

# Redistricting 2010: *Legal Principles*

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## SUMMARY

There are four basic legal principles that govern the redistricting process:

- (1) One Person-One Vote;
- (2) Section 5 of the Voting Rights Act, which requires DOJ approval for changes in election procedures or practices;
- (3) Section 2 of the Voting Rights Act, which prohibits discrimination in elections; and
- (4) *Shaw v. Reno* limitations on the use of race as a factor.

## ONE PERSON -ONE VOTE

The “one person, one vote” requirement derived from the US Constitution requires that members of an elected body be drawn from districts of substantially equal population. This requirement applies to the single-member districts of “legislative” bodies such as city councils. Exact equality of population is not required. However, we must strive to create districts that have a total population deviation of no more than 10% (i.e., a deviation of 10% or less between the most heavily populated district and the least populated district). This 10% deviation is usually referred to as the “total maximum deviation.” It is measured against the *ideal* or *target* population for the governmental entity based on the most recent census.

The Town of Redistricting is required to first determine whether the population of its four single-member-district council districts are balanced. If the population deviation among the four districts exceeds the permissible total maximum deviation, the Town should redraw the boundaries.

## VOTING RIGHTS ACT

### *Preclearance*

Section 5 of the US Voting Rights Act, 42 U.S.C. §1973c, requires all “covered jurisdictions” to obtain pre-approval (i.e., to “preclear”) any changes to voting standard, practices, or procedure before they may become legally effective. The entire State of Texas has been identified in the applicable US Department of Justice (DOJ) regulations a “covered jurisdiction;” thus, all local governments in the State, as well as the State itself, are required to preclear any voting change, including their redistricting plan. This includes changes to any city councilmember district lines.

Preclearance may be accomplished in either of two ways:

- (a) Submitting the redistricting plan to DOJ for its examination and preclearance; or
- (b) Obtaining a declaratory judgment from a special federal district court in DC.

Submission to DOJ is by far the most common method chosen, and is usually substantially faster and less expensive.

### *Retrogression*

The legal standard applied by DOJ under Section 5 is whether the new plan has the purpose or the effect of denying or abridging the right to vote on account of race or color. This standard has been called the “retrogression” standard. In effect, it considers whether a minority group has been made worse off by a proposed change in voting standards, practices or procedures, such as a redistricting plan.<sup>1</sup>

The US Supreme Court has made it clear that DOJ is not to apply other standards in determining whether to preclear new districting plans.<sup>2</sup> The inquiry to be conducted by DOJ is whether the new plan has the purpose or effect of causing retrogression with respect to a minority group.

### *Benchmark*

To determine if retrogression exists, it is necessary to compare a *proposed* plan against a benchmark. Typically, that benchmark is the political subdivision’s *prior* (i.e., current) district boundary plan using the *new* population and demographic data.

DOJ’s retrogression analysis looks at the totality of a plan. If, in adjusting district boundaries, any retrogression from the benchmark plan has occurred, the burden will be on the Town of Redistricting to assure DOJ that as little retrogression has occurred as is reasonably feasible considering all of the circumstances.

### *Discrimination*

Section 2 of the Voting Rights Act forbids a voting standard, practice or procedure from having the effect of reducing the opportunity of members of a covered minority to participate in the political process and to elect representatives of their choice.<sup>3</sup> In practical terms, this non-discrimination provision prohibits districting practices that result in “packing” minorities into a single district in an effort to limit their voting strength. Also, “fracturing” minority populations into small groups in a number of districts, so that their overall voting strength is diminished, can constitute discrimination under Section 2. There is no magic number that designates the threshold of packing or fracturing. Each plan must be judged on a case-by-case basis.

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<sup>1</sup> While a political subdivision can strive to improve voting conditions for minorities, it is not required to do so under Section 5. Instead, the inquiry under Section 5 is whether the political subdivision made things worse for minorities.

<sup>2</sup> See *Miller v. Johnson*.

<sup>3</sup> Under Section 2, the issue is choice. Political subdivisions are not required to assure minority voters the opportunity to elect minority representatives because in reality minority voters might choose to elect non-minority candidates.

Although the Supreme Court has made clear that the DOJ may not consider Section 2 standards in determining whether to preclear a redistricting plan under Section 5, the Town of Redistricting cannot ignore Section 2 requirements. The anti-discrimination standards apply to the redistricting plan regardless of whether DOJ may legally consider them in the preclearance analysis. Failure to consider them adequately could risk litigation brought by a member of a protected minority group (e.g., LULAC or NAACP), or even by DOJ.<sup>4</sup>

The Supreme Court has defined the minimum requirements for a minority plaintiff to bring a Section 2 lawsuit. There is a three-pronged legal test the minority plaintiff must satisfy in order to bring suit:

- (1) the minority group's voting age population is numerically large enough and geographically compact enough so that a councilmember district with a numerical majority of the minority group can be drawn (i.e., it is possible to create a "majority minority district");<sup>5</sup>
- (2) the minority group is politically cohesive, that is, it usually votes and acts politically in concert on major issues; and
- (3) there is "polarized voting" (e.g., the Anglo majority usually votes to defeat candidates of the minority group's preference).<sup>6</sup>

### **SHAW V. RENO**

While satisfying Section 5 and Section 2 standards of the Voting Rights Act require a local government to explicitly consider race, the Supreme Court case of *Shaw v. Reno* places strict limits on the manner and degree in which race may be a factor. In effect, therefore, local governments like the Town of Redistricting must walk a legal tightrope, where the competing legal standards must all be met.

In *Shaw v. Reno*, the Supreme Court applied the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution to redistricting plans. According to the Court, where racial considerations predominate in the redistricting process to the subordination of traditional (non-race-based) factors, the use of race-based factors is subject to the "strict scrutiny" test. To pass this difficult test requires that there be a showing that:

- (1) the race-based factors were used in furtherance of a "compelling state interest;" and
- (2) the application of race-based factors is "narrowly tailored."<sup>7</sup>

A majority of the Supreme Court has indicated that compliance with Section 2 of the Voting Rights Act is a "compelling state interest." It is reasonable to assume that the Court would find that satisfying Section 5 of the Voting Rights Act would also be a compelling state interest for

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<sup>4</sup> It is possible for DOJ to approve a plan under Section 5 but bring suit under Section 2.

<sup>5</sup> In the federal appellate Fifth Circuit, which includes Texas, the minority population to be considered is *citizen* voting age population.

<sup>6</sup> *Thornburg v. Gingles*, 478 U.S. 30 (1986).

<sup>7</sup> e.g., they must be used only to the minimum extent necessary to accomplish the compelling state interest.

strict scrutiny purposes so long as the efforts to comply with Section 5 are consistent with the Court's narrow, retrogression-based interpretation of Section 5.

The following principles emerge in the post-*Shaw* environment to guide local governments such as the Town of Redistricting in the redistricting process:

1. Race may be considered as one factor among others;
2. Race may not be the predominant factor in the redistricting process to the subordination of traditional redistricting principles;
3. Bizarrely shaped districts are not unconstitutional *per se*, but the bizarre shape may be evidence that race was the predominant consideration in the redistricting process;
4. If race is the predominant consideration, a proposed plan may still be constitutional if it is "narrowly tailored" to address compelling governmental interest such as compliance with the Voting Rights Act; and
5. If a plan is narrowly tailored, it will use race no more than is necessary to address the compelling governmental interest.

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