

REDISTRICTING & RACE:  
THE VOTING RIGHTS ACT &  
U.S. CONSTITUTION  
FOR THE  
MICHIGAN INDEPENDENT CITIZENS  
REDISTRICTING COMMISSION

---

**By Bruce L. Adelson**  
**Attorney at Law**

# Redistricting & Race

*What do you do?*

# Redistricting & Race

Redistricting has been part of the American experience since the nation's earliest moments.

In the late 18<sup>th</sup> century, Patrick Henry, who opposed the new Constitution, tried to draw district lines to deny a seat in the first Congress to James Madison, the Constitution's primary author. Henry ensured that Madison's district was drawn to include counties politically opposed to Madison.

The attempt failed, and Madison was elected.

Redistricting had begun.

# Redistricting & Race

Race is always a part of the redistricting process. Being race-conscious or aware of race during the redistricting process is part of the process.

*United States v. Hays*, 515 U.S. 737, 745 (1995),  
*Easley v. Cromartie*, 532 U.S. 234, 253-54 (2001)  
(quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996))

# Redistricting & Race

Compelling, legally acceptable reason for use of race in redistricting is compliance with the Constitution and Voting Rights Act: *Harris v Arizona Independent Redistricting Commission*, 136 S. Ct. 1301, 194 L. Ed. 2d 497 (2016).



# Redistricting & Race

See: *United States v. Hays*, 515 U.S. 737, 745 (1995)

“We recognized... however, that ‘the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors.

That sort of race consciousness does not lead inevitably to impermissible race discrimination.’”



# Redistricting & Race

For more than 100 years, the [U.S.] Constitution has prohibited intentional government efforts to treat similarly situated people worse than others, because of their race or ethnicity.

Sometimes, the reason for intentional discrimination is old-fashioned [racism] or stereotype.

But singling out racial minorities for worse treatment because of the candidates or parties they prefer still involves singling out racial minorities for worse treatment. And it still invites particularly close scrutiny under the constitution [and the Voting Rights Act].

# Redistricting & Race

Redistricting legislation usually just describes which census blocks fall in which districts, or which streets district lines follow: nothing in a redistricting statute *looks* like it has anything to do with race.

But if the line-drawers intentionally drew the lines to harm residents specifically because of their race, that's almost always illegal.

Loyola Marymount University School of Law



# Redistricting & Race

Some Examples  
From Michigan and other states



# Redistricting & Race

“The Department’s complaint alleges the current method of election for the Eastpointe City Council results in black citizens in Eastpointe having less opportunity than white citizens to participate in the political process and to elect candidates of their choice to the city council, in violation of Section 2 of the Voting Rights Act.”

DOJ – 6/5/2019

# Redistricting & Race

“While Defendants have not and do not concede the ultimate issue of Section 2 liability, Defendants nonetheless acknowledge that it would be reasonable for the Court to find that the three preconditions established by [\*Thornburg v. Gingles\*, 478 U.S. 30 \(1986\)](#), are present and that, under the totality of the circumstances, the United States would succeed should this matter proceed to trial.”

*USA v. City of Eastpointe* – Federal Court, E.D. of Michigan  
Civil Action No. 4:17-CV-10079 (TGB) (DRG) **2019**

# Redistricting & Race

Officials in the city of Griffin (GA) sought to adopt a redistricting plan under which only two of the six single member districts would be majority black even though the city's black population had recently increased from 42 to almost 50 percent.

Lawsuit filed - City then agreed to a redistricting plan with three majority-minority districts. In the next election, held under the new plan, three African-American candidates of choice won.

# Redistricting & Race

In 2003, officials in the Town of Delhi, Louisiana, adopted a plan that made a major reduction in the black voting age population of one of the town's wards.

In objecting to the plan, DOJ found that officials adopted the plan despite the availability of more favorable alternative maps that had been presented during the process. DOJ found evidence of discriminatory intent noting that the reduction was made in the face of steady Black population growth over the course of the preceding three decades and adopted over concerns raised by the town's own hired demographer.

# Redistricting & Race

The nitty gritty – Let's break it down....



# Redistricting & Race

In southwest Phoenix, Hispanic voters from benchmark District 22 will lose their present ability to elect their candidate of choice.

Under the proposed plan, the majority of the benchmark district is split between proposed districts 13 and 14.

The Hispanic voting age population in the benchmark district (65.0%) decreases to 51.2 and 50.6 percent in proposed Districts 13 and 14, respectively. Historically, a district with an Hispanic voting age population percentage of that level has not been one in which Hispanic voters have been able to elect a candidate of their choice.

# Redistricting & Race

Proposed District 23 was created out of parts of six benchmark legislative districts in the greater Phoenix area, encompassing parts of Maricopa and Pinal Counties.

More than 74 percent of the proposed district comes from benchmark District 7. Our information is that Hispanic voters were able to elect candidates of their choice in benchmark District 7. In benchmark District 7, 30.2 percent of the voting age population was Hispanic.



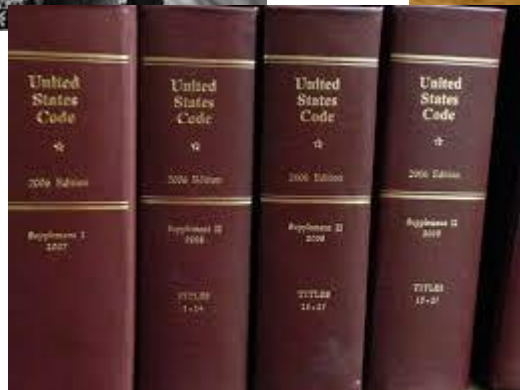
# Redistricting & Race

In creating the proposed district, the AIRC made several adjustments. For example, the towns of San Manuel (46.2% Hispanic) and Oracle (38.3% Hispanic), both of which had been in existing District 7 were removed while the entire city of Casa Grande (39.1% Anglo) and virtually all of Apache Junction (87.9% Anglo) were placed into proposed District 23.

We have been unable to determine whether the Hispanic voters will continue to exercise their electoral franchise effectively in the proposed district. In addition, the circumstances surrounding the removal of these two towns and the resulting drop in the Hispanic voting age population percentage, has raised concerns regarding the ability of the AIRC to establish that this action [does not discriminate against Hispanics].

# Redistricting & Race

## The Voting Rights Act of 1965



# Redistricting & Race

“By 1965 concerted efforts to break the grip of state disfranchisement had been under way for some time, but had achieved only modest success overall and in some areas had proved almost entirely ineffectual. The murder of voting-rights activists in Philadelphia, Mississippi, gained national attention, along with numerous other acts of violence and terrorism.”

DOJ

# Redistricting & Race

“Department of Justice's efforts to eliminate discriminatory election practices by litigation on a case-by-case basis had been unsuccessful in opening up the registration process; as soon as one discriminatory practice or procedure was proven to be unconstitutional and enjoined, a new one would be substituted in its place and litigation would have to commence anew.”

DOJ

# Redistricting & Race

“Finally, the unprovoked attack on March 7, 1965, by state troopers on peaceful marchers crossing the Edmund Pettus Bridge in Selma, Alabama, en route to the state capitol in Montgomery, persuaded the President and Congress to overcome Southern legislators' resistance to effective voting rights legislation. President Johnson issued a call for a strong voting rights law and hearings began soon thereafter on the bill that would become the Voting Rights Act.”

DOJ

# Redistricting & Race

The 1965 Voting Rights Act created a significant change in the status of African Americans throughout the South. The Voting Rights Act prohibited the states from using literacy tests and other methods of excluding African Americans from voting. Prior to this, only an estimated twenty-three percent of voting-age blacks were registered nationally, but by 1969 the number had jumped to sixty-one percent.

Library of Congress

# Redistricting & Race

“Blacks have been in this country for over 400 years and have only been voting [post-Jim Crow] for 56. This is a testament to the power of the Voting Rights Act - it removed barriers such as literacy tests, poll taxes, and other disenfranchising mechanisms...”

Professor Gilda R. Daniels, Esq.  
University of Baltimore School of Law

# Redistricting & Race

The Voting Rights Act of 1965 offered African Americans a way to get around the barriers at the state and local levels that had prevented them from exercising their 15th Amendment right to vote. After it was signed into law, Congress amended it five more times to expand its scope and offer more protections.

**This law has been called one of the most effective pieces of civil rights legislation ever enacted**

Georgetown University Law Center



# Redistricting & Race

## Packing, Cracking, and More



# Redistricting & Race

“**cracking**”: splintering minority populations into small pieces across several districts, so that a big group ends up with a very little chance to impact any single election.

Another tactic is called “**packing**”: pushing as many minority voters as possible into a few super-concentrated districts, and draining the population’s voting power from anywhere else.

# Redistricting & Race

Prior to redistricting, 72.75% of District 26's population was black.

Accordingly, Alabama's plan added 15,785 new individuals, and only 36 of those newly added individuals were white.



*ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. v.  
ALABAMA ET AL. (2015)*

# Redistricting & Race

“That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State.

The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view as to what counts as forbidden retrogression.

...we agree with the United States ... that the legislature must have a “strong basis in evidence” in support of the (race-based) choice that it has made.”

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. v. ALABAMA ET AL. (2015)

# Redistricting & Race

In redistricting, Alabama asked...

**“How can we maintain present minority percentages in majority-minority districts?”**

**“But ... they should have asked:**

**To what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?”**

# Redistricting & Race

## Types of Districts



# Redistricting & Race

**Are you required to draw districts that are less than 50 percent minority?**

Section 2 of the Voting Rights Act requires drawing new and preserving existing majority-minority districts when possible (one, person, one vote) but does not require the creation of districts that are less than 50 percent minority.

# Redistricting & Race

The Voting Rights Act does not prevent drawing districts where minority groups may constitute less than 50 percent of a district.

Creating these districts may be appropriate in communities that have experienced significant growth in their minority populations over the last decade.

Drawing these districts may fairly recognize increasing minority population that may soon be large enough to constitute a majority-minority district



# Redistricting & Race

## Majority-minority districts required where:

“(1) the minority group is sufficiently large and geographically compact to comprise a majority in a single-member district; (2) political cohesiveness; (3) the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances ... usually to defeat the minority's preferred candidate.”

Thornburg v. Gingles and Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996)

Together, the second and third conditions are known generally as “**racially polarized**” voting.

# Redistricting & Race

## Minority-Coalition Districts:

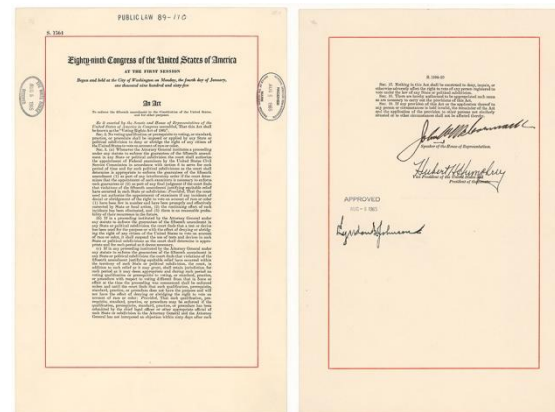
A minority-coalition district is a type of majority-minority district in which two or more minority groups combine to form a majority in a district. A district that is 25% African-American, 20% Latino and 6% Asian American is a majority-minority district, but it is not a single group majority district.

The Supreme Court has not ruled whether VRA Section 2 requires such districts.

# Redistricting & Race

Crossover Districts: Minorities do not form a numerical majority but can still reliably control outcome of the election with some non-minority voters “crossing over” to vote with the minority group.

Supreme Court in 2009 held that Voting Rights Act does not require these districts.



# Redistricting & Race

Influence Districts: Large number of minority voters but fewer than would allow minority group voters to control the result of the election when voting as a bloc.

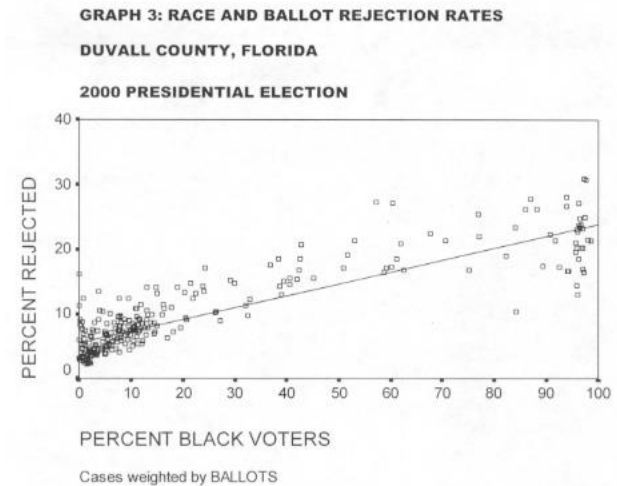
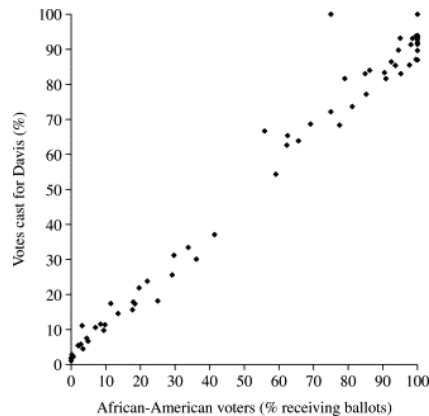
Number or proportion necessary to allow a minority group to influence or shape an election outcome is determined by a review and analysis of past Michigan elections.

Influence electoral outcomes through coalitions but not determine outcome

# Redistricting & Race

## Election Analysis – VRA Required

### Racial Bloc or Racially Polarized Voting Analysis



# Redistricting & Race

## **What is entailed in a vote dilution analysis?**

Analysis of voting patterns by race/ethnicity to determine if voting is polarized and if proposed districts offer minorities an opportunity to elect candidates of choice

## **Why do the analysis?**

Ensure compliance with the Voting Rights Act?

## **How is the analysis conducted?**

Statistical analysis of voting patterns required

## **When should the analysis be conducted?**

Prior to adopting a final redistricting plan adopting a final redistricting plan

# Redistricting & Race

“The key statistical analysis needed to comply with the Federal Voting Rights is to estimate the voting behavior of various racial and/or ethnic groups from aggregate election results to see if there is racially polarized voting.”

- Dr. Jonathan Katz, Cal Tech

# Redistricting & Race

“Racial bloc voting need not occur in every election in the district, and the victory of a minority candidate in a particular election does not foreclose a finding of racially polarized voting.”

RECONSTRUCTING RACIALLY POLARIZED VOTING

Professor Travis Crum, Duke Law Journal (2020)





## Legislative District 2



### Demographics

Total population: 204,608  
 Hispanic: 59.6%  
 Non-Hispanic white: 33.8%  
 African-American: 2.9%  
 Native American: 1.3%  
 Asian-American: 1.1%

### Voter registration

Democrat: 42.3%  
 Independent: 33.2%  
 Republican: 24.5%

# Redistricting & Race

We [U.S. Supreme Court] agree with the United States that the requirement that districts have approximately equal populations is a background rule against which redistricting takes place.

It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, “traditional” factors in the drawing of district boundaries.

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. v. ALABAMA ET AL. (2015)

# Redistricting & Race

Think about driving a car. It's important to keep to the speed limit. If you obsess over your speed, and stare only at the speedometer, subordinating every other stimulus, you're likely to crash.

But if you pay attention to the road, and surrounding traffic, and the directions to your destination, and signaling when you change lanes, and the car temperature, and the amount of gas you've got left, and the weather, and the music on the radio — and also check in on your speed from time to time — then your attention to the speed doesn't "predominate."