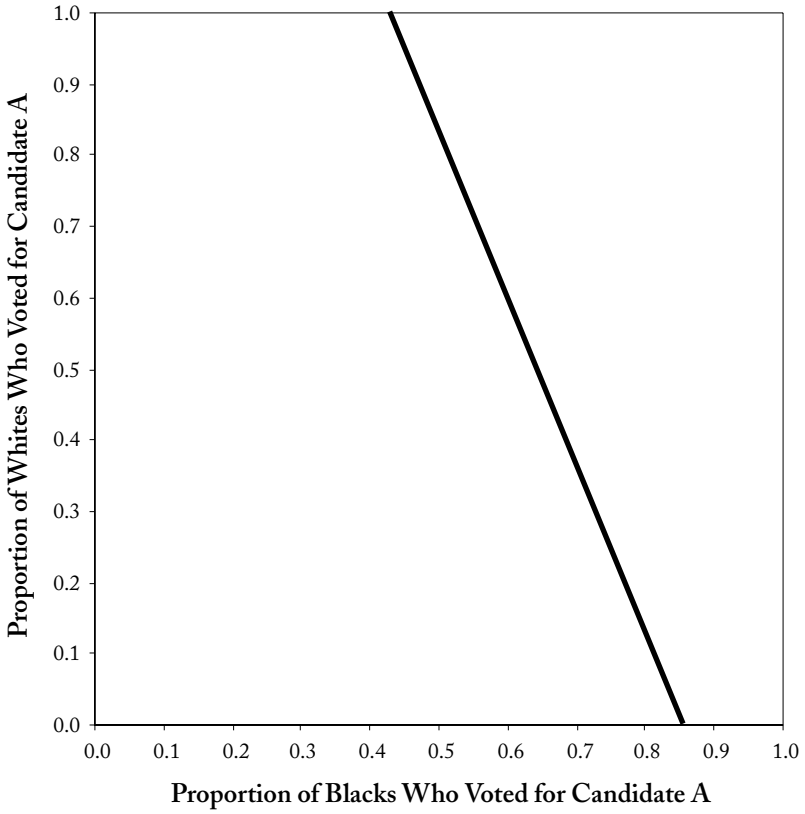
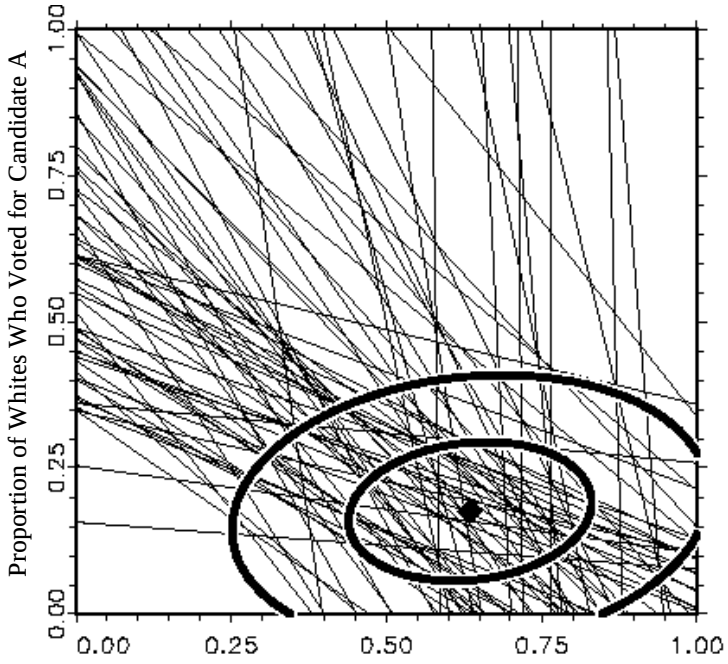


Figure 7, for example, shows the bounds lines for the hypothetical precincts depicted in Figures 4 and 5. The dots in Figures 4 and 5 are lines in Figure 7.

37. Linear regression is one such method, but there are others.

Figure 7. Maximum likelihood estimation of proportion of black voters who voted for Candidate A and proportion of white voters who voted for Candidate A, based on method of bounds for seventy-five hypothetical precincts (downloaded from Gary King's Web site, http://gking.harvard.edu, and reprinted with permission)



King's method places all the bounds lines from all the precincts in a district on a single graph.[38] Then, using mathematical formulas, it finds the smallest circle or ellipse that will intersect a high percentage of the line segments in the graph. Parts of the circle or ellipse that extend outside the graph are ignored, or truncated. Within this circle or ellipse are a series of concentric circles or ellipses, each slightly smaller than the one before it. The point at which the smallest circle or ellipse touches (that is, is tangent to) a bounds line gives a maximum likelihood estimate for that bounds line (that is, the estimate of the percentage of white voters and

38. This is called a "tomographic plot."

black voters for a candidate in that precinct). The means (averages) of the coordinates of all these points are the basis for the maximum likelihood estimate for the percentage of white voters and black voters for a candidate district-wide.[39]

The logic of the analysis is that there is a *modal*, or typical, proportion of black voters who voted for Candidate A and the data from each precinct reflect variation around that value. There also is a modal proportion of white voters who voted for Candidate A, and the data from each precinct also reflect variation around that value. The modal value for these two values is reflected by the heavy diamond in Figure 7. The diamond's position on the horizontal axis suggests that 63% is the estimated percentage of blacks who voted for Candidate A and 17% is the estimated percentage of whites who voted for Candidate A.

The ovals in Figure 7 are *confidence limits.* The smaller oval represents a 50% confidence limit. If statistical assumptions are correct, then 50% of the time the actual value of the quantity estimated will be within the 50% confidence region. The larger oval—portions of which extend outside the figure into values that are impossible, and, therefore, disregarded—represents a 95% confidence limit. If statistical assumptions are correct, then 95% of the time the actual value of the quantity estimated will be within the 95% confidence region.

D. The Statistical Goal in Summary

The statistical analyses described in this chapter inform the legal analysis of whether the boundaries of voting districts have been drawn in a way that improperly deprives minority voters of the opportunity to elect candidates of their choice.

The essential goal of the statistical analyses described here is to determine whether voters of different ethnic groups reliably prefer different candidates in elections. *Homogeneous precinct analysis* is useful for precincts in which all or almost all of the voters of a precinct are of the same ethnic group. If many precincts are ethnically mixed, then *ecological regression* is useful for determining whether the ethnic composition of a precinct is statistically associated with the voters' choices in elections. Professor Gary King's method, developed late in the last decade, has the

39. This description is based on the discussion in Bernard Grofman, *A Primer on Racial Bloc Voting Analysis, in* Persily, *supra* note 11, at 54.

same goal as ecological regression, but uses *maximum likelihood* techniques other than regression to accomplish that goal.

III. Case-Management Issues in Redistricting Litigation

This chapter focuses on case-management issues in redistricting cases, including cases in which 28 U.S.C. § 2284 (1994) requires a three-judge district court.

Redistricting litigation is complex and time-consuming, and thus many of the case-management techniques used by judges in handling complex civil cases are applicable in the redistricting context. *See Manual for Complex Litigation, Third* (Federal Judicial Center 1995). But redistricting cases also are characterized by unique features that require appropriate management responses. The suggestions presented in this chapter are based on Center staff's conversations with a sampling of district and appellate judges who have recent experience handling redistricting cases.

A. Managing Voting Rights Act and Equal Protection Clause Cases

1. Schedule the case with pending election dates in mind

In most cases plaintiffs will be asking the court to remedy an alleged violation before the next election in the challenged district. If the case is filed shortly before an election, plaintiffs may ask the court to enjoin the election until a new redistricting plan is developed. One of the first things the court must do upon receiving the case is find out when the next election will be held. It should then work back in time from that date, identifying earlier dates that establish deadlines for other significant aspects of the election process, such as the date by which candidates are required to file and the date when ballots must be ready. The court should then work back in time from the earliest relevant date in the election process to establish a final date by which the case must be resolved in order to permit the election to proceed. Although the election at issue may seem far away at the time the case is filed, the time frame for deciding the case may actually be much shorter, because there may be a need to develop and order implementation of a new districting plan months in advance of the election.

Given that election-related dates drive redistricting litigation, the court should meet with attorneys in the case early on, in order to become aware of all dates relevant to the pending election. It may also be helpful to meet with other stakeholders in the election process, such as election

officials and other representatives of the state, in order to obtain information about election dates and procedures.

2. Manage the case aggressively

Several judges expressed the opinion that redistricting cases need aggressive case management. One reason for this is that these cases are likely to involve multiple parties and many lawyers. Indeed, because it takes a good deal of resources to litigate a redistricting case, plaintiffs sometimes bring in large law firms on a pro bono basis to help them with the discovery and expert costs involved in the litigation. Moreover, the number of parties and lawyers may increase as the case proceeds. For example, a case that starts out as a vote dilution case may later become a racial gerrymandering case as well, increasing the number of parties to the point where ten or more attorneys may be present at routine status hearings.

Redistricting cases also generate a substantial amount of paperwork, including lengthy expert reports based on statistical evidence. Thus, the court should oversee the case carefully, making sure to meet with the parties regularly and review the case file frequently. As a practical, time-saving matter, the court should consider requiring executive summaries of all expert reports.

3. Consider using special masters or court-appointed experts

Some judges have used special masters or court-appointed experts under Federal Rule of Evidence 706 to assist them with particularly complex aspects of redistricting cases. In *Dillard v. City of Greensboro*, 956 F. Supp. 1576 (M.D. Ala. 1997), the court appointed a special master to draft a remedial redistricting plan and provided the special master "with explicit instructions on the legal standards and criteria to be used in drawing up a redistricting plan and directed the special master to adhere closely to those instructions." *Id.* at 1577.

Similarly, in *Anthony v. Michigan*, 35 F. Supp. 2d 989 (E.D. Mich. 1999), the court appointed a law professor pursuant to Federal Rule of Evidence 706 to serve as an independent expert and directed the professor to evaluate the statistical evidence on racial bloc voting proffered by the parties in the reports of their experts. The court's expert was directed to "express an opinion in the form of a written report as to whether there is a genuine issue as to any material fact with respect to plaintiffs' claim[ed section 2 violation.]" *Id.* at 1000.

4. Make detailed findings of fact and fully explain conclusions of law

Appellate courts have required detailed findings of fact in redistricting cases. As the Fifth Circuit stated with respect to vote dilution cases in *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989):

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions, we have strictly adhered to the rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning. Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts.

Id. at 1203 (quotation marks and quotation history omitted).

Thus, courts of appeals have remanded vote dilution cases when they were dismissed by the district court without written findings of fact or conclusions of law, *Westwego Citizens*, 872 F.2d at 1204, and when the district court failed to take note of substantial evidence contrary to the evidence supporting its conclusions, *Velasquez v. City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984). *See also Overton v. City of Austin*, 871 F.2d 529, 530–31 (5th Cir. 1989) (district court must perform a "searching and practical evaluation of past and present reality.")

B. Managing Three-Judge District Courts Convened Pursuant to 28 U.S.C. § 2284

Title 28, section 2284(a) of the United States Code requires that a three-judge district court be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" (1994).

1. Statutory requirements

The initial responsibilities of the district judge receiving a request for a three-judge court, as well as those of the chief judge of the circuit, are stated in 28 U.S.C. § 2284(b):

> In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composi-

tion . . . of the court shall be as follows:

> (1) Upon filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

As the statute makes clear, the district judge initially receiving the case should determine whether a three-judge court is required, and upon deciding that one is required, must "immediately" notify the chief judge of the circuit. This can be done by personal notice and by forwarding a copy of the complaint to the chief judge. Given that three-judge court cases are relatively rare, and that one of the purposes of the legislation creating such courts was to expedite important litigation, *see Swift v. Wickham*, 382 U.S. 111, 119–20 (1965) (direct review by the Supreme Court accelerates final determination on the merits), procedures should be in place to flag these cases in the district court clerk's office so that they are not given routine treatment.

2. Compose the three-judge court with the partisan nature of redistricting cases in mind

The statute assigns the chief judge of the circuit the duty of selecting the circuit judge and the third judge who will sit on the panel in a redistricting case, but does not place any restrictions on the chief judge's discretion in this regard. That discretion may be exercised with a view toward limiting the forum shopping that often occurs in redistricting cases. The parties are often political partisans, representatives of political parties or candidates for office, and their efforts to gain what they perceive as an advantage in the litigation may result in multiple filings on the federal level in addition to competing state court filings. Thus, for example, if Party A files a case in a given district on the assumption that there is a strong chance of obtaining a judge who is considered to be sympathetic to the Republican Party, Party B may well file a case in a district in which there is deemed to be a strong chance of obtaining a judge considered to be sympathetic to the Democratic Party. Rules designating the district that receives the first filing as the forum may solve the forum-

shopping problem, but if they do not, the chief circuit judge can also resolve it in the way he or she composes the three-judge court. For example, forum-shopping incentives may be reduced if the chief judge in the above example assigns the same two judges to both panels.

In composing three-judge panels, chief judges also have opportunities to insulate assigned judges from the politics of the state in which they are sitting. Thus, a district judge assigned to the case need not be from the same district as the judge who initially received it, and a circuit judge assigned to the case need not be from the same state as the district court in which the case was originally filed.

3. Schedule the case with the requirements of parallel state court proceedings in mind

Title 28, section 2284(a) of the United States Code requires the convening of a three-judge court when "the constitutionality of the apportionment of congressional districts or the apportionment of any statewide body" is challenged. Thus, a request for a three-judge district court often occurs when there is litigation in the state court on the same subject. In addition, the state legislature may be involved in the process of the redistricting plan at issue. Three-judge district courts should therefore manage their cases with federalism and comity concerns in mind.

In scheduling the case, for example, three-judge courts should be mindful of the teaching of *Growe v. Emison,* 507 U.S. 25, 32–34 (1993), that when parallel redistricting litigation is under way in both state and federal courts, the federal court must defer to the timely efforts of the state, including its courts, to redraw legislative districts. In *Growe,* the three-judge district court stayed all proceedings in a parallel Minnesota state court proceeding shortly before the state court issued its own redistricting plan. *Id.* at 30. The district court later issued an order adopting its own legislative and congressional districting plans and permanently enjoining interference with implementation of those plans. *Id.* at 31. Its justification for doing so was that, in its view, the state court's modification of the state legislature's plan failed to cure an alleged violation of the VRA. *Id.* On appeal, the Supreme Court held that the district court had erred in not deferring to the state court proceedings. *Id.* at 32. Citing *Scott v. Germano,* 381 U.S. 407 (1965), the Supreme Court reiterated that "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that

highly political task itself." *Growe*, 507 U.S. at 33. The *Growe* Court noted that the principles expressed in *Germano* derive from a recognition that the Constitution gives the states primary responsibility for apportionment of their federal congressional and state legislative districts. "[T]he doctrine of *Germano* prefers *both* state branches [legislative and judicial] to federal courts as agents of apportionment." *Growe*, 507 U.S. at 34.

In *Germano*, the Supreme Court had remanded the case with directions that the district court enter an order fixing a reasonable time within which the appropriate agencies of the state, including its highest court, might validly accomplish the redistricting and still leave ample time to permit the redistricting plan to be used in the next election. 381 U.S. at 409. The *Growe* Court quoted these directions with approval, 507 U.S. at 35, and thus the implications for scheduling three-judge court cases are clear.

When there is parallel state litigation, at the first pretrial conference, the district court should arrive at a date by which the matter must be resolved in the state in order to allow for potential litigation in federal court if the state does not successfully resolve the matter. The court should, without dismissing the case, defer to the state during this period of time. Since the possibility remains that the state will not be able to resolve the matter, scheduling should also allow time for the three-judge court to recommence active consideration of the case and resolve any federal questions, and permit state officials to implement the federal court decision and begin the election process in a timely fashion. The notion is to find and set workable final dates for conclusion of state activity in the case and ultimate resolution of the case in federal court if need be. This should be done early in the case, in order to avoid having to postpone the election. The court might also consider requiring the parties to file a copy of every pleading filed in state court during the period in which it is deferring to state court proceedings, so that it remains aware of developments in the case.

4. Decide which judge will take the lead in managing the case

Once the three judges are selected, they—not the chief circuit judge—should decide who will take the lead in managing the case. One judge experienced in these matters suggests that the district judge initially assigned the case should take the lead. The judge who takes the lead should handle routine pretrial matters; the three judges should con-

vene only for such matters as dispositive motions and the final pretrial conference. Nevertheless, coordination among the three judges on the panel will be important, and thus the lead judge should require the parties to file their pleadings with all judges on the court. Work schedules of circuit and district court judges are different, and coordination will require ongoing communication between members of the court.

5. Require judges and parties to use the same computer program

The parties in redistricting cases ordinarily make use of computer programs in drawing district lines and gathering demographic data, and those programs and data are likely to be admitted as evidence and reviewed by the court. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 961–62 (1996) (discussing REDAPPL software). It is therefore important to agree on a common computer program early in the case—perhaps at the first pretrial conference. Of course, if questions about the reliability and admissibility of competing computer programs are involved in the litigation, this may not be possible.

It also is important to ensure that the court has access to the computer program when it needs it. Access to the program must be secure, so that the data are confidential and so that the parties or other interested persons cannot alter the data. To avoid the appearance of impropriety, the program used by the court and the parties should, if at all possible, not be the same as that used by any state politicians likely to be affected by the outcome of the case.

6. Decide which judge will preside at trial

Members of the three-judge court should also decide early on who will preside at trial in the case. If the judge initially assigned to the case takes the lead in managing it, it may make sense for that judge to handle the trial as well. Redistricting cases are bench trials replete with data and expert witnesses. One appellate judge observed that although such cases are somewhat more informal than jury trials, they are best handled by an experienced trial judge.

There is no statutory presumption that a circuit judge will preside at trial in a three-judge redistricting case. Although there is nothing wrong with having a circuit judge preside over the trial, is it not uncommon for a circuit judge to defer to an experienced trial judge on the panel.

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