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OUTLINE OF REDISTRICTING LAW

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OUTLINE OF REDISTRICTING LAW

1. Introduction

a. Article XXI, section 2(d), of California Constitution: List of criteria to be considered, in order of priority.

2. What is the VRA?

a. 1965 adoption during height of civil rights movement

b. Immediately tested and upheld by Supreme Court.

c. Two key operative sections: 2 and 5.

3. Section 2 of VRA

a. Relevant text –42 U.S.C. § 1937(f)

i. 42 U.S.C. § 1973

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

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

ii. 42 U.S.C. § 1973b(f)(2)

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

b. "Results test"—per 1982 amendments, as explained in *Gingles*.

i. In 1982, Congress amended Section 2 of the voting rights act in response to the United State Supreme Court's opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980). In *Mobile*, the Court had held that a Section 2 violation required proof that a "contested electoral mechanism was intentionally adopted or maintained

by state officials for a discriminatory purpose." *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

ii. In *Gingles*, the Court recognized that the amendment made clear that "a violation could be proved by showing discriminatory effect alone." *Id.* A discriminatory effect occurs where "a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Gingles*, 478 U.S. at 63, 44.

c. A violation of Section 2 can occur through "cracking" or "packing"

i. **Cracking:**

1. Dispersal of minority groups into districts in which they constitute an ineffective minority of voters. *See Voinovich*, 507 U.S. at 154 (1993).

ii. **Packing:**

1. Concentration of minority groups into districts where they constitute an excessive majority, thereby depriving the minority group of influence in other districts. *See Voinovich*, 507 U.S. at 154; *Shaw v. Reno*, 509 U.S. 630, 667 n.6 (1993)

2. Example: "A minority group . . . might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates." *Voinovich*, 507 U.S. at 153.

d. How does a plaintiff challenging a districting system prove that system violates Section 2?

i. **Summary** – A districting system violates Section 2 of the VRA where:

1. A plaintiff satisfies the *Gingles* preconditions

a. "First, the minority group must be able to demonstrate that it is **sufficiently large and geographically compact** to constitute a majority in a single-member district.´ *Gingles*, 478 U.S. at 50.

b. "Second, the minority group must be able to show that it is **politically cohesive."** *Gingles*, 478 U.S.. at 51. (Also referred to as **minority bloc voting**)

c. "Third, the minority must be able to demonstrate that the **white majority votes as a sufficient bloc** to enable it – in the

absence of special circumstances, such as the minority candidate running unopposed . . . to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

d. *Note*: The second and third *Gingles* preconditions are often referred to as "racially polarized voting" and considered together.

2. **And** the court determines that, based "'on the totality of circumstances,' minorities have been denied an 'equal opportunity' to 'participate in the political process and to elect representatives of their choice.'" *Abrams v. Johnson*, 521 U.S. 74 (1997) (quoting 42 U.S.C. § 1973(b).

3. *Note*: A court evaluating a state's redistricting plan under Section 2 must use this analysis. *See Growe v. Emison*, 507 U.S. 25, 37-42 (1993) (holding that the district court erred in "choosing not to apply the [*Gingles*] preconditions for a vote dilution violation" and instead "proceed[ing] directly to the 'totality of the circumstances' test" when evaluating Minnesota's proposed single-member redistricting plan).

ii. ***Gingles* Preconditions:**

1. Geographically Compact Minority Population: A minority group is sufficiently large and geographically compact where the minority group constitutes **over 50%** of the eligible **voting-age population** (see below) in an area defined according to **traditional districting principles.**

a. **Minority Constitutes Over 50%**

i. To establish geographical compactness, "[a] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009) These potential districts are known as **majority-minority districts.**

ii. Cases address sufficiency of minority group population in terms of voting-age population. *See e.g.*, *Bartlett*, 129 S. Ct. at 1242 (defining majority-minority district as composing a "numerical, working majority of the voting-age population")

iii. The Ninth Circuit has endorsed use of *citizen* voting-age population in *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989) ("The district court was

correct in holding that eligible minority voter population, rather than total minority population, is the appropriate measure of geographical compactness."), *abrogated on other grounds*, *Townsend v. Holman Consulting Corp*., 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc).

iv. Although the U.S. Supreme Court has not explicitly decided that the statistic should be further refined by citizenship, it has endorsed that view in dicta. *See LULAC*, 548 U.S. at 429 (observing that the voting-age citizen population "fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates").

v. Insufficiently Large Populations. Proof that the minority population in the potential election district is large enough to form an **influence** or **crossover** district does not satisfy the first *Gingles* precondition.

1. Crossover Districts → A district in which minority voters make up less than a majority, but can elect a candidate of the minority group's choice where white voters cross over to support the minority's preferred candidate. *See Bartlett*, 129 S. Ct. at 1248 ("§ 2 does not mandate creating or preserving crossover districts")

2. Influence Districts → Districts "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Bartlett*, 129 S. Ct. at 1242. Section 2 "does not require the creation of influence districts." *Bartlett*, 129 S. Ct. at 1242 (citing *LULAC*, 548 U.S. at 445).

b. **In an area constructed pursuant to "traditional districting principles"**

i. The compactness "inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *LULAC*, 548 U.S. at 433.

ii. These principles are discussed further below in Section 6 of this outline.

c. Plaintiffs cannot state a claim under Section 2 by challenging the size of the government body. In other words, a state need not increase the number of total districts in order to accommodate a minority group that is not sufficiently large and geographically compact to constitute a majority in one of the existing districts. *See Holder v. Hall*, 512 U.S. 874 (1994)

2. **Racially Polarized Voting:** The following factors guide a court's assessment of whether **racially polarized voting** exists.

   a. "A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim . . . and, consequently, establishes minority bloc voting within the context of § 2." *Gingles*, 478 U.S. at 56.

   b. "[I]n general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56.

   c. "A pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." *Gingles*, 478 U.S. at 57.

   d. "[I]n a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally sufficient bloc voting." *Gingles*, 478 U.S. at 57.

   e. "[T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest." *Gingles*, 478 U.S. at 57.

   f. "The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances. One important circumstance is the number of elections in which the minority group has sponsored candidates. Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process. Similarly, where a minority group has begun to sponsor candidates just

recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." *Gingles*, 478 U.S. at 57 n.25.

iii. **Totality of the Circumstances:** Courts will consider the following non-exhaustive list of factors in determining whether, based "'on the totality of circumstances,' minorities have been denied an 'equal opportunity' to 'participate in the political process and to elect representatives of their choice.'" *Abrams v. Johnson*, 521 U.S. 74 (1997) (quoting 42 U.S.C. § 1973(b):

1. "[W]hether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426 (citing *DeGrandy*, at 1000). "[T]he proper geographic scope for assessing proportionality is . . . statewide." *LULAC*, 548 U.S. at 437.

2. "[T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the democratic process." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, 97th Cong., 2nd Sess. at 28-29 (1982), U.S. Code Cong. & Admin. News 1982, pp. 177, 206-07)).

3. "[T]he extent to which voting in the elections of the state or political subdivision is racially polarized." *Gingles*, 478 U.S. at 37.

4. "[T]he extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 37.

5. "[I]f there is a candidate slating process, whether the members of the minority group have been denied access to the process." *Gingles*, 478 U.S. at 37.

6. "[W]hether political campaigns have been characterized by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37.

7. "[T]he extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37.

8. "[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group" *Gingles*, 478 U.S. at 37.

9. "[W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 37.

4. Section 5 of VRA

a. Overview

i. Purpose of Section 5 – to prevent the implementation of changes that affect the right to vote in jurisdictions that meet certain criteria without the approval of the Attorney General of the United States or United State District Court.

ii. Coverage formula – a state or smaller political subdivision is subject to the requirements of Section 5 (or "covered") if it had in place a test or device that restricted people's ability to register or vote and less than 50% of the eligible population was either registered to vote or actually voted during certain elections.

iii. Preclearance process – covered jurisdictions must submit any proposed voting related changes to the United States Attorney General or United States District Court for approval along with any information relating to the purpose, effects and process of developing the proposed changes. The Attorney General or District Court will then compare the current and proposed systems to ensure that the new system will not deny or abridge the right to vote on account of race, color, or membership in a language minority group.

b. Relevant text

i. 42 U.S.C. § 1973c:

> "(a) Whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect [at the time the jurisdiction became covered] . . . , such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure:
>
> "Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.
>
> "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this

section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

"(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

"(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

"(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice."

ii. 42 U.S.C. § 1973b (f)(2):

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

c. Covered jurisdictions

i. Covered States: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia.

ii. States with some currently covered counties or townships: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.

iii. California counties covered: Kings, Merced, Monterey, and Yuba Counties.

d. Coverage formulas

i. The original coverage formula in the Voting Rights Act of 1965 applied the preclearance requirements to any state or political subdivision:

1. that maintained a "test or device" restricting the opportunity to register and vote ***and either***

2. where less than 50 percent of persons of voting age were registered to vote on November 1, 1964, ***or***

3. where less than 50 percent of persons of voting age voted in the presidential election of November 1964.

ii. "Test or device" included such requirements as the applicant being able to pass a literacy test, establish that he or she had good moral character, or have another registered voter vouch for his or her qualifications.

iii. The initial legislation was temporary and only implemented the preclearance process for five years.

iv. In 1970, Congress reauthorized the enforcement of Section 5 for another five years and updated the coverage formula to include any states or political subdivision that met the 1965 test in the 1968 presidential elections.

1. Monterey and Yuba Counties became covered under the 1970 definition.

v. In 1975, Congress reauthorized Section 5 for another seven years and updated the coverage formula to include any states or political subdivisions that met the 1965 test in the 1972 presidential elections. The 1975 legislation also expanded the definition of "test or device" to include the practice of providing election information, including ballots, only in English in states or political subdivisions where members of a single language minority constituted more than five percent of the citizens of voting age.

1. Kings, Merced and Yuba Counties met the 1975 requirements for covered subdivisions based on minority language restrictions.

vi. Section 5 of the Voting Rights was reauthorized for another twenty-five years in both 1982 and 2006. Congress has not updated the coverage formula to include more states or political subdivisions since 1975.

e. Pre-clearance considerations

i. Because parts of California are covered by Section 5, any state-wide voting related change that affects the covered counties must be submitted for preclearance.[1] *Lopez v. Monterey County*, 525 U.S. 266 (1999).

ii. There are two necessary determinations made to establish that a proposed redistricting plan meets the Section 5 standard: (1) that the plan was adopted free of any discriminatory purpose; and (2) that the proposed plan will not have a retrogressive effect. *See* Department of Justice Guidance Concerning

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[1] The DOJ did not object to the state wide redistricting plans submitted by California in 2001. *See* http://www.justice.gov/crt/about/vot/sec_5/statewides.php

Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7,471 (Feb. 9, 2011).

iii. Discriminatory purpose analysis

1. 2006 amendments to the VRA updated the definition of "purpose" in Section 5 to forbid jurisdictions from acting with "any discriminatory purpose" when changing voting related practices. The DOJ will conduct a holistic review of the submitted voting change and its process of adoption to determine whether direct or circumstantial evidence exists of any discriminatory purpose of denying or abridging the right to vote on account of race or color or membership in a language minority group. 76 Fed. Reg. 7,471.

iv. Non-retrogression standard

1. A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. *See Beer v. United Stat*es, 425 U.S. 130, 140-42 (1976).

2. When determining whether a minority has that opportunity to effectively exercise the electoral franchise, the District Court and the DOJ will consider a broad array of factors. The DOJ guidelines contain many pages listing different factors and types of evidence that will be considered in retrogression analysis. 76 Fed. Reg. 7,470-73; 28 C.F.R. § 51.20-64.

3. In *Georgia v. Ashcroft*, the United States Supreme Court ruled that section 5 "leaves room for States to use . . . influence and coalition districts," rather than a majority minority district, to avoid retrogression, depending upon the circumstances. *Georgia v. Ashcroft*, 539 U.S. 461, 482-83 (2003) (finding that "a court must examine whether a new plan adds or subtracts "influence districts"—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process;" "Section 5 leaves room for States to use these types of influence and coalitional districts.")

4. In 2006, when Congress reauthorized the Voting Rights Act it amended the Section 5 language because it believed that "[t]he effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued

Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act." Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 § 2(b)(6) (2006).

5. Thus, Congress refocused Section 5 retrogression analysis to "protect the ability of such citizens to elect their preferred candidates of choice." 42 U.S.C. § 1973c(d).

6. The DOJ in their 2011 guidelines also provide the following advice: "In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance."

7. The DOJ will look at a wide array of factors to determine if this ability exists: "census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact on the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change. Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any Section 5 analysis, additional demographic and election data in the submission is often helpful in making the requisite Section 5 determination. 28 CFR 51.28(a). For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan."

8. The Supreme Court's *Georgia v. Ashcroft* decision in 2003 had adopted a totality of the circumstances analysis to determine whether a plan is retrogressive. 539 U.S. 461, 484-85 (2003). Because the Supreme Court has not yet applied or interpreted the 2006 Amendments, it is important to keep these factors in mind when planning for preclearance. The Court held that the following factors or types of evidence can be considered when analyzing retrogression of a state-wide redistricting plan: the number of majority-minority districts; the number of influence or coalition districts; the ability of minority groups to elect candidates of choice; the minority groups' ability to influence the political process; the political party preferences of minority groups; voter registration rates of minority groups; the ability of representatives of minority communities to obtain leadership positions once elected; whether the representatives elected by minority

groups at all levels support the proposed redistricting plan; alternative proposed redistricting plans; census data from the time the benchmark plan was created; current census data; testimony from individual intervenors. *Id*. at 466-89.

9. In determining whether a submitted change is retrogressive the Attorney General will compare the submitted change to the last legally enforceable redistricting plan in force or effect. *Riley v. Kennedy*, 553 U.S. 406, 411 (2008).

10. In certain circumstances, because of significant population changes, retrogression may be unavoidable. "In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less retrogressive plan cannot reasonably be drawn. . . . In considering whether less retrogressive alternative plans are available, the Department of Justice looks to plans that were actually considered or drawn by the submitting jurisdiction, as well as alternative plans presented or made known to the submitting jurisdiction by interested citizens or others. In addition, the Department may develop illustrative alternative plans for use in its analysis, taking into consideration the jurisdiction's redistricting principles. . . . Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." 76 Fed. Reg. 7,472.

f. Intersection of Section 2 and Section 5

i. Individuals may file suit alleging that a change to the procedures relating to elections violates Section 2. No such right exists regarding preclearance. Under Section 5 the private right of action is slightly different. Individuals cannot file suit alleging that a voting change has a retrogressive purpose or effect. 28 C.F.R. § 51.49. Once a change has been precleared, individuals cannot challenge that preclearance determination. *Id.*

Individuals can file suit against covered jurisdictions claiming that certain changes that were not precleared should have been and are thus not enforceable. *See e.g., Lopez v. Monterey County*, 525 U.S. 266 (1998).

If a state files for preclearance under Section 5 in the United States District Court for the District of Columbia, individuals can attempt to intervene. *See e.g., Georgia v. Ashcroft*, 539 U.S. 461, 476-77 (2003). But there is no individual cause of action relating to retrogression analysis available under Section 5.

ii. Preclearance under Section 5 will not preclude any legal action under Section 2 by the Attorney General or any other party if implementation of the change

demonstrates that such action violates the requirements of Section 2. 28 C.F.R. § 51.55(b).

iii. An alleged violation of Section 2 does not prevent pre-clearance of a change under Section 5. *Reno v. Bossier Parish School Board* (*Bossier I*), 520 U.S. 471 (1997).

g. Pre-clearance process

i. If a jurisdiction is covered, it must submit all proposed changes relating to any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" for approval to the United States Attorney General or United States District Court of the District of Columbia.

ii. The vast majority of changes are submitted to the Attorney General who has delegated the responsibility for handling these determinations to the Chief of the Voting Rights Sections of the Civil Rights Division of the United States Department of Justice. 28 C.F.R. § 51.3.

iii. If a change is made in a covered jurisdiction without preclearance, it is not legally enforceable. 76 Fed. Reg. 7,470.

iv. In the case of California redistricting, changes affecting voting in the covered counties may be submitted by the State in written form as soon as possible after they become final.

v. Preclearance by the Attorney General

1. After the proposed change is submitted for review, the Attorney General has 60 calendar days to object to the change. 28 C.F.R. § 51.9(a)-(c). If no objection is made within that time period, the change is considered cleared. 28 C.F.R. § 51.42.

2. If the Attorney General does object to the proposed change he must notify the submitting jurisdiction of the reasons for his decision. 28 C.F.R. § 51.42. The jurisdiction may request that the Attorney General reconsider or submit the same proposed change to the United States District Court for preclearance. *Id.*

vi. Required information

1. The Department of Justice requires that any jurisdiction seeking preclearance of a state wide redistricting plan submit the following information:

a. Proposed change and process of adoption: (1) A copy of any ordinance, enactment, order, or regulation embodying a change affecting voting; (2) A copy of any ordinance, enactment, order, or regulation embodying the voting practice that is proposed to be repealed, amended, or otherwise

changed; (3) Identifying information of the body responsible for making the change and the submission.; (4) A statement identifying the statutory or other authority under which the jurisdiction undertakes the change and a description of the procedures the jurisdiction was required to follow in deciding to undertake the change; (5) The date of adoption of the change affecting voting; (6) The date on which the change is to take effect; (7) A statement that the change has not yet been enforced or administered, or an explanation of why such a statement cannot be made; (8) Where the change will affect less than the entire jurisdiction, an explanation of the scope of the change; (9) A statement of the reasons for the change; (10) A statement of the anticipated effect of the change on members of racial or language minority groups; (11) A statement identifying any past or pending litigation concerning the change or related voting practices; (12) A statement that the prior practice has been precleared (with the date) or is not subject to the preclearance requirement and a statement that the procedure for the adoption of the change has been precleared (with the date) or is not subject to the preclearance requirement, or an explanation of why such statements cannot be made. 28 C.F.R. § 51.27.

b. Demographic information: (1) Total and voting age population of the affected area before and after the change, by race and language group. If such information is contained in publications of the U.S. Bureau of the Census, reference to the appropriate volume and table is sufficient; (2) Any estimates of population, by race and language group, made in connection with the adoption of the change; (3) Demographic data provided on magnetic media shall be based upon the Bureau of the Census Public Law 94-171 file unique block identity code of state, county, tract, and block and follow certain formatting and presentation guidelines. 28 C.F.R. § 51.28(a).

c. Maps: (1) The prior and new boundaries of the voting unit or units; (2) The prior and new boundaries of voting precincts; (3) The location of racial and language minority groups; (4) Any natural boundaries or geographical features that influenced the selection of boundaries of the prior or new units; (5) The location of prior and new polling places; (6) The location of prior and new voter registration sites. 28 C.F.R. § 51.28(b).

d. The Attorney General has very specific requirements regarding the format and presentation of the required demographic and cartographic information. 28 C.F.R. § 51.28.

e. Information about publicity and public participation: For submissions involving controversial or potentially controversial changes, evidence of public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place. Examples of materials demonstrating public notice or participation include: (1) Copies of newspaper articles discussion the proposed change; (2) Copies of public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared; (3) Minutes or accounts of public hearings concerning the proposed change; (4) Statements, speeches, and other public communications concerning the proposed change; (5) Copies of comments from the general public; (6) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose. 28 C.F.R. § 51.28(f).

f. Minority group contacts: For submissions from jurisdictions having a significant minority population, the names, addresses, telephone numbers, and organizational affiliation (if any) of racial or language minority group members residing in the jurisdiction who can be expected to be familiar with the proposed change or who have been active in the political process. 56 Fed. Reg. 51,836 (Oct. 16, 1991), 28 C.F.R. § 51.28(h).

g. The submitting jurisdiction must demonstrate that the proposed change and all relevant background information related to the process for adopting the change has been made publicly accessible. 28 C.F.R. § 51.28(g).

h. Other information that the Attorney General determines is required for an evaluation of the purpose or effect of the change. 28 C.F.R. § 51.27(r).

i. Public Comment

    i. Any individual or group may send to the Attorney General information concerning a change affecting voting in a jurisdiction to which Section 5 applies. 28 C.F.R. § 51.29.

2. If a submission does not conform with these requirements, the Attorney General will not analyze the merits of the submitted change, but will notify the submitting jurisdiction of inappropriateness of its submission.

3. **Determinations made:**

a. Using the information provided, the Attorney General will determine: (a) The extent to which a reasonable and legitimate justification for the change exists; (b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change; (c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; (d) The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change. 28 C.F.R. § 51.57.

b. When reviewing new districting plans the Attorney General will look at: (1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction; (2) The extent to which minorities have been denied an equal opportunity to influence elections and the decision making of elected officials in the jurisdiction; (3) The extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated; and (4) The extent to which the voter registration and election participation of minority voters have been adversely affected by present or past discrimination. 28 C.F.R. § 51.58.

c. In determining whether a submitted redistricting plan has the prohibited purpose or effect the Attorney General, in addition to the factors described above, will consider the following factors (among others): (1) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens; (2) The extent to which minority voting strength is reduced by the proposed redistricting; (3) The extent to which minority concentrations are

fragmented among different districts; (4) The extent to which minorities are overconcentrated in one or more districts; (5) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered; (6) The extent to which the plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and (7) The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards. 28 C.F.R. § 51.59.

vii. Preclearance by the United States District Court

1. The Attorney General is acting as a surrogate for the Court when preclearing voting related changes in a covered jurisdiction; thus, there is no difference in the legal standards and requirements for preclearance in either venue. 28 C.F.R. §51.48.

2. The same type of information listed above that would be relevant to the Attorney General's inquiry would be relevant to the District Court's determination.

3. All preclearance cases must be filed in the United State District Court for the District of Columbia. 42 U.S.C. § 1973c(a).

5. U.S. Constitutional Issues in Redistricting

a. Equal Protection/14th Amendment Constraints.

i. **Text**: "[N]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

ii. Principles

1. Race can play a role in drawing district lines but if it is the *sole* or *predominant* factor, then a reviewing court applies strict scrutiny.

2. To invoke strict scrutiny, a 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.

3. Oddly shaped districts are one type of circumstantial evidence that gives rise to a claim of unconstitutional racial gerrymandering. But oddly shaped districts are neither necessary nor sufficient to show that racial considerations predominated and thus invoke strict scrutiny.

4. To survive an equal protection challenge based on strict scrutiny, race-based classifications must be narrowly tailored to achieve a compelling state interest.

5. The Supreme Court has reserved the issue of whether a State's compliance with the VRA (either section 2 or section 5) may justify drawing districts based solely or predominantly on race under a strict scrutiny analysis.

6. However, a majority of the current justices have stated in separate opinions that they would hold that compliance with section 5 would justify drawing districts based predominantly on race. (See below.)

iii. Key Cases

1. *Shaw v. Reno*, 509 U.S. 630 (1993).

   a. Background: As a result of the 1990 census, North Carolina became entitled to a 12th seat in the U.S. House of Representatives. The General Assembly enacted a reapportionment plan that created a majority-black district. The AG objected under § 5 of the VRA, and the General Assembly passed new legislation creating a second majority-black district. Petitioners (N.C. state residents) sued, claiming unconstitutional racial gerrymandering.

   b. Equal Protection violations can arise in the redistricting context where lines are drawn primarily based on race.

      i. "[W]e have held that the Fourteenth Amendment requires state legislation that explicitly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest. These principles apply not only to legislation that contains explicit racial distinctions, but also to those rare statutes that, although race neutral, are, on their face, unexplainable on grounds other than race." (p. 643 (citations and quotation marks omitted).)

      ii. "[A]pellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification." (p. 658.)

   c. Bizarrely shaped districts can be evidence of predominantly race-based line-drawing, in violation of Equal Protection, and can give rise to strict scrutiny.

      i. "[R]edistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race demands the same close scrutiny that we give other state laws that classify citizens by race." (p. 644 (citation omitted).)

ii. "We believe that reapportionment is one area in which appearances do matter. 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." (p.647.)

2. *Miller v. Johnson*, 515 U.S. 900 (1995).

a. Background: Georgia residents challenged redistricting plan following 1990 census, which gave Georgia another congressional seat. DOJ twice refused to give pre-clearance under § 5 of the VRA to plans that contained only two majority-minority districts. The General Assembly then created *three* majority-minority districts using the ACLU's "max-black" plan as a benchmark. The result was one odd-shaped new majority-minority district.

b. For purposes of strict scrutiny, Court assumed *arguendo* that compliance with § 5 was a compelling state interest, but also found that because § 5 did not *require* the third majority-black district, Georgia's redistricting plan was not narrowly tailored to the goal of complying with the VRA (the third district was not *necessary* under §5).

i. "To satisfy strict scrutiny, the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest…. As we suggested in *Shaw*, 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." (p. 921.)

ii. "Georgia's drawing of the Eleventh District was not required under the Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5." (p. 923.)

iii. "It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." (pp. 927-28.)

c. A bizarrely shaped district is neither necessary nor sufficient to a claim that race was the predominant factor in line-drawing.

i. "Our observation in *Shaw* of the consequences of racial stereotyping was not meant to suggest that a district must be bizarre on its face before there is a constitutional violation. Nor was our conclusion in *Shaw* that in certain instances a district's appearance (or, to be more precise, its in appearance in combination with certain demographic evidence) can give rise to

an equal protection claim a holding that bizarreness was a threshold showing." (p. 912 (citation omitted).)

ii. "Shape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement 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 the district lines." (p. 912.)

iii. "[P]arties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding a district's geometry and makeup nor required to make a threshold showing of bizarreness." (p. 915.)

d. Court explicates the distinction between awareness of race in the redistricting process and having race predominate.

i. "Redistricting legislatures will … almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process…. The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a 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." (p. 916.)

3. *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J.).

a. Context: 1990 census entitled Texas to three additional congressional seats. Texas created new majority-minority districts in an attempt to comply with the VRA and received § 5 preclearance. Plaintiffs then challenged on the basis of unconstitutional racial gerrymandering.

b. Decision to apply strict scrutiny is based on several factors that indicate a "subordination" of other legitimate considerations to race, not merely the consciousness of race in line-drawing.

i. "Strict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts.

Electoral district lines are 'facially race neutral,' so a more searching inquiry is necessary before strict scrutiny can be found applicable in redistricting cases than in cases of 'classifications based explicitly on race. For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated" to race.' By that, we mean that race must be '*the predominant* factor motivating the legislature's [redistricting] decision.'" (pp. 958-59.)

ii. "These findings—that the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data—together weigh in favor of the application of strict scrutiny. We do not hold that any one of these factors is independently sufficient to require strict scrutiny." (p. 962.)

c. Court assumes that compliance with § 2 of the VRA may be sufficient to survive strict scrutiny where State has *strong basis* for concluding that creating a majority-minority district is *necessary* to comply with § 2. Here, however, Texas's effort did not survive strict scrutiny because it was not "narrowly tailored" to avoid § 2 liability because § 2 did not require the non-compact districts at issue.

i. "As we have done in each of our previous cases in which this argument has been raised as a defense to charges of racial gerrymandering, we assume without deciding that compliance with the results test, as interpreted by our precedents can be a compelling state interest. We also reaffirm that the 'narrow tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering such interests. If the State has a strong basis in evidence for concluding that creation of a majority-minority district is reasonably necessary to comply with § 2, and the districting that is based on race substantially addresses the § 2 violation, it satisfies strict scrutiny." (p. 977 (internal quotation marks and citations omitted).)

ii. "[We have] found that all three districts are bizarrely shaped and far from compact, and that those characteristics are predominantly attributable to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy…. These characteristics defeat any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.' 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."

d. Even assuming *arguendo* that compliance with VRA § 5 is a compelling state interest, Texas's effort was not "narrowly

tailored" because it went beyond merely preventing "retrogression."

i. "The final contention offered by the State and private appellants is that creation of District 18 (only) was justified by a compelling state interest in complying with VRA § 5. We have made clear that § 5 has a limited substantive goal: 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…. The problem with the State's argument is that it seeks to justify not maintenance, but substantial augmentation, of the African-American population percentage in District 18…. The State has shown no basis for concluding that the *increase* to a 50.9% African-American population in 1991 was necessary to ensure nonretrogression. Nonretrogression 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." (p. 983.)

iv. A number of cases suggest, but do not directly decide, that compliance with the VRA can be a compelling state interest and that redistricting plans can be narrowly tailored to achieve that goal, so as to withstand strict scrutiny.

1. *Shaw v. Hunt*, 517 U.S. 899 (1996).

a. "We assume, *arguendo,* for the purpose of resolving this suit, that compliance with § 2 could be a compelling interest, and we likewise assume, *arguendo,* that the General Assembly believed a second majority-minority district was needed in order not to violate § 2, and that the legislature at the time it acted had a strong basis in evidence to support that conclusion…. Where, as here, we assume avoidance of § 2 liability to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored." (pp. 915-16.)

2. *Bush v. Vera*, 517 U.S. 952 (1996).

a. "[T]he state interest in avoiding liability under VRA § 2 is 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 racial bloc voting…. [I]f 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." (p. 994 (citations omitted) (O'Connor, J., concurring)).

3. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 518-19 (2006)

   a. If strict scrutiny applies, "the State must justify its districting decision by establishing that it was narrowly tailored to serve a compelling state interest, *such as compliance with § 2 of the Voting Rights Act.*" (p. 475 (Stevens, J., concurring in part and dissenting in part) (emphasis added).)

   b. "We have in the past left undecided whether compliance with federal antidiscrimination laws can be a compelling state interest. I would hold that compliance with § 5 of the Voting Rights Act can be such an interest…. To support its use of § 5 compliance as a compelling interest with respect to a particular redistricting decision, the State must demonstrate that such compliance was its actual purpose and that it had a strong basis in evidence for believing that the redistricting decision was reasonably necessary under a constitutional reading and application of the Act. Moreover, in order to tailor the use of race narrowly to its purpose of complying with the Act, a State cannot use racial considerations to achieve results beyond those that are required to comply with the statute." (pp. 518-19 (Scalia, J., concurring in part and dissenting in part, joined by Thomas and Alito, JJ., and Roberts, C.J.) (citations and internal quotation marks omitted).)

   c. "Justice BREYER has authorized me to state that he agrees with Justice SCALIA that compliance with § 5 of the Voting Rights Act is also a compelling state interest. I, too, agree with Justice SCALIA on this point." (p. 475, n.12 (citation omitted) (Stevens, J., concurring in part and dissenting in part).)

b. Population Equality ("One Person, One vote").

i. Population Equality—Congressional Districts.

1. **Basis for Rule:** "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States…. Representatives … shall be apportioned among the several States which may be included within this Union, according to their respective numbers…." U.S. Const., Article I, § 2.

2. **Principle:** For congressional redistricting, any deviations from *absolute* equality must be supported by consistently applied, specific non-discriminatory objectives such as making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.

3. **Key Cases**

   a. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

      i. Context: Challenge to Missouri congressional redistricting statute. Ideal populations per district would have been 431,981, but the ten districts varied

from ideal by a range of 12,260 below (2.84%) to 13,542 above (3.13%). Average variation from ideal was 1.6%.

ii. Even *de minimis* variances from absolute equality were held unconstitutional under the "as nearly as practicable" standard for one person, one vote.

1. "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people (is) the fundamental goal for the House of Representatives,' the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." (pp. 530-31 (citation omitted).)

iii. Court rejected Missouri's purported justifications for straying from absolute population equality, which included efforts to anticipate population shifts and maintain existing county/municipal boundaries.

1. "Missouri contends that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress. But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people." (p. 533.)

2. "Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances." (p. 536.)

b. *Karcher v. Daggett*, 462 U.S. 725 (1983).

i. Context: Challenges to constitutionality of New Jersey's congressional reapportionment statute. The

plan contained 14 districts with an average population deviating from the "ideal" population by 0.1384%—the largest district had a population of 527,472, the smallest had a population of 523,798 (the difference between them being 0.6984% of the average district).

ii. Court held that variance from absolute equality was unconstitutional and that New Jersey's plan was not per se the product of good faith efforts to achieve population equality—deviations could have been avoided or significantly reduced.

iii. Deviations from absolute equality must be *necessary* to achieve a consistently applied, nondiscriminatory legislative policy, such as preserving voting strength of a racial minority group.

1. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations. The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors." (pp. 740-41.)

2. "Article I, § 2 therefore permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown. Thus, two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. … If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." (pp. 730-31.)

iv. Court reiterates the "as nearly as practicable" standard.

1. "Article I, § 2 establishes a high standard of justice and common sense for the apportionment of congressional districts: equal representation for equal numbers of people. Precise mathematical equality, however, may be difficult to achieve in an imperfect world; therefore the 'equal representation' standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality as nearly as is practicable." (p. 730 (internal quotation marks and citation omitted).)

v. Court recognizes that new technology (as of 1983) makes it relatively easy to achieve population equality.

1. "The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has." (p. 733.)

ii. Population Equality—State Districts.

1. **Basis for Rule:** Population equality requirement at the state level is based on the 14th Amendment's Equal Protection Clause, not Article I, § 2.

2. **Principles:**

a. For state redistricting, the constitutional allows more flexibility to deviate from absolute equality, compared with Congressional redistricting, as long as the deviations are supported by consistently applied, legitimate non-discriminatory reasons.

b. Courts have used a maximum deviation of 10% as a rebuttable presumption of constitutionality.

3. Key Cases

a. *Reynolds v. Sims*, 377 U.S. 533 (1964).

i. Context: Challenge to Alabama reapportionment scheme. Lower court found scheme invalid under Equal Protection Clause in that the apportionment was not on a population basis.

ii. The Equal Protection Clause requires that seats in both houses of a bicameral state legislation must be

apportioned on a population basis—otherwise certain citizens may have their right to vote impaired/diluted.

1. "In *Baker v. Carr*, 369 U.S. 186, we held that a claim asserted under the Equal Protection Clause challenging the constitutionality of a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by federal courts." (p. 556.)

2. "It could hardly be gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted." (p. 562.)

iii. There is "somewhat more flexibility" with state legislative apportionment, compared with congressional apportionment, in terms of absolute population equality

1. "Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment." (p. 578.)

iv. Deviations from absolute equality must be supported by legitimate considerations—which do *not* include history or geography alone, or economic/group interests.

1. "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are

permissible factors in attempting to justify disparities from population-based representation…. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle….. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing." (pp. 579-80.)

b. *Larios v. Cox*, 300 F. Supp. 1320 (N.D. Ga. 2004), *aff'd* 542 U.S. 947 (2004).

i. Context: Three-judge court reviewed Georgia's decennial redistricting of state senate and house and found deviations from the equal population that were not justified by appropriate considerations—even though the deviations in population were less than 10%, which other courts had used as a rebuttable presumption of constitutionality. U.S. Supreme Court's summary affirmance suggests that there is no strict 10% safe harbor for state redistricting.

ii. Deviations from absolute equality must be supported by legitimate state interests such as making districts compact and contiguous and maintaining the cores of prior districts.

1. "While the Court has allowed some flexibility in state legislative reapportionment and, to a lesser extent, in congressional reapportionment, the central and invariable objective in both instances remains equal representation for equal numbers of people. Thus, deviations from exact population equality may be allowed in some instances in order to further legitimate state interests such as making districts compact and contiguous, respecting political subdivisions, maintaining the cores of prior districts, and avoiding incumbent pairings. However, where population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny. (pp. 1337-38.)

iii. Prior Supreme Court decisions indicate that deviations under 10% may be presumptively constitutional.

1. "In reviewing one person, one vote challenges to state legislative plans, the Supreme Court has adopted a so-called 'ten percent rule' for allocating the burden of proof… [T]he Court eventually stated in more precise terms that, as a general matter, 'an apportionment plan with a maximum population deviation *under 10%* falls within this category of minor deviations' that are insufficient to make out a prima facie case of discrimination in violation of the Fourteenth Amendment. *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (emphasis added). In contrast, a plan with a higher maximum deviation 'creates a prima facie case of discrimination and therefore must be justified by the State.' *Id.* at 842-43. In considering legitimate justifications, courts must consider '[t]he consistency of application and the neutrality of effect of the nonpopulation criteria' in order to determine whether a state legislative reapportionment plan violates the Fourteenth Amendment." (pp. 1339-40.)

iv. The "10% Rule" is a *rebuttable* presumption.

1. "Most lower courts presented with challenges to plans with population deviations of less than 10% have concluded that such plans are not automatically immune from constitutional attack…. [F]or deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an honest and good faith effort to construct districts as nearly of equal population as is practicable. However, this is a rebuttable presumption." (p. 1340.)

2. "We agree that state legislative plans with population deviations of less than 10% may be challenged based on alleged violation of the one person, one vote principle. Indeed, the very fact that the Supreme Court has described the ten percent rule in terms of 'prima facie constitutional validity' unmistakably indicates that 10% is not a safe harbor. Had the Court intended to foreclose all one person, one vote challenges to plans with population deviations not rising to the 10% level, the Court would undoubtedly have said as much, rather than expressing that such plans are merely 'prima facie'—in other words, rebuttably—constitutional." (pp. 1340-41.)

v. Georgia's plan was unconstitutional even though deviations were (barely) less than 10% (9.98%).

1. "[T]he policies the population window was used to promote in this case were not 'free from any taint of arbitrariness or discrimination.' The record makes abundantly clear that the population deviations in the Georgia House and Senate were not driven by any traditional redistricting criteria such as compactness, contiguity, and preserving county lines. Instead, the defense has put forth two basic explanations for the

population deviations. First, witnesses for the defendant have repeatedly asserted—and a look at the redistricting maps does nothing to dispel the notion—that a powerful cause of the deviations in both plans was the concerted effort to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence (at the expense of suburban Atlanta), even as the rate of population growth in those areas was substantially lower than that of other parts of the state. Second, the deviations were created to protect incumbents in a wholly inconsistent and discriminatory way. On this record, neither explanation can convert a baldly unconstitutional scheme into a lawful one." (pp. 1341-42.)

iii. Perspective on Population Equality.

1. With modern technology, absolute equality is easy to achieve.

2. Despite the leeway (especially at the state-legislative level), we recommend a deviation of no more than 1% in most cases and no more than 2%, in each case justified by legitimate state criteria, which was endorsed in *Wilson v. Eu*, 1Cal.4th 707 (1992).

3. In *Wilson*, 1 Cal.4th at 718 , the California Supreme Court ruled that deviations of state legislative districts of less than 1 percent from ideal equality were amply justified by legitimate state objectives, "namely, the need to form reasonably compact districts, to use census tracts rather than blocks in forming districts . . . , and to comply with the Voting Rights Act."

6. Other Criteria For Consideration Under Article XXI, Section 2(d)

a. Generally

i. Historical perspective

1. Many of these criteria originated in the work of special masters on the 1973 redistricting plans.

   a. *Wilson v. Eu*, 1 Cal. 4th at 714: "These 1973 criteria include (1) equality of population, (2) contiguity and compactness of districts, (3) respect for county and city boundaries, (4) preservation of the integrity of the state's geographical regions, (5) consideration of the 'community of interests' of each area, (6) formation of state senatorial districts from adjacent assembly districts ('nesting'), and use of assembly district boundaries in drawing congressional district boundaries, and (7) reliance on the current census, and on undivided census tracts."

2. Some were then adopted into the California constitution in 1980.

    a. The standards adopted in 1980 included (1) consecutively numbered single-member districts, (2) "reasonably equal" populations among districts of the same type, (3) contiguous districts, and (4) "respect" for the "geographical integrity of any city, county, or city and county, or of any geographical region" to the extent possible without violating the other standards.

3. In the 1990s, the Special Masters applied and interpreted these criteria and those adopted by the Special Masters in the 1970s.

4. It is important to remember that there are differences in language between the 1973 criteria, the 1980 constitutional standards, and the current constitutional language in Section 2(d) that the Commission is to apply.

ii. Protection from federal constitutional challenges.

1. Explicit and consistent reliance on the redistricting criteria specified in Section 2(d) and other legitimate, traditional redistricting criteria can help avoid federal constitutional challenges.

    a. *Shaw v. Reno*, 509 U.S. 630, 647 (1993): "We emphasize that these criteria are important not because they are constitutionally required—they are not—but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines.".

    b. *Cano v. Davis*, 211 F. Supp. 2d 1208, 1221-22 (C.D. Cal. 2002): A three-judge federal panel held that California redistricting plans did not violate the federal Constitution in part because the legislature did not "abandon[] its traditional districting principles, or subordinate them to racial considerations," but rather "rigorously applied" them.

2. In other words, adhering to these criteria in drawing district lines can help defeat a claim that race was the "predominant factor" in a redistricting plan.

iii. **Judicial deference** to districts drawn in conformity with Section 2(d)-like criteria.

1. *Nadler v. Schwarzenegger*, 137 Cal. App. 4th 1327, 1340 (2006): "Courts must approve a reapportionment plan if it appears to reflect a reasonable application of the standards, even though alternatives may appear equally reasonable."

iv. **Failure to comply** can lead to invalidation of the redistricting plan.

1. A plan that fails to comply with a state constitution's "traditional" redistricting provisions like those found in Section 2(d)—for instance, a plan that disregards these criteria in creating minority influence districts that are permitted but not required by federal law—could be subject to challenge.

2. *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009): state-law requirement trumped legislature's desire to enhance minority voting strength by drawing crossover district that was not required by VRA.

b. Geographic contiguity – (d)(3)

i. **Text**: "Districts shall be geographically contiguous."

ii. "Functional" or literal approach to contiguity?

1. Special Masters in the 1990s, applying the 1980 constitutional provisions, used functional approach: "The constitutional requirement of 'contiguity' is not an abstract or geometric technical phrase. It assumes meaning when seen in combination with concepts of 'regional integrity' and 'community of interest.'"

2. The California Supreme Court "approve[d] in principle the Masters' concept of functional contiguity and compactness." *Wilson v. Eu*, 1 Cal. 4th at 725.

3. The Masters reviewed the ballot materials supporting the adoption of a contiguity standard in the California Constitution and noted that the Legislative Analyst's analysis explained that it "'would require districts be composed of adjacent territory and not widely separated areas. It would also help deter odd-shaped districts which join distant communities only by corridors along beaches, highways and waterways.'" *Wilson v. Eu*, 1 Cal.4th at 759, quoting Ballot Pamp., Proposed Amends. To Cal. Const. with arguments to voters, Primary Elec. (June 3, 1980).

4. Another definition of contiguity is that the entirety of the district is connected.. Example: Arizona and Colorado courts have defined contiguity as "the geographic connection uniting the entirety of a district. . . . A district that is geographically separated is not contiguous." *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 211 Ariz. 377, 363 (2006) (citing *Carstens v. Lamm*, 543 F. Supp. 68, 88 (D. Colo. 1982)).

c. Geographic integrity – (d)(4)

i. **Text**: "The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that *minimizes their division to the extent possible* without violating the requirements of any of the preceding subdivisions."

1. The prior constitutional provision only required that the geographic integrity of cities, counties, and geographic regions "be respected to the extent possible." Propositions 11 and 20 are more specific, and require that divisions be minimized to the extent possible. [2]

ii. Definition of "community of interest"

1. **Text**: "A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process. Communities of interest shall not include relationships with political parties, incumbents, or political candidates."

2. This definition was taken from the definition developed by the Special Masters in the 1970s and used by the Special Masters in the 1990s.

3. It does not include relationships with political parties, incumbents, or political candidates. *See also* Section 2(e) ("The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party.").

4. Community of interest is qualified by the term "local" in Proposition 20.

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[2] "The geographical integrity of any city, county, or city and county, or of any geographical region shall be respected to the extent possible without violating any other subdivision of this section." Cal. Const. Art. XXI, § 1(e) (2006).

d. Geographic compactness – (d)(5)

i. **Text**: "To the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population."

ii. While compactness is not fully defined, at a minimum, it requires that nearby areas of population not be bypassed for more distant population.

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