Drawing the Line 2001

Redistricting in Virginia

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Process, Population, and Law

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More than half of today's members of the General Assembly face their first decennial redistricting session.[1] What should General Assembly members know now to be ready to redistrict in 2001? How does the redistricting process work? How will redistricting in 2001 differ from redistricting in 1991? What are today's legal standards for drawing redistricting plans that will stand up to court challenges? What information and technology will be used to draw plans?

This is the first in what will be several reports on redistricting.[2] It gives an overall description of the process and highlights developments in the redistricting scene since 1991. Preparations for redistricting have been underway since 1998 under the oversight of the Joint Reapportionment Committee.[3] That Committee has supervised the efforts of the Division of Legislative Services to be ready to provide the information and services that the General Assembly will need to meet its constitutional obligation to redraw congressional and state legislative district lines in 2001.

I. Virginia's Redistricting Process

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.
>
> Any such reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution.[4]

The legislature in Virginia, as in most states, draws congressional and state legislative district lines. In final form, a redistricting plan is a bill: introduced by a member; considered in committee; passed by both houses; and signed, returned for amendment, or vetoed by the Governor.

A redistricting plan can originate with the Committee on Privileges and Elections, an individual member of the General Assembly, or another interested individual or group. Before any plan can become law, it must be converted to bill form and introduced by a member.

Under the Constitution, redistricting must take place in 2001, and redistricting laws take effect immediately. The usual four-fifths vote required for other emergency legislation does not apply to decennial redistricting laws.

Since Virginia is subject to § 5 of the Voting Rights Act, a redistricting plan cannot be put into

effect or used to conduct an election until it has been submitted to and precleared by the Department of Justice or, alternatively, by the District Court of the District of Columbia.

II. Shifts in Population: Estimated 2000 Population Figures

Population shifts trigger the need to redistrict. Virginia's 1990 population was 6,187,358. Population estimates and projections indicate that Virginia's 2000 population will be approximately 6,900,000.[5] The Commonwealth has grown approximately 11.5%.

These estimates and projections give numbers for the State and its counties and cities. The Joint Reapportionment Committee authorized the Division to purchase estimates for smaller geographic areas from a commercial vendor, from which the Division generated population estimates for the present General Assembly and congressional districts and the present voting precincts. These district and precinct estimates are available in more detail on the Division's web site at http://dls.state.va.us/gis/welcome.html.

The total state population is approximately 6,925,000 under these estimates. As noted on the explanation for the estimates in the "Read Me" file on the web site, the estimates should be viewed with caution particularly at the precinct level. See Table 1 and Table 2 for the estimates for the Senate and House of Delegates districts and their deviations from ideal population. The estimated range of deviations for Senate districts is +44% to -25%. The range of deviations for House of Delegates districts is +68% to -32%.

The Center for Public Service January 2000 *Spotlight on Virginia* reviews the population shifts in Virginia during the 1990's and points out the complexity of the picture. Shifts in the 1970s focused on the "urban corridor" along I-95 and shifts in the 1980s followed I-95 and I-64 east to Hampton Roads along the "golden crescent." But shifts in the 1990s are not easily pinpointed to one area. The picture is more diffuse with growth sprouting from the I-95 corridor in the Culpeper to King George area and along I-64 west to Albemarle. New prison populations can have significant impact on some smaller localities.

Localities gaining more than 20% in population under the Center's estimates include the Counties of Amelia, Bedford, Chesterfield, Culpeper, Fluvanna, Frederick, Goochland, Greene, Greensville, Hanover, James City, King George, Louisa, Loudoun, New Kent, Powhatan, Prince William, Richmond, Spotsylvania, Stafford, Sussex, and York and the Cities of Chesapeake and Manassas Park. Localities losing population include the Counties of Alleghany, Buchanan, Dickenson, Henry, Highland, Lee, Northampton, and Tazewell and the Cities of Bristol, Charlottesville, Clifton Forge, Covington, Danville, Franklin, Fredericksburg, Galax, Hopewell, Lynchburg, Martinsville, Norfolk, Norton, Petersburg, Portsmouth, Richmond, Roanoke, and Staunton.

III. The 2000 Census

A. Background

April 1, 2000, was the official census day for the twenty-second decennial census or count of the United States' population. The Census Bureau, a part of the United States Department of Commerce, conducts the census and has been working during 2000 to compile the reports it will issue on the country's April 1, 2000, population.

By December 31, 2000, the Census Bureau will issue its first report to the President of the United States—the official population for each of the 50 states for the purpose of apportioning seats in the House of Representatives. In January 2001, states will be informed officially of the number of congressional seats assigned to each state. Experts predict that Virginia will continue to have 11 congressional seats.

The United States Supreme Court ruled last year that the federal Census Act (13 U.S.C. § 1 *et seq.*) prohibits the use of statistically adjusted numbers to apportion the congressional seats among the states.[6] The numbers released December 31, 2000, will be total state population numbers without any breakdown to the locality, precinct, or census block level.[7]

B. Redistricting Data—Maps and Population Counts

The first detailed report produced by the Census Bureau will be the information needed by the states and localities to redraw the boundaries of congressional, state legislative, and local election districts. Under current federal law, the Bureau must

report this redistricting data to the 50 states by April 1, 2001. Congress passed this law in 1975 (Public Law 94-171) so that the states would be able to redistrict as promptly as possible after the decennial census. The Census Bureau has stated that Virginia will have priority for the delivery of the redistricting data because of its tight timetable to redistrict in time for 2001 House of Delegates elections. Virginia received the data on February 25, 1981, and January 22, 1991, but the Bureau has indicated that it will be March before the 2000 census data is released to Virginia.

There are two basic pieces of information needed to redraw election district lines: maps and population data. The Census Bureau will provide both items. A major development for the 2000 Census is the use of the Internet to distribute both maps and data.

Maps. The Census Bureau has created a digital database it calls TIGER,[8] which supports mapping functions. It does not contain statistical reports. The TIGER/Line files were used in redistricting in 1991, and the Bureau has been editing and updating these files continuously.

The Bureau has reported that the 2000 TIGER/Line files will be available on the Internet in the first quarter of 2001. This will be the first release of the TIGER/Line files that is specifically designed to support redistricting functions and will contain the numbered census blocks to match the numbered census blocks for which population numbers are given. The 2000 maps are the most detailed ever. Census maps for 1980 showed approximately 73,000 blocks in Virginia. There were roughly 150,000 blocks on the 1990 census maps for the Commonwealth. Virginia expects the 2000 Census maps to show about 210,000 blocks.

These files contain a digital database of geographic features for the entire United States—features such as streets, highways, railroads, rivers, political boundaries, census statistical boundaries, and more. The database contains information about these features such as their location in latitude and longitude, the name, the type of feature, address ranges for most streets, the geographic relationship to other features, and other related information.

These files are not graphic images of maps. They contain digital data describing geographic features. To use these data, a user must have mapping or Geographic Information System (GIS) software that can import TIGER/Line files. The General Assembly will be using a new GIS system for redistricting in 2001 based on standard GIS technology and a redistricting application called autoBound provided by Digital Engineering Corporation.

Geographic units. There are a number of geographic units that will be shown on the census maps:

- Counties and cities.
- VTDs or voting districts–these are the precincts. Each precinct will be coded with a six-digit number representing the census locality code and the State Board of Elections precinct code. For example, Accomack County's Chincoteague Precinct will be coded as 001101. The code for Accomack is 001 and the Chincoteague Precinct is number 101. An asterisk after the VTD code indicates that the precinct is a "true" or actual precinct as opposed to a "pseudo" precinct.[9]
- Minor civil divisions–these will be county magisterial or election districts.
- Census tracts–these are census statistical areas averaging about 4,000 people. The tracts tend to remain the same from one census to the next.
- Census block groups–these are sets of census blocks within a tract and identified by the same first digit.
- Census blocks–these are the smallest census geographic areas. A block may be as small as one city block defined by four streets or as large as several square miles in rural areas. The average population for a block nationwide is 100 people. Blocks are identified by a four-digit number, unique within a 2000 Census tract.
- State legislative and congressional districts. For the first time, the 2000 Census maps will show these districts on the census maps as the districts exist in 2000.

Data for each geographic unit. The Census Bureau will publish population statistics for each geographic unit described above down to the level of each census block. The Census 2000 Redistricting Data Summary File will provide the population counts down to the block level and be available on the Internet and CD-ROM in March 2001. The Bureau will place the population data on the Internet using the American FactFinder and is promoting use

TABLE 1: House of Delegates Districts

Ideal District Population: 69,253

District	Total Population	Deviation from Ideal	Percent Deviation	District	Total Population	Deviation from Ideal	Percent Deviation
1	60,965	-8,288	-12	51	73,436	+4,183	+6
2	63,635	-5,618	-8	52	77,479	+8,226	+12
3	61,879	-7,374	-11	53	73,716	+4,463	+6
4	67,211	-2,042	-3	54	82,721	+13,468	+19
5	63,710	-5,543	-8	55	86,107	+16,854	+24
6	64,856	-4,397	-6	56	89,315	+20,062	+29
7	61,476	-7,777	-11	57	65,746	-3,507	-5
8	64,108	-5,145	-7	58	76,943	+7,690	+11
9	70,436	+1,183	+2	59	67,830	-1,423	-2
10	63,561	-5,692	-8	60	63,810	-5,443	-8
11	62,592	-6,661	-10	61	65,132	-4,121	-6
12	63,583	-5,670	-8	62	71,191	+1,938	+3
13	89,296	+20,043	+29	63	60,152	-9,101	-13
14	66,192	-3,061	-4	64	71,028	+1,775	+3
15	72,051	+2,798	+4	65	83,256	+14,003	+20
16	61,557	-7,696	-11	66	81,110	+11,857	+17
17	59,768	-9,485	-14	67	86,504	+17,251	+25
18	64,817	-4,436	-6	68	66,140	-3,113	-4
19	74,912	+5,659	+8	69	59,768	-9,485	-14
20	60,850	-8,403	-12	70	57,669	-11,584	-17
21	68,957	-296	0	71	56,577	-12,676	-18
22	67,985	-1,268	-2	72	77,414	+8,161	+12
23	60,399	-8,854	-13	73	77,573	+8,320	+12
24	69,272	+19	0	74	65,542	-3,711	-5
25	67,825	-1,428	-2	75	65,446	-3,807	-5
26	71,503	+2,250	+3	76	76,700	+7,447	+11
27	72,779	+3,526	+5	77	76,525	+7,272	+11
28	93,750	+24,497	+35	78	87,443	+18,190	+26
29	76,772	+7,519	+11	79	64,312	-4,941	-7
30	77,114	+7,861	+11	80	54,248	-15,005	-22
31	71,469	+2,216	+3	81	69,737	+484	+1
32	116,051	+46,798	+68	82	66,813	-2,440	-4
33	85,149	+15,896	+23	83	65,959	-3,294	-5
34	73,686	+4,433	+6	84	73,306	+4,053	+6
35	74,031	+4,778	+7	85	67,247	-2,006	-3
36	80,365	+11,112	+16	86	46,938	-22,315	-32
37	66,683	-2,570	-4	87	50,325	-18,928	-27
38	66,480	-2,773	-4	88	51,806	-17,447	-25
39	62,760	-6,493	-9	89	51,668	-17,585	-25
40	80,751	+11,498	+17	90	54,313	-14,940	-22
41	68,632	-621	-1	91	61,032	-8,221	-12
42	62,387	-6,866	-10	92	58,760	-10,493	-15
43	77,517	+8,264	+12	93	68,680	-573	-1
44	62,734	-6,519	-9	94	62,782	-6,471	-9
45	64,119	-5,134	-7	95	59,888	-9,365	-14
46	64,757	-4,496	-6	96	80,674	+11,421	+16
47	64,105	-5,148	-7	97	80,981	+11,728	+17
48	68,454	-799	-1	98	73,539	+4,286	+6
49	62,403	-6,850	-10	99	68,052	-1,201	-2
50	74,400	+5,147	+7	100	61,243	-8,010	-12

TABLE 2: Senate Districts
Ideal District Population: 173,111

District	Total Population	Deviation from Ideal	Percent Deviation	District	Total Population	Deviation from Ideal	Percent Deviation
1	172,441	-670	0	21	154,519	-18,592	-11
2	148,532	-24,579	-14	22	163,364	-9,747	-6
3	187,330	+14,219	+8	23	164,258	-8,853	-5
4	198,394	+25,283	+15	24	170,064	-3,047	-2
5	138,201	-34,910	-20	25	169,500	-3,611	-2
6	130,564	-42,547	-25	26	183,401	+10,290	+6
7	157,537	-15,574	-9	27	180,166	+7,05	+4
8	176,689	+3,578	+2	28	210,006	+36,895	+21
9	143,390	-29,721	-17	29	198,817	+25,706	+15
10	171,366	-1,745	-1	30	165,892	-7,219	-4
11	183,995	+10,884	+6	31	163,977	-9,134	-5
12	180,664	+7,553	+4	32	183,186	+10,075	+6
13	165,544	-7,567	-4	33	249,809	+76,698	+44
14	212,621	+39,510	+23	34	171,695	-1,416	-1
15	167,314	-5,797	-3	35	164,393	-8,718	-5
16	147,978	-25,133	-15	36	173,461	+350	0
17	204,803	+31,692	+18	37	214,288	+41,177	+24
18	165,856	-7,255	-4	38	152,235	-20,876	-12
19	154,868	-18,243	-11	39	161,339	-11,772	-7
20	162,743	-10,368	-6	40	159,232	-13,879	-8

of the Internet to retrieve information in lieu of distributing voluminous paper reports.

Total population and voting age population. In 1991 the Bureau reported the total population for each geographic unit and, for the first time, the voting age population for each geographic unit. Voting age population numbers will be reported again in 2001. The Bureau also reports the total and voting age population numbers for each racial category listed below and for persons of Hispanic/Non-Hispanic origin.

New racial categories and multi-race responses. More detailed information will be provided in the 2000 Census than ever before as the result of changes in the reporting of racial data. In the early 1990s, the federal Office of Management and Budget (OMB) reviewed the policy that guided the reporting of racial data in the census and other federal programs. That policy was first issued in 1977 and is known as Directive 15. It provided that federal data on race, including census data, would use five categories: white, black, American Indian/ Alaska Native, Asian/Pacific Islander, and other race. It also allowed a separate question on Hispanic ethnicity.

The OMB review was prompted by indications that a growing number of people would prefer to respond to the census or other federal questionnaires that they were multi-racial. After several years of hearings and research, OMB issued a revised Directive 15 in October 1997. The results of these revisions on the 2000 Census questionnaire were:

- To divide the Asian/Pacific Islander category into two categories: (i) Asian and (ii) Native Hawaiian and Other Pacific Islander.
- To report on the basis of six categories: African-American or Black, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, White, and other race.
- To provide that respondents must be allowed to mark one or more than one of the six racial categories and have the opportunity to indicate a multi-racial background.
- To provide a separate question, before the race question, to allow respondents to indicate whether or not they identify themselves as Hispanic or Latino.

Detailed statistics on race. In September 1999, the Bureau announced that the 2000 Census PL 94-171 data reports will include the full range of racial detail: the six racial categories plus the 57 possible categories for persons who choose more than one race (ranging from two races to all six racial categories). Thus 63 racial numbers will be given for each geographic unit from the state level to the census block level. These 63 numbers will be cross-tabulated by Hispanic/Non-Hispanic origin and given for the total population and the voting age population. There can be 252 numbers for any geographic unit. The Bureau reported in its "Strength in Numbers" guide to Census 2000 redistricting data that its decision to provide the full range of racial detail will "provide users the maximum flexibility for analyzing these new data for any area. This flexible design also met the needs of the Department of Justice for enforcement of civil rights programs."

In developing redistricting plans and reports, it will be necessary to aggregate and allocate these multi-race numbers to a manageable number. The Statistical Policy Office of the OMB issued Bulletin 00-02 on March 9, 2000. One approach suggested by the OMB Bulletin would be to consolidate the information as follows:

- Report each of the six single race categories: African-American or Black, American Indian and Alaska Native, Asian, Native Hawaiian and Other Pacific Islander, White, and other race.
- Allocate any combination of white and one other race category to the minority race category.
- If any combination of minority race categories is greater than one percent of the population, allocate that number to the most populous minority race category in the combination.
- Report one number for the balance of multiple minority race categories.

The addition of these four categories will equal 100 percent of the total population. This approach reduces the 63 items of racial data to a more manageable 12 plus items. The Department of Justice may also issue guidance on this issue but has not done so as of November 2000.

C. Redistricting Data—Two Sets of Census Numbers

Background—Accuracy and undercounts. The census cannot be 100 percent accurate. According to the Census Bureau, the 1990 Census was the first census less accurate than its predecessor. There was an overall undercount of 1.6 percent nationwide. That undercount was not uniform, and the census missed a disproportionate number of racial and ethnic minorities. According to the Bureau's numbers, the nationwide undercount was 4.4 percent for African-Americans, 5 percent for Hispanics, and 12.2 percent for American Indians living on reservations. For Virginia, the Bureau reported a 2.0 percent undercount of total population, including 1.5 percent for whites, 3.8 percent for African-Americans, and 6.6 percent for Hispanics.

Statistically adjusted census numbers. In 1997, the Census Bureau outlined procedures to statistically adjust the 2000 actual count as a way to reduce the differential undercount. That plan was controversial and challenged in court. As noted above, the United States Supreme Court ruled last year that the federal Census Act (13 U.S.C. § 1 *et seq.*) prohibits the use of statistically adjusted numbers to apportion the congressional seats among the states.[10] Debate continues on the issue whether statistically adjusted numbers can be used for redrawing congressional, state legislative, and local election district lines.

Actual and adjusted census data. In 1997, Congress passed an appropriations act for a number of federal agencies including the Department of Commerce and the Census Bureau (Public Law 105-119). Section 209 (j) of that act requires the Bureau to release actual counts for the PL 94-171 redistricting data.

The Census Bureau has said that it will report two sets of population numbers for redistricting in 2001 – the numbers produced by the actual enumeration and the numbers resulting from statistical adjustments based on a post-enumeration survey. The Bureau has said that it expects the adjusted numbers to be more accurate than the actual counts. However, it also has stated that it will review the adjusted numbers and release them only if its review shows that the adjusted numbers are more accurate than the actual numbers. It will decide this question and release the actual numbers, with or without the adjusted numbers, by April 1, 2001, the federal law deadline for providing redistricting data.

Chapter 884, 2000 Acts of Assembly. The 2000 General Assembly enacted legislation (Chapter 884) requiring the General Assembly and local governing bodies to use the actual numbers for redistricting and prohibiting the use of statistically modified numbers in redistricting.[11]

Commonwealth v. Reno. The Commonwealth filed suit in the federal District Court of the District of Columbia asking for preclearance of Chapter 884 under § 5 of the Voting Rights Act. The suit asked the Court to find that Chapter 884 did not require preclearance because it does not change Virginia's past practice of using actual population numbers or, alternatively, to preclear Chapter 884 because it does not dilute minority voting strength. The Commonwealth also asked the Court to rule that the Department of Justice should use actual counts to review redistricting plans under § 5. The Department of Justice argued that the suit was premature because the Census Bureau has not made a final decision to release the statistically adjusted numbers. On October 17, 2000, the Court agreed with the Department and dismissed the Commonwealth's suit as premature. The Commonwealth has filed its notice of appeal to the United States Supreme Court and is proceeding with the appeal.

Current status. As of November 2000, Virginia state law requires the use of actual population counts, and the Commonwealth expects to receive those counts in March 2001. Whether the State will also receive and use statistically adjusted counts depends on future occurrences and the outcome of the Commonwealth's appeal in *Commonwealth v. Reno*. Whether the Department of Justice will review redistricting plans using actual numbers or statistically modified numbers or both is now unknown. If two sets of numbers are released, the differences between the actual and modified numbers may not be great, but the amount of difference is now unknown. If two full sets of numbers are released, the volume of statistical data for redistricting will be doubled.

IV. Legal Issues

A. Equal Population

Ideal districts and deviations from the ideal. The "one person/one vote" standard determines whether population shifts will require changes in existing districts. The legal standards governing permissible population deviations have remained relatively constant during the 1990s.

The starting point for measuring the inequality among districts is the ideal district, the total state population divided by the number of districts. Using the estimated state population of 6,925,000, the ideal district size would be:

Congressional (11 districts)	629,545
State Senate (40 districts)	173,125
House of Delegates (100 districts)	69,250

The way to measure how far a plan departs from the ideal involves looking at each individual district and at the overall plan. An individual **district deviation** can be stated as an absolute number or a percentage. Usually the inequality or deviation is expressed in percentage terms. For example, assume a 69,250 ideal House district size, a district with 71,000 population would have 1,750 too many people or a +2.5% district deviation (the difference between the actual district and the ideal district populations divided by the ideal district population.)

The deviation for an overall plan is most often expressed either:

(i) in terms of the **deviation range**—the range from the largest plus (+) deviation to the largest minus (-) deviation—a +5% to -5% deviation range; or

(ii) in terms of the **total or overall deviation**—the sum of the largest plus (+) deviation and the largest minus (-) deviation, ignoring the plus and minus signs—a 10% total or overall deviation.

Other measures of deviations in a plan are designed to show how many districts are clustered near the ideal district size, such as the mean or average district deviations.

Congressional districts—strict equality. Congressional districts must be drawn with virtually equal populations. In a series of cases, the Supreme Court has interpreted Article I, Section 2 of the United States Constitution as prohibiting inequalities among the congressional districts within a state, and it applied an increasingly strict standard of equality through the 1980s.[12]

In *Karcher v. Daggett*, the Supreme Court held in 1983 that no matter how small the deviations among the districts in a congressional plan, the plan could be challenged if any other plan had smaller deviations and the state could not show a rational justification for the deviation. The Court overturned a New Jersey congressional plan with an overall deviation range of .6984% after plaintiffs showed a

plan had been filed with an overall deviation range of .4514%. The Court rejected the defendants' justification for the deviations on the ground that it was not uniformly applied statewide.

During the 1990s, more than half of the congressional plans drawn by the states had an overall deviation that rounded to 0.00%.[13] A number of states had plans with a deviation of only one person. Several plans drawn during the 1990s to revise congressional district plans in the course of racial gerrymandering claims have deviations in the 0.82% to 0.14% range. Virginia's 1991 congressional district plan had a 0.00% deviation for each district. The 1998 revised congressional district plan had an overall deviation of 0.14% based on 1990 census figures.[14]

State legislative districts—the 10% standard. A different standard applies to state legislative districts. In its interpretation of the requirements of the equal protection clause of the Fourteenth Amendment, the Supreme Court has required states to draw legislative districts that are substantially equal in population. The Court has held that a plan with an overall deviation of less than 10% is "prima facie" valid.[15]

Speaking for a unanimous Court in 1993, Justice O'Connor confirmed that a less than 10% total deviation in a state legislative plan is presumptively acceptable and quoted from a past opinion that:

> "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."[16]

There are instances where a total deviation in excess of 10 percent has been upheld.[17] **But** the body that drew the plan will have the burden to show a rational public policy necessitates the higher deviation. The only policy found valid to date has been the preservation of political subdivisions and the avoidance of splitting counties, cities, or towns.

Case law suggests that state legislatures should draw state legislative district plans with the goal of substantial population equality among districts and a less than +5% to –5% deviation range. There is no guarantee that a state legislative district plan with a less than 10% overall deviation cannot be challenged by a plaintiff with a plan that has a lesser deviation and that satisfies other legitimate redistricting criteria such as compactness. The burden will be on that plaintiff to discredit the legislature's plan.

B. Compactness and Contiguity

Article II, Section 2, of the Virginia Constitution provides that election districts "shall be composed of contiguous and compact territory." In 1992, the Virginia Supreme Court reviewed the "contiguous and compact territory" requirement in a challenge to two Senate districts created by the 1991 General Assembly.

In a five-to-two decision, the Court upheld the districts and ruled that the compactness requirement applies only to the shape of a district and not to the content of the district. The Court advised that combining different communities of interest (such as urban and rural communities) in a district was a policy matter and not a factor to be weighed in applying compactness requirements. The Court gave "proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment."[18]

The Court referred to the resolution setting out criteria to be applied in redistricting that the Senate Committee on Privileges and Elections had adopted in 1991. With respect to compactness, that resolution stated: "Districts shall be reasonably compact. Irregular district shapes may be justified because the district line follows a political subdivision boundary or significant geographic feature."

There are several statistical methods to measure the comparative compactness of districts. These measures may produce different results and are offered by expert witnesses in litigation. The courts have not agreed on one single measure of compactness and have often relied on the appearance of a district–a visual or "eyeball" evaluation.[19]

The contiguity requirement means that a district must be composed of one geographic area and not two or more separate pieces. The lower

court in the *Jamerson* case ruled that an intervening body of water or wetlands will not defeat contiguity. Buggs Island Lake connected two parts of Senate District 18.[20]

C. Compliance with the Voting Rights Act—§ 2

Section 2. All states are subject to § 2 of the Voting Rights Act as amended in 1982.[21] Section 2 prohibits any state from imposing a voting qualification or procedure that results in the denial or abridgment of the right to vote on account of race, color or status as a member of a language minority group. The plaintiff in a § 2 case may establish a violation of § 2

> . . . 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 [protected] class of citizens . . . 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.

Minority group members filing a § 2 challenge do not need to prove an intent to discriminate. The legal standard under § 2 to prove a violation is based on a "results" test. The court determines, based on the "totality of the circumstances," whether the plaintiffs have an equal opportunity "to participate in the political process and to elect representatives of their choice."

Thornburg v. Gingles. In 1986, the Supreme Court upheld the 1982 amendments to § 2 and the "results" test.[22] The Court's opinion stressed the fact-intensive nature of a § 2 case. *Gingles* spelled out three "preconditions" to a § 2 claim:

> . . . 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.
> . . . the minority group must be able to show that it is politically cohesive . . . [that it has] . . . distinctive minority group interests.
> . . . the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate.[23]

The Court upheld the lower court's ruling that the multi-member districts being challenged violated § 2 with the exception of one district in which black candidates had been elected in proportion to their population during several past elections.

Once a plaintiff meets the three *Gingles'* preconditions, the court will still examine other facts and the "totality of the circumstances." Other facts reviewed by the courts include:

- election successes by minority candidates and minority-preferred candidates;
- racially polarized voting patterns;
- the use of potentially dilutive mechanisms such as at-large districts or staggered terms;
- racial appeals in campaigns;
- candidate selection procedures;
- a past history of official discrimination;
- continuing adverse effects on minority groups of past discrimination;
- responsiveness of elected officials to minority concerns; and
- the policies justifying the challenged law or practice.

Expert evidence is frequently offered to prove or disprove a history of racially polarized voting and whether the majority votes as a bloc to the detriment of the minority. Evidence on racial bloc voting patterns is directed at proving or disproving the proposition that minority voters vote for minority candidates and white voters vote for white candidates – that racial voting patterns make it more difficult for minority groups to elect the candidates of their choice. A number of methods can be used to evaluate racial bloc voting patterns, and they can be complicated. One method looks at "homogeneous precincts"–how precincts in all white and all minority areas vote. A second statistical method is called "bivariate regression" analysis. It analyzes how voting patterns change with the racial makeup of the precincts. Additional forms of statistical analysis have evolved during the 1990s.

Majority-minority districts; influence districts. The cases do not specify an exact percent-

age required to constitute a majority-minority district as required in a *Gingles* analysis. The courts conduct a fact-specific inquiry and weigh the facts concerning total population, voting age population, and other factors. No single percentage can be said to be the number needed to create a majority-minority district.

A related issue involves minority influence districts—districts in which a minority may influence, if not control, the outcome of an election. The Supreme Court has not ruled on the question whether the Voting Rights Act can be used to require the creation or preservation of an influence district. The precise definition of an influence district (30%, 40%) remains unclear. Lower court opinions are divided on this issue.[24]

Summary. Redistricting plans that are precleared under § 5 can still be challenged under § 2 of the Voting Rights Act. Plaintiffs in § 2 cases have the burden to prove the violation. The trial involves a fact-intensive inquiry. This litigation can be costly and complex. The combination of the need to comply with § 2 and the need to comply with the new *Shaw* case law discussed below presents state legislatures with new redistricting challenges.

D. Compliance with the Voting Rights Act—§ 5

Section 5 preclearance. This provision of the Voting Rights Act covers only certain jurisdictions that have been determined to have a history of past discriminatory practices. Virginia and all of its political subdivisions are covered by § 5 with the exception of several localities that have "bailed out" of § 5 coverage.[25]

Under § 5, Virginia cannot implement any redistricting plan or other change in voting laws and practices until the plan or change is "precleared."

The State must submit the change to the Department of Justice (or alternatively to the District Court for the District of Columbia) and obtain a ruling that the plan meets § 5 standards. In most instances, a covered jurisdiction files its submission with the Department of Justice, rather than filing suit with the district court, to save time and money. If the Department of Justice denies preclearance, the jurisdiction may still file suit for a declaratory judgment and seek preclearance in the district court.

Preclearance standard–retrogression. The legal standard to show compliance with § 5 is proof that the plan or change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

With respect to the "effect" of a change, the Supreme Court has enunciated a "non-retrogression" standard. In *Beer v. United States,* the Court upheld preclearance of a redistricting plan for New Orleans that increased from one to two the number of African-American majority districts. The Department of Justice had denied preclearance and the District of Columbia District Court subsequently precleared the plan. The Supreme Court stated that ". . . the purpose of § 5 has always been 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."[26]

In *City of Lockhart v. United States,* the Court broadened the retrogression standard to cover a plan that did not offer any improvement in minority voting strength. The Supreme Court held: "Since the new plan did not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance. . . .Although there may have been no improvement in [minority] voting strength, there has been no retrogression either."[27]

During the 1991 round of redistricting, the Department of Justice refused to preclear a number of plans, citing the possible violation of § 2 standards and the possibility of creating additional majority-minority districts. Before 1998, Department regulations provided that a plan must comply with § 2 to gain § 5 preclearance. The Department has repealed that regulation in light of Supreme Court rulings.

In 1997, the Supreme Court held that the Department of Justice had exceeded its § 5 authority by denying preclearance on the grounds of a § 2 violation.[28] This year, a closely divided Court held that both the purpose and effect prongs of § 5 were subject to a retrogression test. Justice Scalia wrote for the five-member majority and described the "limited meaning that we have said preclearance has in the vote-dilution context":

> It does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be

> stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.[29]

A comparative analysis—the benchmark or baseline to judge retrogression. The determination whether retrogression has occurred requires a comparative analysis. The new plan must be compared to the existing plan. The state must look at the existing plan and its 2000 Census population data. Then it compares that plan to the new plan and its 2000 Census population data. There are several comparisons involved:

- Does the new plan have the same number or more majority-minority districts?
- Is the minority percentage in each new district greater or less than the minority percentage in each existing district?
- How has the population shifted among the districts?
- How has the racial population shifted among the districts?
- Does the election history of the state indicate that the percentage needed to create an effective majority-minority district in 2001 may be greater or less than that required in 1991?

The retrogression standard sounds simple, but its application to concrete redistricting plans may present some very hard questions in the coming round of redistricting.

Justice Scalia's opinion in the 2000 *Bossier Parish* case referred to the baseline concept. The Court held that the challenge to the 1992 plan was not moot simply because no further regular elections would be conducted under that plan:

> [I]n at least one respect the 1992 plan will have a probable continuing effect: Absent a successful subsequent challenge under § 2, it, rather than the 1980 predecessor plan – which contains quite different voting districts – will serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance.[30]

This quotation raises one problem relevant to the application of the retrogression standard in 2001: What happens if an existing plan that serves as the baseline was never challenged under the *Shaw* case law, discussed below, but could have been challenged? The problem for some jurisdictions under § 5 in 2001 will be how to deal with a baseline plan vulnerable to a *Shaw* challenge because it stretched the bounds of compactness to create majority-minority districts and, simultaneously, prove that its new plan retains minority voting strength and avoids impermissible § 5 retrogression. This conundrum will not be resolved before the next round of redistricting litigation.

E. Shaw v. Reno—*New Law on Race-Based Redistricting*

Shaw v. Reno. Prior to 1993, the concept of racial gerrymandering surfaced in cases of discrimination against minority groups. Examples of impermissible racial gerrymandering under the federal constitution or § 2 of the Voting Rights Act included "packing" minority voters into one minority-populated district to prevent them from having an effective voice in more than one district; or "cracking" a concentration of minority voters into several districts to prevent their effective control of one district. Challenges to "packing" and "cracking" will continue to be part of the racial gerrymandering picture but only a part of that picture.

In 1993, the Supreme Court held that plaintiffs could challenge the North Carolina congressional plan as an impermissible racial gerrymander under the Equal Protection Clause of the Fourteenth Amendment.[31] The *Shaw* plaintiffs were residents of the challenged district but did not sue as members of a minority or protected class. Racial gerrymandering took on a whole new meaning.

In a five-to-four decision, the Court observed that the redistricting plan in question was racially neutral on its face, but so "bizarre" that it was "unexplainable on grounds other than race." The Court explained that "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling government interest."[32]

In a series of cases since 1993, the Supreme Court has spoken to a number of the questions raised by *Shaw.*

Standing. To challenge a race-based redistricting plan, the plaintiff must be a resident of the challenged district or demonstrate a special harm caused to him by the redistricting.

> Where a plaintiff resides in a racially gerrymandered district, however, the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action.[33]

Race may be considered. The Court has recognized that race may be considered in the redistricting process and that the Voting Rights Act requires consideration of race. In 1993 in *Shaw*, the Court indicated that race-conscious redistricting is not necessarily unconstitutional.

> [T]his Court never has held that race-conscious state decision making is impermissible in *all* circumstances. . . . . redistricting differs from other kinds of state decision making in that the legislature always is *aware* of race when it draws district lines, just as it is aware of . . . a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible discrimination.[34]

Race cannot predominate. In a *Shaw* challenge, plaintiffs have the burden to prove race predominated in the legislature's actions.

> 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, respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."[35]

Examples of evidence used to show that race predominated have included the shape of the district, the configuration of the computer system used to draw plans, statements made by the jurisdiction in preclearance submissions, and testimony of participants in the redistricting process.[36]

Strict scrutiny and plans narrowly tailored to serve a compelling state interest. If a plaintiff shows that race predominated in the drawing of a district, the plan will be subject to strict scrutiny and the defendant must show that the plan was narrowly drawn to serve a compelling state interest.

The Supreme Court discussed both the strict scrutiny test and what constitutes a compelling State interest in *Bush v. Vera*.[37] The Court upheld the lower court's decision to invalidate three Texas congressional districts, applied the strict scrutiny standard, and rejected the State's proffered compelling reasons for its actions. Those reasons included compliance with the Voting Rights Act, politics, and incumbency protection. Justice O'Connor, who wrote the plurality opinion, took the unusual step of filing a separate concurring opinion in the case to set out rules to guide states in their task of reconciling the *Shaw* case law and Voting Rights Act. Here is her advice:

> Today's decisions, in conjunction with the recognition of the compelling state interest in compliance with the reasonably perceived requirements of § 2, present a workable framework for the achievement of these twin goals. I would summarize that framework, and the rules governing the States' consideration of race in the districting process, as follows.
>
> First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny. . . . Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race does strict scrutiny apply. . . .
>
> Second, where voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to . . . elect representatives of their choice." § 2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present—viz., (i) the minority group "is sufficiently large and geographically compact to constitute a majority in a single member district," (ii) "it is politically cohesive," and (iii) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate," . . . .

> Third, the 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.
>
> Fourth, if a State pursues that compelling interest by creating a district that "substantially addresses" the potential liability. . .and does not deviate substantially from a hypothetical court-drawn § 2 district *for predominantly racial reasons*, . . . its districting plan will be deemed narrowly tailored. . . . .
>
> Finally, however, districts that are bizarrely shaped and noncompact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, for predominantly racial reasons, are unconstitutional.[38]

The record for developing a redistricting plan must show how the jurisdiction balances "traditional redistricting criteria" and the need to comply with the Voting Rights Act.

F. Traditional Redistricting Criteria

Post-*Shaw* case law has recognized a number of "traditional redistricting criteria." These racially neutral criteria should be balanced with considerations of racial fairness and Voting Rights Act compliance. The record of the redistricting process should show that real consideration was given to these criteria—to the extent that racial considerations do not predominate the redistricting process. Courts have recognized a number of traditional criteria:

- Population equality;
- Compactness;
- Contiguity;
- Avoiding splits of political subdivisions and precincts;
- Preserving communities of interest;
- Preserving the basic shape of existing districts;
- Protecting incumbents and avoiding the pairing of incumbents;
- Political fairness or competitiveness; and
- Voter convenience and effective administration of elections.

Political issues and competitiveness will be part of the mix in considering traditional redistricting criteria, but challenges based on political gerrymandering are unlikely. The Supreme Court ruled in *Bandmer v. Davis*[39] that political gerrymandering can be challenged in court. However, the Court set a very high burden of proof for plaintiffs to show a substantial long-term negative effect on the plaintiff's political party. No plan has been overturned to date on grounds of political gerrymandering. In *Republican Party of Virginia v. Wilder,*[40] plaintiffs claimed that the pairing of 15 Republican and one independent incumbent members in eight districts constituted impermissible political gerrymandering. The district court refused to enjoin the 1991 House of Delegates election, and plaintiffs did not pursue the case after the 1991 election.

G. Balancing Competing Legal Requirements

States in 2001 will walk a tightrope between competing legal requirements. Traditional redistricting requirements must be considered. Race can be considered in conjunction with traditional criteria, but cannot predominate redistricting deliberations.

Jurisdictions covered by § 5 of the Voting Rights Act will carry the burden to show that the position of minority voters has not "retrogressed" under the new redistricting plan.

On November 27, 2000, the Supreme Court heard arguments in *Hunt v. Cromartie.*[41] The Court will have one more opportunity this term to give guidance on the application of *Shaw* case law. In this case, the Court will again review North Carolina congressional districts. It is not known whether the Court will issue its opinion in time to guide Virginia's redistricting process this spring.

Some lessons learned during the litigation of the 1990s include:

- The redistricting process should incorporate consideration of multiple factors.
- Building districts by blocks, rather than precincts or tracts, may suggest undue emphasis on detailed racial data.
- Traditional criteria such as compactness, respect for communities of interest, and incumbency

should be given substantial weight in drawing and discussing plans, designing reports on the plans, and designing the computer programs used to develop plans. Racial demographics can be considered but only as one aspect of the process.

- The submission of a plan for § 5 preclearance should demonstrate the consideration of both traditional redistricting criteria and racial demographics. Submission requirements as outlined in Part VI emphasize racial factors, but submission documentation can be used for more than § 5 preclearance purposes. As part of the redistricting record, the submission may become evidence in post-*Shaw* litigation.

Notes

[1] Nineteen members of the present Senate served in the General Assembly in the 1991 Special Sessions on redistricting. Nine members were in the Senate in 1991, and 10 members were in the House in 1991. Forty-three members of the present House of Delegates served in the 1991 Special Sessions on redistricting. Forty-two members were in the House in 1991, and one member was in the Senate in 1991. Most present members participated in the 1998 Session when the General Assembly redrew the lines for five of Virginia's congressional districts in response to the decision in *Moon v. Meadows*, 952 F.Supp. 1141 (E.D. Va. 1997) that held the Third Congressional District violated the Equal Protection Clause and was an invalid racial gerrymander.

[2] Future reports will cover the potential timetable for redistricting, the primary schedule for 2001, public hearing announcements, the details of the General Assembly's redistricting computer application, and further developments in the legal standards governing redistricting.

[3] The Joint Reapportionment Committee is composed of eight members: three members of the Senate Committee on Privileges and Elections appointed by the Committee chair and five members of the House Committee on Privileges and Elections appointed by the Committee chair. See, Virginia Code §§ 24.2-300 and 24.2-301. Its members are: Senator Kevin G. Miller, chair; Delegate Vincent F. Callahan, Jr., vice-chair; Senators Charles J. Colgan and J. Randy Forbes; and Delegates M. Kirkland Cox, V. Earl Dickinson, James H. Dillard II, and Marian Van Landingham.

[4] Constitution of Virginia, Article II, Section 6.

[5] The Virginia Employment Commission projection for 2000, issued in March 1999, is 6,992,045. The Census Bureau estimate for 7/1/99, issued 3/9/00, is 6,872,912. The Weldon Cooper Center for Public Service provisional estimate for 7/1/99, issued in January 2000, is 6,872,900.

[6] *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999).

[7] The total population for Virginia released December 31, 2000, will be greater than the state's total population for redistricting because the congressional apportionment numbers include overseas personnel that are allocated to the state but not allocated to specific counties, cities, and census blocks in the state.

[8] TIGER stands for the Bureau's Topologically Integrated Geographic Encoding and Referencing database of geographic information.

[9] **Actual and "pseudo" or false precincts.** Approximately 1,500 or 68 percent of the Commonwealth's 2,196 precincts now in effect have boundaries that meet the requirements for census block boundaries and § 24.2-305. The 2000 Census maps and population tables will show these precincts with an asterisk to indicate that the precinct is an "actual" precinct and the same as the locality's legal precinct.

Approximately 690 or 32 percent of the precincts have boundaries that do not fully meet these requirements. A part of the precinct's boundary may follow an invisible line and divide one or more census blocks. In these cases, the Division of Legislative Services worked with the Census Bureau and "adjusted" the precinct line for census purposes to follow the nearest census block line. The 2000 Census maps and population tables will show these "psuedo" precincts without the asterisk. In 1991 approximately 40 percent of Virginia's precincts were adjusted to meet census requirements for block boundaries.

Note: These "psuedo" precincts are used only for census purposes and to obtain census statistics for precincts. The precincts used to conduct elections are not changed by these technical census-related adjustments. If a state legislative district line follows a "pseudo" precinct line, it may split the locality's actual precinct.

Combined precincts. In approximately 70 instances, the local precinct could not be adjusted to follow a census block because there was no visible physical feature near the line described in the local precinct ordinance. In these cases, the census maps and population reports will show a combined precinct with the total population for the combined precincts.

[10] *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999).

[11] See, Code of Virginia, §§ 24.2-301.1 and 24.2-304.1.

[12] *Wesberry v. Sanders*, 376 U.S. 1 (1964. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). *White v. Regester*, 412 U.S. 124 (1971). *Karcher v. Daggett*, 462 U.S. 725 (1983).

[13] *Redistricting Law 2000*, National Conference of State Legislatures, 44-45 (1999). *The Realists' Guide to Redistricting*, American Bar Association, 3-8 (2000).

[14] The 1998 plan was drawn in response to the decision in *Moon v. Meadows*, 952 F.Supp. 1141 (E.D. Va. 1997). See note 1 above.

[15] As adjusted in 1994 and based on 1990 census data, the overall deviation range for the present Senate districts was +4.27% to -4.59% and the overall deviation range for the present House of Delegates districts was +4.97% to -4.95%.

[16] *Voinovich v. Quilter,* 507 U.S. 146, 161.

[17] *Mahan v. Howell,* 410 U.S. 315 (1973) (Virginia House of Delegates plan with a 16.4% total deviation justified by policy not to split counties and cities); *Brown v. Thomson,* 462 U.S. 835 (1983).

[18] *Jamerson v. Womack,* 244 Va. 506, 517.

[19] Compactness also is a factor in evaluating claims of vote dilution under § 2 of the Voting Rights Act as discussed below, and it is also a "traditional redistricting criteria" relevant in racial gerrymandering cases as discussed below.

[20] *Jamerson v. Womack,* Case HB-880, Circuit Court, City of Richmond (1992).

[21] 42 U.S.C. § 1973 (a) and (b) (1982).

[22] 478 U.S. 30 (1986).

[23] 478 U.S. at 50-51 (citations omitted).

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[24] Some lower courts have indicated that § 2 does not reach influence districts. See, for example, *DeBaca v. County of San Diego,* 794 F.Supp. 990 (S.D. Cal 1992) aff'd, 5 F.3d 535 (9th Cir. 1993). Compare, *Armour v. Ohio,* 775 F.Supp. 1044 (ND Ohio 1991); *Rural West Tennessee African American Affairs Council Inc. v. McWherter,* 877 F.Supp. 1096 (WD Tenn. 1994), aff'd 516 U.S. 801 (1995) (mem).

[25] Fairfax City, Frederick County and Shenandoah County have "bailed out" from coverage pursuant to § 4 of the Voting Rights Act by showing a ten-year record of compliance with the Voting Rights Act and meeting defined requirements. The United States consented to the declaratory judgment in each of those cases. These Virginia localities are the first jurisdictions nationwide to bail out successfully. Additional Virginia localities are pursuing this process.

[26] 425 U.S. 130, 141 (1976).

[27] 460 U.S. 125, 134-35 (1983).

[28] *Reno v. Bossier Parish School Board,* 520 U.S. 471 (1997).

[29] *Reno v. Bossier Parish School Board,* 120 S.Ct. 866, 875 (2000).

[30] 120 S.Ct. 866, 871 (2000).

[31] *Shaw v. Reno,* 509 U.S. 630 (1993).

[32] 509 U.S. at 643-44.

[33] *United States v. Hays,* 515 U.S. 737, 744-45. (1995).

[34] 509 U.S. at 642 and 646.

[35] *Miller v. Johnson,* 515 U.S. 900, 916 (1995) (citations omitted).

[36] See *Moon v. Meadows,* 952 F.Supp. 1141 (ED.Va. 1997).

[37] 517 U.S. 952 (1996).

[38] 517 U.S. at 993-94 (citations omitted).

[39] 478 U.S. 109 (1986).

[40] 774 F.Supp. 400 (WD Va. 1991).

[41] No. 99-1864 and No. 99-1865.