Redistricting in the 2000s

A Review of Recent Court Decisions

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I. Introduction

Redistricting has always been a political game, played at the highest levels by state legislatures and redistricting commissions. The rules of the game have been laid down by the United States Supreme Court.

A. Population Equality

In the 1960s, the Court said that states must redraw their legislative and congressional districts every ten years to take account of changes in the population recorded by the federal census. *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964). As Justice Douglas declared: "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." *Gray v. Sanders*, 372 U.S. 368, 381 (1964).

In the 1970s, the Court developed a standard of population equality that required legislative districts to differ by no more than ten percent from the smallest to the largest, unless justified by some "rational state policy." *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973).

In the 1980s, the Court developed a standard of equality for congressional districts that required them to be mathematically equal, unless justified by some "legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725 (1983).

B. Voting Rights Act of 1965

While that pretty well completed the Court's work on rules for population equality, its rules for treatment of racial and ethnic minorities were far from settled. The Voting Rights Act of 1965 had been enacted to provide equality of opportunity for racial minorities to vote.

1. § 2 - Not Deny or Abridge Right to Vote on Account of Race

Section 2 of the Act prohibited any state or political subdivision from imposing a "voting qualification or prerequisite to voting, or standard, practice or procedure to deny or abridge the right to vote on account of race or color."

2. § 5 - Preclearance and Retrogression

Section 5 required certain "covered" jurisdictions to preclear any change in their electoral laws, practices, or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia before it could take effect. In the 1970s, the Court had said that a redistricting plan need not be precleared by the Justice Department if it would be likely to cause fewer minority representatives to be elected than before, that is, it would cause a retrogression in the representation of minorities. *Beer v. United States*, 425 U.S. 130 (1976).

3. Discriminatory Results

The U.S. Supreme Court began the 1980s with a decision that said that a plan would not be found to discriminate against a racial minority unless the plaintiffs could prove that its drafters *intended* to discriminate against them. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Congress was swift to react to this new limitation on how to prove racial discrimination. In 1982, after most of the plans based on the 1980 census had already been enacted, Congress amended § 2 of the Voting Rights Act, codified as amended at 42 U.S.C. § 1973, to make clear that it applied to any plan that *results* in discrimination against a member of a racial or ethnic minority group. Pub. L. No. 97-205, § 3, June 29, 1982, 96 Stat. 134.

4. *Thornburg v. Gingles*

How were the courts to determine whether a redistricting plan would have discriminatory results? In the 1986 case of *Thornburg v. Gingles*, 478 U.S. 30, the Court set forth three preconditions a minority group must prove in order to establish a violation of § 2 of the Voting Rights Act:

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

478 U.S. at 50-51.

If the minority group could establish those three preconditions, it would be entitled to proceed to the next step: proving a § 2 violation by "the totality of the circumstances." Those circumstances would have to show that the members of the minority group had "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice." 42 U.S.C.A. § 1973 (b).

5. Majority-Minority Districts

What does that mean, "less opportunity?" In North Carolina, where *Gingles* arose, it meant replacing multimember districts where blacks were in the minority with single-member districts where blacks were in the majority. To the rest of the country it meant that, wherever there was a racial or ethnic minority that was "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50-51, the State would have to draw a district for them or risk having its plan thrown out, even if the State acted without any intent to discriminate.

Being forewarned of the effects of § 2, drafters of redistricting plans after the 1990 census went to great lengths to draw majority-minority districts wherever the minority population counts seemed to justify it. In states where redistricting plans could not take effect until they had been precleared by the Justice Department, the Justice Department encouraged the State to draw redistricting plans that created new districts where members of a racial or language minority group (primarily African Americans or Hispanics) were a majority of the population. These new "majority-minority" districts were intended to protect the states from liability under § 2 for failing to draw districts that the minority group had a fair chance to win.

6. Racial Gerrymanders

As states drew the plans, they discovered that the Justice Department had little concern that majority-minority districts be compact. In some cases, the department refused to preclear a plan unless the State "maximized" the number of majority-minority districts by drawing them wherever pockets of minority population could be strung together. As the plans were redrawn to obtain preclearance, some of the districts took on bizarre shapes that caused them to be labeled "racial gerrymanders." *Shaw v. Reno* (*Shaw I*), 509 U.S. 630 (1993).

C. Equal Protection Clause

The racial gerrymanders were attacked in federal court for denying white voters their right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution. *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II*), 517 U.S. 899 (1996); and *Lawyer v. Dept. of Justice*, 521 U.S. 567 (1997). The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy, *Miller v. Johnson*, 515 U.S. 900, 924-25, 115 S. Ct. 2475, 2492-93, slip op. at 22 (1995).

1. Strict Scrutiny

The Court held that a racial gerrymander must be subjected to "strict scrutiny" to determine whether it was "narrowly tailored" to achieve a "compelling state interest" in complying with § 2. *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993).

2. Traditional Districting Principles

Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed "traditional districting principles," *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v.*

Hunt (Shaw II), 517 U.S. 899 (1996), such as keeping districts compact, not dividing political subdivisions, and preserving communities of interest.

North Carolina, which was at the center of the political and legal storm over racial gerrymanders, was still in court defending the districts it drew based on the 1990 census after the results of the 2000 census had been released. *See Hunt v. Cromartie*, 532 U.S. 234 (Apr. 18, 2001) No. 99-1864, and *Smallwood v. Cromartie*, No. 99-1865.

For districts based on the 2000 census, just exactly what states would have to do to avoid discriminating against racial and ethnic minorities was still unclear.

II. Counting the Population

Every decade, there are lawsuits over how the census should be conducted.

A. Census Not An Invasion of Privacy

As the Census Bureau was asking citizens to answer the 2000 census, certain groups charged that the census itself, particularly the long form, was an invasion of privacy. Presidential candidate George W. Bush, when asked about his attitude toward the long form, answered that he was not sure that he would answer all the questions, if he got one. Fortunately for the Census Bureau, a federal district court in Mr. Bush's home state found that Census 2000 did not invade individual privacy in violation of the constitution. *Morales v. Daley*, 116 F. Supp.2d 801 (S.D. Tex. 2000).

B. Counting the Population Overseas

When the apportionment of congressional seats among the 50 states was announced at the end of 2000, the State of Utah sued the Secretary of Commerce, home of the Census Bureau, alleging that the Bureau had erred in failing to count Mormon missionaries among U.S. residents overseas, thus causing Utah to lose one congressional seat to North Carolina. A three-judge federal panel dismissed the complaint. *Utah v. Evans*, 143 F. Supp.2d 1290 (D. Utah Apr. 17, 2001), *aff'd* ___ U.S. ____ (Nov. 26, 2001) (No. 01-283) (mem.)

C. Sampling

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

Congress attempted to stop the use of sampling by enacting Pub. L. No. 105-119, § 209 (j), 111 Stat. 2480 (1997), which required that all data releases for the 2000 census show "the number of persons enumerated without using statistical methods." It also authorized lawsuits to determine whether the Bureau's plan to use sampling for apportioning seats in Congress was constitutional.

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

D. Imputation

The State of Utah, in addition to challenging the failure to count Mormon missionaries, challenged the use by the Census Bureau of the statistical technique known as "imputation," whereby the Bureau added missing individuals and data about them to the official census counts based on information attributed to them based on the known characteristics of others in similar housing units in the same neighborhood. The district court held for the Census Bureau. The U.S. Supreme Court affirmed, holding that the "imputation" used by the Census Bureau was different from the "sampling" prohibited by the Court in 1999, since it was attempting to determine the characteristics of missing individual data rather than extrapolating data from a sample to the whole population. *Utah v. Evans*, 143 F. Supp.2d 1290 (D. Utah Apr. 17, 2001), *aff'd* 536 U.S. ____, 122 S.Ct. 2191 (June 20, 2002) (No. 01-714).

E. Release of Adjusted Census Data

Having used statistical techniques to adjust the population counts for undercounts and overcounts, the Census Bureau, shortly before the release of the official census counts in 2001, decided not to release the adjusted counts, saying it was not confident they were correct. Plaintiff Oregon state legislators sought release of the adjusted counts under the Freedom of Information Act. The Census Bureau resisted, citing the "deliberative process" privilege. The district court found that the deliberative process privilege did not permit nondisclosure of the adjusted numbers because they were neither predecisional nor deliberative and ordered the Department of Commerce to release the adjusted data. The court of appeals affirmed. *Carter v. U.S. Department of Commerce*, No. 02-35161 (9th Cir. Oct. 8, 2002).

III. Equal Population

Although the rules for population equality had been settled for decades, a few lower courts in the 2000s still had to handle challenges to plans based on equal population.

A. Congressional Plans - A Legitimate State Objective

Congressional districts must differ in population by no more than one person, unless justified by some "legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725 (1983). In Kansas, a three-judge federal panel upheld the congressional plan against a charge that its overall range of 33 persons was too large. The court found the plan could have had an overall range that was smaller, but that the Legislature's judgments regarding communities of interest and other redistricting concerns were sufficient to justify the overall range of 33 persons (0.0049%). *Graham v. Thornburgh*, No. 02-4087-JAR (D. Kan. July 3, 2002).

B. Legislative Plans

Legislative districts must differ by no more than ten percent from the smallest to the largest, unless justified by some "rational state policy." *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973).

1. Not Following a Rational State Policy

The Idaho Supreme Court twice rejected legislative plans drawn by the Idaho Commission on Redistricting because they had overall ranges of 10.69 and 11.79 percent, first because the Commission had offered no evidence that the population disparity had resulted from the advancement of a rational state policy and then because the rational state policies used by the Commission—preserving whole counties and preserving traditional neighborhoods and communities of interest—were not applied consistently statewide. *Smith v. Idaho Commission on Redistricting*, 2001 Op. No. 95, 38 P.3d 121 (Idaho Nov. 29, 2001); *In the Matter of the Petition Challenging Legislative Redistricting, Application for Injunctive Relief and Application for Writ of Prohibition*, 2002 Opinion No. 30 (Idaho Mar. 1, 2002).

2. State Law More Strict than U.S. Constitution

The Alaska Supreme Court found that 16 house districts in Anchorage violated the equal-population requirements of the Alaska Constitution, even though their overall range was 9.5 percent, because the constitution had been amended in 1998 to make the state standard "as near as practicable" and thus more exacting than the federal standard. It found that a deviation of 6.9 percent in one house district, which resulted in an overall range of 12 percent in the house districts statewide, could not be justified as necessary to avoid retrogression under § 5 of the Voting Rights Act. *In re 2001 Redistricting Cases*, No. S-10504 (Alaska Mar. 21, 2002).

IV. Traditional Districting Principles

The U.S. Supreme Court in *Shaw v. Reno* had said that one way a State could defeat a claim that it had created a racial gerrymander would be to follow "traditional districting principles," such as "compactness, contiguity, and respect for political subdivisions." *Shaw v. Reno*, 509 U.S. 630 at 647 (slip op. at 15). Later, in a 1995 Georgia case, it added "respect for . . . communities defined by actual shared interests." *Miller v. Johnson*, 515 U.S. 900, 919-20 (1995), slip op. at 14. In a 1996 Texas case, it added "maintaining . . . traditional boundaries." *Bush v. Vera*, 517 U.S. 952, 977 (1996). And in a 1997 Georgia case, it added "maintaining . . . district cores" and "[p]rotecting incumbents from contests with each other." *Abrams v. Johnson*, 521 U.S. 74, 84 (slip op. at 8-9) (1997).

These "traditional districting principles" are not found in the U.S. Constitution, but rather in the constitutions, laws, and resolutions of the several states. *See* Appendix G, "State Districting Principles" *Redistricting Law 2000*, Denver, Colo.: National Conference of State Legislatures, 1999. A few of the lower courts in the 2000s had occasion to address what these "traditional districting principles" really mean.

A. Contiguity

1. Contiguity by Water

Most state constitutions require that districts be composed of contiguous territory, that is, territory that "touches," rather than separate pieces some distance away from each other. *See* Table 5, "1990s Districting Principles Used by Each State," *Redistricting Law 2000*, Denver, Colo.: National Conference of State Legislatures, 1999. One question that frequently arises concerning contiguity is whether contiguity by water is sufficient.

The Virginia Constitution, art. II, § 6, requires that districts be "composed of contiguous and compact territory." In a challenge to the General Assembly's 2001 legislative plan, the Virginia Supreme Court held that, where parts of a district are separated by water, "physical access is not necessary for exercising the right to vote, does not impact otherwise intact communities of interest, and, in today's world of mass media and technology, is not necessary for communication among the residents of the district or between such residents and their elected representative." Therefore, contiguity by water was sufficient. *Wilkins v. West*, No. 021003, slip op. at 17, 264 Va. 447, 463, 571 S.E.2d 100, 109 (Nov. 1, 2002).

2. Point Contiguity

A second question concerning contiguity has been whether two pieces of territory that touch only at a point are contiguous for purposes of creating legislative or congressional districts.

a. Minnesota

A five-judge special redistricting panel appointed by the Minnesota Supreme Court to draw legislative and congressional plans in the event of a partisan impasse in the Legislature adopted redistricting principles that prohibited the use of point contiguity, saying, "Districts with areas that connect at only a single point will be considered noncontiguous." *Zachman v. Kiffmeyer*, No. C0-01-160, Order at 2, ¶ 4 (Minn. Spec. Redis. Panel Dec. 11, 2001).

b. North Carolina

The North Carolina Supreme Court affirmed on appeal the decision of the trial court that both Senate and House plans enacted by the General Assembly violated the requirement of the state constitution that "[e]ach . . . district shall at all times consist of contiguous territory." N.C. Const., art. II, §§ 3(2), 5(2). *Stephenson v. Bartlett*, No. 94PA02-2, slip op. at 10 (N.C. July 16, 2003). The trial court, having received guidance from the state supreme court earlier in the proceedings on the same case, had opined that "the mathematical concept of 'point contiguity' does not meet the *Stephenson* criteria for contiguity . . . ." and held that "the term 'contiguity,' as used in *Stephenson*, means that two districts must share a common boundary that touches for a non-trivial distance . . . ." No. 94PA02-2, slip op. at 15.

B. Compactness

The constitutions of most states require that legislative districts be compact. *See* Table 5, "1990s Districting Principles Used by Each State," *Redistricting Law 2000*, Denver, Colo.: National Conference of State Legislatures, 1999. Compactness is difficult to measure by any objective standard, but there have been a few cases over the years where one or more districts have been rejected by the courts because they were not compact.

In 2002, the Alaska Supreme Court found that two house districts drawn by the Alaska Redistricting Board violated the compactness requirement of the Alaska Constitution. *In re 2001 Redistricting Cases*, No. S-10504 (Alaska Mar. 21, 2002).

C. Preservation of Political Subdivisions

Besides equal population, contiguity, and compactness, the most common of the traditional districting principles is that districts not divide political subdivisions; that, where possible, they be composed of whole counties, cities, or towns. *See* Table 5, "1990s Districting Principles Used by Each State," *Redistricting Law 2000*, Denver, Colo.: National Conference of State Legislatures, 1999. Before the "one person, one vote" cases of the 1960s, preserving whole counties was often deemed more important than equalizing district populations. Over the next 40 years, equal population requirements eroded the force of "whole county" and "whole city" requirements. During the 2000s, however, preserving the boundaries of political subdivisions has made a modest comeback.

1. Counties

a. Attentive to County Boundaries

In Colorado, the Reapportionment Commission adopted a legislative plan and submitted it to the Colorado Supreme Court for review, as mandated by the Constitution. The Supreme Court rejected the plan because it was not "sufficiently attentive to county boundaries" and was not accompanied by "an adequate factual showing that less drastic alternatives could not have satisfied the equal population requirement of the Colorado Constitution." The Court remanded the plan to the commission to be redrawn. *In re Reapportionment of the Colorado General Assembly*, No. 01SA386 (Colo. Jan. 28, 2002).

b. Whole-County Provision

The North Carolina Supreme Court affirmed on appeal the decision of a trial court that both the Senate and House plans enacted by the General Assembly violated the provision of the state constitution that no county be divided in the formation of a senate or representative district (the "whole-county provision," or WCP), N.C Const., art. II, §§ 3(3), 5(3). *Stephenson v. Bartlett*, No. 94PA02-2 (N.C. July 16, 2003). The court had earlier recognized that both the equal-population requirement of the state constitution and the requirements of the Voting Rights Act would cause some counties to be divided. *Stephenson v. Bartlett*, No. 94PA02, 355 N.C. 354, 562 S.E.2d 377 (Apr. 30, 2002), *stay denied* 535 U.S. 1301 (May 17, 2002) (Rehnquist, C.J., in chambers). But the state supreme court had directed the trial court and the General Assembly to first create majority-minority districts that met the requirements of the Voting Rights Act while meeting equal population requirements and then create non-VRA districts that kept as many counties as possible whole. Because plaintiffs' plan showed that it was possible to keep more counties whole than had the General Assembly, without violating federal law, the state supreme court held that the trial court was justified in throwing out the General Assembly's plans and drawing plans of its own. No. 94PA02-2, slip op. at 9.

c. Due Regard to Political Subdivisions

In Maryland, the Court of Appeals found that the State's legislative plan, by drawing district boundaries based on the rational goals of avoiding the loss of experienced legislators and reducing incumbent contests, violated the state constitutional requirement that it be drawn giving due regard to natural boundaries and the boundaries of political subdivisions. The court's plan reduced the number of districts that crossed county or city boundaries, while keeping the overall range of population deviations below ten percent. *In the Matter of Legislative Redistricting of the State*, Misc. Nos. 19, 20, 22, 23, 24, 25, 26, 27, 28.29, 30, 31, 32, 33, 34, September Term 2001 (Md. Aug. 26, 2002).

2. Cities

Preservation of city boundaries has traditionally not been accorded the same weight as preservation of county boundaries. In the 2000s, preservation of city boundaries still had to yield to the requirements of the Voting Rights Act, even when keeping them whole did not violate equal population requirements.

a. Vote Dilution Under § 2

The New Jersey Supreme Court resolved the conflict between the state constitution and the Voting Rights Act in a way different from North Carolina. The New Jersey Constitution, article IV, § 2, requires that neither counties nor municipalities be divided in the formation of a legislative district, unless necessary to form districts composed of contiguous, compact territory and with equal populations. The New Jersey Apportionment Commission had divided only two of 566 municipalities, Newark and Jersey City, in forming its legislative plan. The New Jersey Supreme Court upheld the plan against the challenge that it could have divided each city into two districts, rather than three. The court observed that the two cities had each been divided into three districts ever since the constitutional requirement had been adopted nearly 40 years before, and that to pack all Newark and Jersey City residents into two districts each would result in vote dilution in violation of § 2 of the Voting Rights Act. *McNeil v. Legislative Apportionment Commission*, No. A-73, September Term 2002, (N.J. July 31, 2003).

b. Majority-Minority Districts Under § 2

In Massachusetts, plaintiffs challenged the 2001 plan for the House of Representatives because it divided the City of Cambridge into six representative districts when it could have been divided into fewer districts and still met constitutional requirements. The Supreme Judicial Court rejected the challenge. It said the Legislature need not adopt the best plan. Rather, the Legislature must make a reasonable attempt to conform to, and must not violate, the criteria laid out by federal and state law. Dividing the city into more than the minimum number of districts was justified as an attempt to preserve an effective majority-minority district and avoid a challenge to the plan under § 2 of the Voting Rights Act. *Mayor of Cambridge v. Secretary of the Commonwealth*, No. SJC-08716, 436 Mass. 476, 765 N.E.2d 749 (Apr. 8, 2002).

Another group of plaintiffs challenged the 2001 plan for the Massachusetts House of Representatives because it divided the Town of Chelmsford into four representative districts when it could have been divided into fewer districts and still met constitutional requirements. They proposed a plan that divided the town into only two districts, but with slightly larger population deviations than the enacted plan. The Supreme Judicial Court rejected the challenge. It said "the Legislature reasonably could have concluded that it was preferable to seek a closer approximation of population equality in the districts in the Chelmsford area . . . at the expense of dividing the town among four districts." *McClure v. Secretary of the Commonwealth*, No. SJC-

08715, 436 Mass. 614, 766 N.E.2d 847 (Apr. 29, 2002), *cert. denied sub nom. McClure v. Galvin*, No. 02-532 (U.S. Nov. 18, 2002) .

D. Preservation of Communities of Interest

Many state constitutions require that legislative or congressional plans preserve communities of interest, defined in a variety of ways. *See* Table 5, "1990s Districting Principles Used by Each State," *Redistricting Law 2000*, Denver, Colo.: National Conference of State Legislatures, 1999. The definitions of these communities of interest are even more subjective than definitions of compactness. Failure to preserve communities of interest has seldom been a reason given by a court for rejecting a district drawn by state politicians. This decade, Alaska was an exception.

The Alaska Supreme Court threw out two house districts drawn by the Redistricting Board because they violated the requirement of article 6, § 6, of the Alaska Constitution that districts be "a relatively integrated socio-economic area." *In re 2001 Redistricting Cases*, No. S-10504 (Alaska Mar. 21, 2002).

V. Racial and Ethnic Discrimination

The dominant legal issue for redistricting based on the 1990 census had been the conflict between the demands of §2 of the Voting Rights Act, which seemed to say that plan drafters had to draw a majority-minority district wherever a racial or ethnic minority population was sufficiently large and geographically compact to permit it, and the demands of the Equal Protection Clause of the Fourteenth Amendment, which required that consideration of race in a redistricting plan be subordinated to traditional districting principles. States drew majority-minority districts that in some cases were branded racial gerrymanders, thrown out, and drawn again, but the end result was a significant increase in the number of districts represented by African Americans and Hispanics. What would happen when population shifts, which often involved a loss of population in center-city majority-minority districts and a gain of population in white suburban districts, required these majority-minority districts to be redrawn? State legislatures, and the courts, had to take another look at what was required to avoid discriminating against racial and ethnic minorities.

A. Voting Rights Act § 5

Section 5 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973c, requires that certain "covered" jurisdictions, primarily southern states and scattered other counties, *see* Table 6, "Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended," *Redistricting Law 2000*, Denver, Colo.: National Conference of State Legislatures, 1999, "preclear" any change in their election laws, either with the U.S. Department of Justice or with the U.S. District Court for the District of Columbia. A redistricting plan need not be precleared if it is likely to cause fewer minority representatives to be elected than before, that is, if it will cause a “retrogression” in the representation of minorities. *Beer v. United States*, 425 U.S. 130 (1976).

The State of Georgia sought preclearance of its legislative and congressional plans by bringing a declaratory judgment action in district court for the District of Columbia. The court granted preclearance of the congressional plan and the plan for the state House of Representatives, but denied preclearance of the Senate plan. *Georgia v. Ashcroft*, No. 01-2111, 195 F. Supp.2d 25 (D. D.C. Apr. 5, 2002), *aff'd sub nom. King v. Georgia*, Nos. 02-125, 02-425, 02-776 (U.S. Jan. 13, 2003) (mem.) (denying motion to intervene), *rev'd* No. 02-182 (U.S. June 26, 2003) (denial of preclearance of Senate plan).

Georgia enacted a revised Senate plan, Act No. 444, on April 11, 2002, and presented it to the court for preclearance, which was granted. *Georgia v. Ashcroft*, 204 F. Supp.2d 4 (D. D.C. June 3, 2002) *aff'd sub nom. King v. Georgia*, Nos. 02-125, 02-425, 02-776 (U.S. Jan. 13, 2003) (mem.) (denying motion to intervene).

Although it had enacted a revised Senate plan, Georgia continued to appeal the district court's denial of preclearance of its first plan. In June 2003, the U.S. Supreme Court vacated the judgment and remanded the case to the district court for further proceedings consistent with the opinion expressed by Justice O'Connor, on behalf of herself and Justices Rehnquist, Scalia, Kennedy, and Thomas. *Georgia v. Ashcroft*, No. 02-182, ___ U.S. ____, 123 S.Ct. 2498 (U.S. June 26, 2003).

1. Statewide Impact

Justice O'Connor said the district court had erred in focusing too narrowly on a decline in black voting-age population in three districts. Rather, the district court should have evaluated the statewide plan as a whole. It should have looked at the increases in black voting-age population in other districts and tried to determine whether the increases were sufficient to offset the declines.

2. Coalition Districts and Influence Districts

Further, the district court should have looked beyond the plan's effect on the ability of minority voters to elect a candidate of their choice and evaluated its effect on their ability to participate in the political process, such as by forming coalitions with other groups to elect a candidate or by having sufficient voting strength to influence the election of a candidate.

3. Safe Districts or Competitive Districts

The State had a legitimate choice to make in deciding whether it was better to adopt a plan with a certain number of “safe” majority-minority districts or a plan with fewer safe districts but more where the minority had an opportunity to elect a representative of their choice.

4. Impact on Incumbents

The district court also should have considered the impact of the new plan on the incumbents elected from the benchmark majority-minority districts, whether it would adversely affect their legislative leadership, influence, and power.

5. Support by Incumbents

Finally, the district court should have considered the support of the plan by incumbents elected from the benchmark majority-minority districts as evidence of a lack of retrogressive effect. Justice O'Connor noted that, in comparing the new plan to the benchmark plan, it was relevant to examine the benchmark plan both using the new 2000 census figures and using the old 1990 census figures, since the old figures were in effect at the time the benchmark plan was enacted.

B. Voting Rights Act § 2

Section 2 of the Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973, applies throughout the United States. It has been construed to prohibit a State from enacting a redistricting plan that has the effect of denying a racial or language minority a fair opportunity to elect a representative of their choice. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30.

1. Rule of Thumb Discredited

In Illinois, a complaint alleged that the legislative plan drawn by the Legislative Commission on Redistricting violated §2 of the Voting Rights Act by failing to draw a sufficient number of Senate and House districts in which the candidate elected would be the choice of African American voters. Plaintiffs argued that, in order to be an "effective" majority-minority district, the district must have at least a 60 percent minority voting-age population (VAP) or 65 percent minority total population, according to the "rule of thumb" articulated in the Illinois case of two decades before, *Ketchum v. Byrne*, 740 F.2d 1398, 1415-16 (7th Cir. 1984). The court observed that evaluating the districts based on total population was not appropriate when voting-age population statistics were available, and that use of the "rule of thumb" of 60 percent VAP was not appropriate when actual voting results from races within the districts were available. *Campuzano v. Board of Elections*, No. 01 C 50376 (N.D. Ill. May 3, 2002). The expert witnesses for both plaintiffs and the intervener-defendants disavowed the use of the "rule of thumb" and produced statistical analyses of related elections to show that the districts were not (or were) "effective" majority-minority districts. With credible statistical evidence to support the plan drawn by the commission, the court held that plaintiffs had failed to carry their burden of proving that the plan did not provide African Americans effective opportunities to elect candidates of their choice.

2. Coalition Districts

a. An Effective Voting Majority

In New Jersey, plaintiffs sought to enjoin implementation of a legislative plan adopted by the Apportionment Commission. They alleged that the plan violated § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution because it reduced the concentration of African American voters in three legislative districts with an intent to dilute their voting strength. Defendants countered that the plan, while reducing the concentration of African Americans to less than a majority of the voting age population in the three districts, also increased the concentration of African Americans in a fourth district, thus giving them an effective voting majority in all four districts, because both Hispanics and whites often voted for African American candidates. The three-judge court found for the defendants, finding that the plan drafters had not intended to discriminate against African Americans and that the plan did not have the effect of diluting their voting strength. *Page v. Bartels*, No. 01-1733, 144 F. Supp.2d 346, 2001 WL 505187 (D. N.J. May 4, 2001). Rather, it likely would increase by one the number of African Americans elected to the Legislature from the four districts.

b. Not Required by § 2

In Virginia, a complaint alleged that the Fourth Congressional District, as enacted in 2001 and precleared by the Department of Justice, violated § 2 of the Voting Rights Act because it diluted minority votes and significantly impacted the ability of African American voters to elect a candidate of their choice. Plaintiffs did not seek to redraw the district as a majority-minority district, but rather to increase the African American population from 33.6 percent of the total population to about 40 percent of the total population, roughly the same as before the district was redrawn. The State argued that no court had previously held that § 2 of the Voting Rights Act required the creation of a minority "influence" district where the minority population was not sufficiently large to form a majority in a single-member district. Plaintiffs argued that they sought not the creation of an "influence" district but rather the creation of a minority "coalition" district, which they defined as one where the votes of blacks would combine with the crossover votes of whites to elect the black candidate of choice. The court held that § 2 did not require the creation of either "influence" or "coalition" districts and dismissed the complaint. *Hall v. Virginia*, No. 2:03cv151 (E.D. Va. Aug. 7, 2003).

VI. Federalism

Another major legal issue in the 1990s round of redistricting had been the race between the state and federal courts. Plaintiffs shopped for the forum most likely to give them a sympathetic ear, and one federal court went so far as to enjoin a state court from drawing redistricting plans. *See Growe v. Emison*, 507 U.S. 25 (1993). The U.S. Supreme Court had ruled that a federal court must defer to a state court that is making timely progress resolving redistricting disputes. *Id.* But that did not stop at least one federal court in the 2000s from enjoining a state court's redistricting plan.

A. The Role of State Courts in Drawing Congressional Plans

1. State Court Drew Plan

In Mississippi, a complaint filed in the Chancery Court of Hinds County on October 5, 2001, alleged deadlock in the Legislature and asked the state court to draw a congressional plan. *Branch v. Clark*, No. G-2001-1777. On December 21, 2001, the court adopted a plan (color version) as submitted by the plaintiffs. On December 26, 2001, the State's attorney general submitted the plan to the Department of Justice for preclearance, requesting expedited consideration and preclearance by January 31, 2002. On February 14, 2002, the Department of Justice, by a letter to the State's attorney general, requested more information from the State about the operation of the chancery courts and the jurisdiction of a single judge to create and implement a statewide redistricting plan. On the same date, the Department of Justice also requested the Mississippi Supreme Court to expedite its review of the plan adopted by the chancery court, so that "issues inherent to state-level governance [could] first be resolved by state authorities." On December 13, 2001, the Mississippi Supreme Court held that the Chancery Court did have jurisdiction to issue a redistricting plan. *In re Mauldin*, No. 2001-M-01891.

2. Federal Court Enjoined Plan

On January 15, 2002, a three-judge federal court concluded that, because of the need to have the plan drawn by the state court precleared by the Justice Department before it could become effective, it "appears to be uncertain that the State authorities will have a redistricting plan in place by March 1," and therefore decided to begin drawing their own congressional redistricting plan. *Smith v. Clark*, No. 3:01-CV-855WS, 189 F. Supp.2d 503 (S.D. Miss. 2002).

On February 4, 2002, the federal court adopted a plan, which it proposed to implement "absent the timely preclearance of the redistricting plan adopted by the State Chancery Court, which is now pending for preclearance before the United States Attorney General." *Smith v. Clark*, No. 3:01-CV-855WS, 189 F. Supp.2d 512 (S.D. Miss. 2002)

On February 26, 2002, the federal court enjoined the State from implementing the congressional plan adopted in *Branch v. Clark* on December 21, 2001, even if the plan were precleared, because the federal court held that the state court's assertion of jurisdiction to adopt the plan violated Article I, § 4, of the U.S. Constitution, which says that "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof." *Smith v. Clark*, No. 3:01-CV-855WS, 189 F. Supp.2d 548 (S.D. Miss. Feb. 26, 2002), *aff'd sub nom. Branch v. Smith*, No. 01-1437, ___ U.S. ____, 123 S.Ct. 1429 (Mar. 31, 2003). The Court distinguished the Minnesota case of *Growe v. Emison*, 507 U.S. 25 (1993), and cases from California, New York, Texas, and New Jersey, where state courts had drawn or modified congressional plans, on the ground that in none of those cases had the state court's jurisdiction been challenged on the basis of Article I, § 4. The federal district court conceded that the Mississippi Supreme Court had found that the state chancery court did have jurisdiction in this case, but reached its own conclusion that the Mississippi Supreme Court's decision was not supported by Mississippi law. The Court ordered the State to conduct elections based on the plan adopted by the federal court February 4, 2002. The order left open the possibility that the Legislature might enact a congressional plan at some future date.

3. Injunction before Preclearance was Proper

A unanimous U.S. Supreme Court affirmed the judgment of the federal district court enjoining implementation of the plan drawn by the state court because it had not been precleared under § 5 of the Voting Rights Act. *Branch v. Smith*, No. 01-1437, ___ U.S. ____, 123 S.Ct. 1429 (U.S. Mar. 31, 2003). The Court vacated the district court's alternative holding that the state court had no constitutional authority to adopt a congressional plan.

Mississippi's attorney general had responded to the Justice Department's last request for information about the state court plan on February 20, 2002. The plan would have gone into effect 60 days later, absent objection from the Justice Department. But the Mississippi attorney general had not appealed the federal district court order of February 26 enjoining implementation of the state court plan. The Supreme Court concluded that, because the State had not appealed the injunction, "the State was no longer 'seek[ing] to administer' the state court plan, and thus the 60-day time period for DOJ review was no longer running." Slip op. at 8. The passage of time had not caused the plan to be precleared. Since the plan had not been precleared, it could not be implemented, and the federal district court had properly adopted a plan of its own.

B. The Role of Federal Courts in Drawing Single-Member Districts

1. 2 U.S.C. § 2c Requires Single-Member Districts

Seven members of the Court agreed that the federal district court had properly adopted a plan using single-member districts, as mandated by 2 U.S.C. § 2c. *Branch v. Smith*, No. 01-1437, ___ U.S. ____, 123 S.Ct. 1429 (U.S. Mar. 31, 2003).

2. 2 U.S.C. § 2a (c)(5) Requires At-Large Election

Justices O'Connor and Thomas dissented, saying that the district court should have ordered at-large elections, as mandated by 2 U.S.C. § 2a (c)(5), since they were of the opinion that the mandate to draw single-member districts only applied after the State had redistricted and did not give a federal court authority to draw the districts first.

Justices Stevens, Souter, and Breyer concurred that § 2c mandated the federal court to draw single-member districts, but expressed their opinion that the enactment of § 2c had impliedly repealed § 2a (c)(5), so that at-large elections were never an option. Justices Scalia, Rehnquist, Kennedy, and Ginsburg expressed their opinion that the role of § 2a (c)(5) was to permit the use of at-large elections when "the election is so imminent that no entity competent to complete redistricting pursuant to state law (including the mandate of §2c) is able to do so without disrupting the election process." Scalia, J., slip op. at 19.

VII. Conclusion

The 2000 round of redistricting litigation is now almost over. But not quite. There is still the issue of partisan gerrymandering.

A suit in Pennsylvania had challenged that state's congressional plan as a partisan gerrymander. The district court had held that, although plaintiffs had alleged that they had been shut out of the political process, they had "not alleged facts indicating that they have been shut out of the political process and, therefore, they cannot establish an actual discriminatory effect on them." *Vieth v. Commonwealth*, No. 1: CV-01-2439, 188 F. Supp.2d 532, 547 (M.D. Pa. Feb. 22, 2002), *appeal dismissed for want of jurisdiction sub nom. Pennsylvania Republican Caucus v. Vieth*, No. 01-1713 (U.S. Oct. 7, 2002); *appeal dismissed as moot*, No. 01-1873 (Act 1 had been repealed for any election after 2002), *and sub nom. Jubelirer v. Vieth*, No. 02-135 (U.S. Oct. 7, 2002). The partisan gerrymandering claim was dismissed, 188 F. Supp.2d 532, but the plan was struck down for violation of equal-population requirements: its overall range of 19 persons could have been lower and still accomplished the State's goal of preserving whole precincts. 195 F. Supp.2d 672 (M.D. Pa. Apr. 8, 2002), *appeal dismissed as moot sub nom. Jubelirer v. Vieth*, No. 01-1817 (U.S. Oct. 7, 2002), *and Schweiker v. Vieth*, No. 01-1823 (U.S. Oct. 7, 2002) (Act 1 had been repealed for any election after 2002).

On April 18, 2002, the General Assembly enacted a new congressional plan, HB 2545, Act 34, which reduced the overall range of the plan from 19 persons to one person. On April 23, 2002, the court stayed its order of April 8, allowing Act 1 to be used for the 2002 election. It set a hearing for May 8, 2002, on the question of whether Act 34 should govern elections in 2004 and beyond.

On January 24, 2003, a three-judge court held that Act 34 met equal population requirements. 241 F. Supp.2d 478 (M.D. Pa. 2003). The three-judge court also held that the plan was not an unconstitutional partisan gerrymander, because plaintiffs had not alleged facts "indicating that they have been shut out of the political process." 241 F. Supp.2d at 484. The court noted that, even though the plan met equal population requirements, it "jettisons every other neutral non-discriminatory redistricting criteria that the Supreme Court has endorsed in one person-one vote cases." *Id.* at n.3.

On June 27, 2003, the U.S. Supreme Court noted probable jurisdiction in the case. *Vieth v. Jubelirer*, No. 02-1580. It will presumably be scheduled for oral argument during the term that begins this fall. Stay tuned.

TABLE OF AUTHORITIES

U.S. Constitution

United States Code

Federal Cases

State Constitutions

State Cases