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Redistricting for Local Governments after the 2000 Census

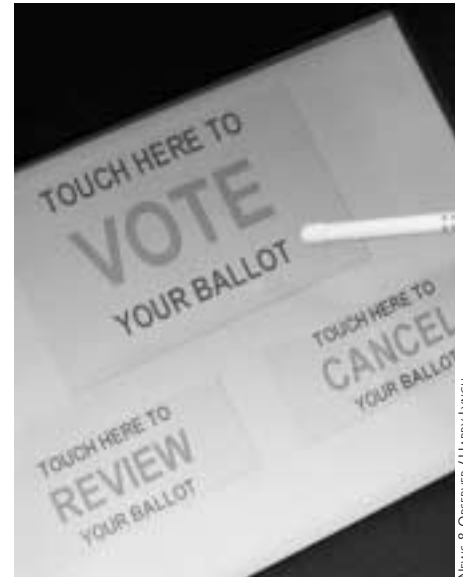
Robert P. Joyce

With the results of the 2000 census in hand, more than one hundred North Carolina cities, counties, and school systems may face the politically loaded challenge of redrawing their election districts to comply with the one-person/one-vote requirement of the U.S. Constitution.

Through the 1990s the North Carolina General Assembly drew and redrew the state's twelve congressional election districts four times, as successful challenges under the Voting Rights Act of 1965 and the Equal Protection Clause of the U.S. Constitution occurred one after another. No city, county, or school system wants that to be its fate in the first decade of the 2000s.

The responsibility for drawing new districts for elections to Congress and to the state House of Representatives and Senate lies with the General Assembly. The responsibility for drawing new districts for local government rests with the city councils, the county commissions, and the school boards.

Compared with the state legislature, local governments may receive less attention when they face redistricting, but the questions of law and the practical problems will be just as challenging. This article describes those questions and problems, and gives some answers.



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Must you consider redistricting at all?

Whether a jurisdiction must consider redistricting turns on the sort of electoral system it uses.

Do you elect all your members at large?

If all the members of the city council, the county commission, or the board of education are elected at large—that is, if everyone in the city, the county, or the school system votes for all the members—then you do not have to redistrict. There are no districts to redraw. You need not finish reading this article. If you elect board members from districts, however, you should go on to the next question.



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What kinds of districts do you have: mere residency districts or true electoral districts?

The North Carolina statutes for cities and counties permit three types of districts, with very different redistricting consequences.¹

Residency districts. In the first type of district, candidates must reside in the district from which they wish to run, but all the voters of the jurisdiction vote for that seat. This type is commonly referred to as a “residency district.” As with at-large voting (of which this is a variant), there is no requirement to redistrict after the 2000 census.² In fact, for counties a statutory provision requires a local act of the General Assembly to change residency-district boundaries.³

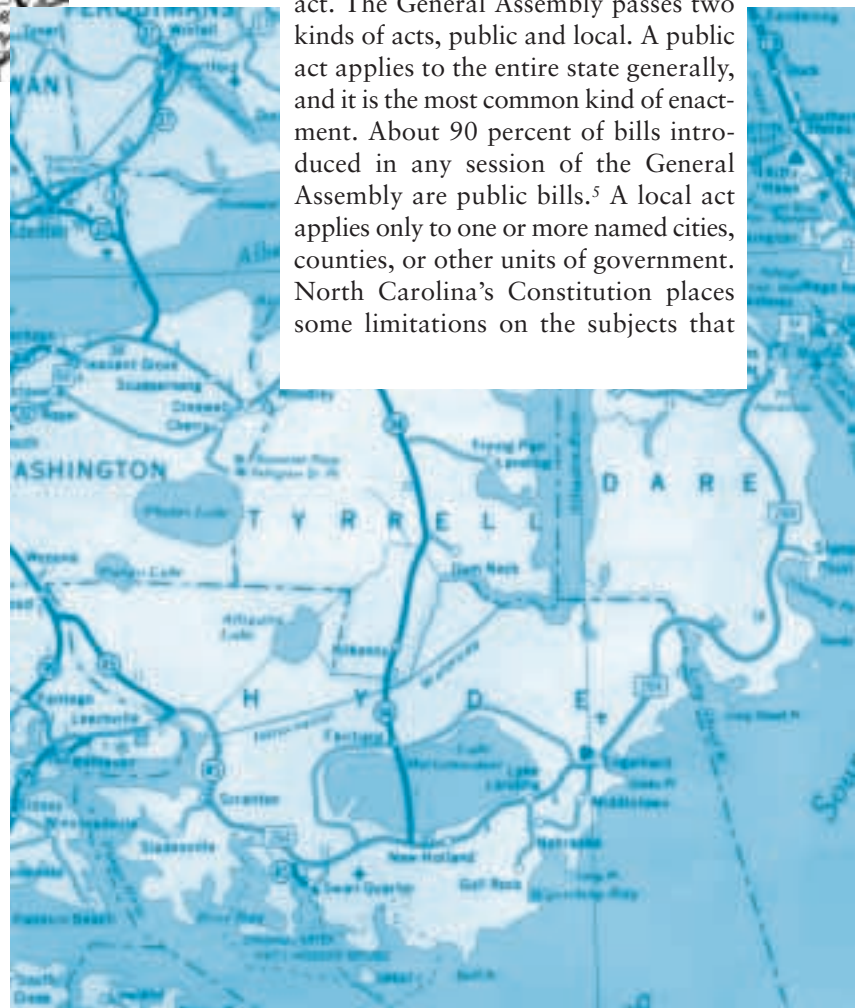
Single-member districts. In the second type of district, candidates must reside in the district from which they wish to run, and only the voters of the district can vote for that seat. Commonly referred to as a “single-member district,” this is the type to which the greatest redistricting attention must be paid after the 2000 census. The trend in recent years has been for jurisdictions to move from at-large elections to single-member districts. It has been spurred, as discussed later, by a drive to create districts that provide minority populations with greater opportunities to elect candidates of their choice.

Blended districts. The third type of district is a variant of residency districts. In this type the candidate must reside in the district from which he or she wishes to run, and all the voters of the jurisdiction vote for that seat in the general election, just as in regular residency districts. In this third type, however, in the primary election, only the voters of the district vote. So this type of district resembles a single-member district in the primary election and an at-large arrangement in the general election. This type requires the same attention after the 2000 census that the single-member district does.

If the election of your board members is from *residency districts*, you do not have to redistrict, and you may stop reading this article. If, however, you have *single-member* or *blended* districts, you should go on to the next question.

Do you have the necessary power?

If your jurisdiction has single-member or blended districts, you must consider redistricting. As discussed later, you may not have to redistrict. That will depend on the relative population changes among your districts since 1990. But if you must redistrict, do you have the authority to do so? The answer to that question generally is yes. The General Assembly has passed special boundary-revision statutes for cities, counties, and school systems,⁴ but in any jurisdiction’s particular situation, the answer may turn on how the use of electoral districts (and the current actual boundaries) came about.



How did your use of electoral districts come about?

The presumptive method of elections is at large. For most of North Carolina’s modern history, nearly all the members of city councils, county commissions, and school boards were elected that way. Beginning in the 1980s, however, there was a movement away from at-large elections to elections by districts, spurred primarily by the need to comply with the federal Voting Rights Act of 1965 (again, discussed in more detail later). Today, 103 jurisdictions use single-member or blended districts and so are subject to redistricting (see Table 1, page 4).

There are three ways in which electoral districts may have come into use for a city or a county, but only two ways for a school system. First, the General Assembly may have moved a city, a county, or a school system from at-large elections to district elections through a local act. The General Assembly passes two kinds of acts, public and local. A public act applies to the entire state generally, and it is the most common kind of enactment. About 90 percent of bills introduced in any session of the General Assembly are public bills.⁵ A local act applies only to one or more named cities, counties, or other units of government. North Carolina’s Constitution places some limitations on the subjects that

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TABLE 1. NORTH CAROLINA JURISDICTIONS SUBJECT TO REDISTRICTING

Subject to Redistricting			Not Subject to Redistricting	
COUNTIES (30)	CITIES (41)	SCHOOL BOARDS (32)	COUNTIES USING RESIDENCY DISTRICTS (24)	CITIES USING RESIDENCY DISTRICTS (26)
Anson	Albemarle	Alexander	Bertie	Angier
Bladen	Benson	Anson	Brunswick	Archdale
Camden	Cary	Beaufort	Chatham	Atkinson
Carteret (blended)	Charlotte	Bladen	Cherokee	Ayden
Caswell	Clinton	Caswell	Currituck	Belhaven
Chowan	Dunn	Charlotte-Mecklenburg	Dare	Bessemer City
Columbus	Edenton	Cumberland	Franklin	Bladenboro
Craven	Elizabeth City	Duplin	Gaston	Calabash
Cumberland	Enfield	Durham	Gates	Cherryville
Duplin	Fayetteville	Edenton-Chowan	Henderson	Concord
Edgecombe	Fremont	Edgecombe	Hertford	Durham
Forsyth	Goldsboro	Franklin	Hyde	Eden
Granville	Greensboro	Granville	Johnston	Fletcher
Guilford	Greenville	Guilford	Macon	Gastonia
Halifax	Henderson	Harnett	Moore	Hickory
Harnett	High Point	Hickory City	Northampton	Lewiston-Woodville
Lee	Jacksonville	Iredell-Statesville	Pender	Lincolnton
Lenoir	Kings Mountain	Lenoir	Randolph	Morganton
Mecklenburg	Lake Waccamaw	Madison	Rutherford	Mt. Airy
Montgomery	Laurinburg	Martin	Scotland	Sanford
Nash	Lexington	Montgomery	Surry	Shelby
Pamlico	Longview	Nash-Rocky Mount	Watauga	Southport
Pasquotank	Lumberton	Newton-Conover City	Wake	Stanley
Pitt	Mooresville	Pamlico	Wayne	Trinity
Robeson	New Bern	Pitt		Valdese
Sampson	Plymouth	Robeson		Weddington
Vance	Princeville	Rockingham		
Washington	Raleigh	Union		
Wilson	Randleman	Vance		
Wayne	Reidsville	Wake		
	Roanoke Rapids	Wilson		
	Rocky Mount	Winston-Salem/Forsyth		
	Siler City			
	Smithfield			
	Statesville			
	St. Pauls			
	Tarboro			
	Thomasville			
	Williamston			
	Wilson			
	Winston-Salem			
			COUNTIES, CITIES, AND SCHOOL BOARDS USING AT-LARGE VOTING	
			All the rest	

may be covered by local acts, but none of them relate to the election of city council members, county commissioners, or school board members. Cities, counties, and school systems are creatures of the General Assembly, and the General Assembly is free to impose on any of them an electoral system of its choosing.

Second, the city, the county, or the school system may have moved from at-large elections to district elections through a court order or a consent decree. That is, someone may have chal-

lenged the at-large system in court on some legal basis—most likely as a violation of the Voting Rights Act of 1965—and either prevailed in the lawsuit, thereby obtaining a court order, or reached a court-approved settlement with the jurisdiction, resulting in a consent decree signed by the challengers, the jurisdiction, and the judge.

Third, the city or the county (but not a school system) may have voluntarily moved from at-large elections to district elections, using “home rule” powers granted by the General Assembly. The home-rule statutes permit a city or a

county, by following procedures laid out in the statutes, to change a number of aspects of its elections, including the number of members of the governing board, the length of their terms, and whether they are elected at large or from districts.⁶ There is no comparable home-rule provision for school systems.

How were the particular boundaries for your current districts set?

As with the use of electoral districts, the current boundaries for your districts may have been drawn in one of three ways. First, they may have been set in the local act that moved you from at-



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large to district voting in the first place. Second, they may have been set by the court order or the consent decree that moved you to district voting. Third, they may have been set by action of the governing board. In the third case, the city council, the county commission, or the school board acted under the authority of statutes specifically giving it this line-drawing authority.⁷

What difference does it make how the current boundaries were set?

Your authority to change the current boundaries may depend on how they were put into place. If the boundaries were set by local act, then cities and counties are specifically authorized by the boundary-revision statutes to revise them to correct for population imbalances after the 2000 census.⁸ For school systems, the relevant statute says that the board may revise them to correct for

population imbalances after the census if the local act does not provide a method for revising them.⁹

If the boundaries were set by court order or consent decree, you need to check the document to determine whether it provides a method for revising the boundaries. There are three possibilities. First, the document may set the boundaries but provide no method for revision. In that case you must consider whether you need to go to the court that entered the order or the decree to get an order permitting you to revise boundaries. Second, the document may both set the boundaries and provide a method for revision. If so, you must follow that method. Third, the document may set the boundaries and explicitly provide that they may be revised to correct for population imbalances after a census, in which case you may proceed under the boundary-revision statutes.¹⁰

If the boundaries were set by action of the governing board, then you may proceed under the boundary-revision statutes.

May the General Assembly do the redistricting for you?

Yes, if it is willing to do so, except perhaps in the case of districts set by court order. The General Assembly retains the power to draw your district lines by local act. If it exercised that power, it could handle problems that might prove tricky for the local board, like assigning incumbents to districts or shortening current incumbents' terms. For more discussion of this subject, see the later section on incumbency protection.

Are you required to redistrict?

Population imbalance triggers the obligation to redistrict. Through much of American history, the courts did not

impose an obligation to redistrict even when populations became extremely imbalanced. After the 1960 census, for example, of twenty states retaining the same number of members in the U.S. House of Representatives as they had been allocated after the 1950 census, not one redistricted. Among them were Georgia, which had last redistricted in 1931; Colorado and Connecticut, in 1921; Idaho and Montana, in 1917; Louisiana, in 1912; and New Hampshire, in 1881.

The issue came to a head in two U.S. Supreme Court cases in the early 1960s. In the first, *Baker v. Carr*,¹¹ the Court for the first time recognized that population imbalances in electoral districts may violate the Equal Protection Clause of the Fourteenth Amendment. In the second, *Reynolds v. Sims*,¹² the Court for the first time held a legislative districting plan to be unconstitutional on the basis of population imbalance. In that case the thirty-five districts of the Alabama Senate varied in population from 15,417 to 634,864. The spread in the state House of Representatives was even greater. Advancing the notion that came to be called “one man, one vote” (later, “one person, one vote”), the Court said that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”¹³ These early cases dealt with redistricting for elections to state legislatures. The Court soon made clear that the one-person/one-vote principle applied to local elections as well.¹⁴

How do you know whether you *should* redistrict after the 2000 census?

In determining whether there is substantial equality in population among districts, courts routinely apply a “10 percent rule.” Local jurisdictions can use this rule too. It works like this: Divide the new population by the total number of seats. That gives you the “ideal” population per seat. Next, apply the new census numbers to your old election districts. Look at the new population of your most populous district, and figure the percentage by which it exceeds the ideal population. Next, look at the population of the least populous district, and figure the percentage by which it is

short of the ideal district. Now add those two percentages. If the total is 10 percent or more, you should redistrict.

The 10 percent rule is court made, not statutory, and its effect is a highly technical, legal one.¹⁵ It serves as the method by which courts allocate the burden of proof in a lawsuit regarding whether a districting plan violates the one-person/one-vote principle. A deviation of 10 percent or more automatically establishes a *prima facie* violation. The burden of proof is then on the city, the county, or the school system to justify the deviation by showing a rational and legitimate policy

Advancing the notion that came to be called “one man, one vote” (later, “one person, one vote”), the Court said that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

for the inequality in districts—be they old districts that have become unbalanced or new districts that have been drawn with such a deviation. This is a difficult task. If the maximum deviation is less than 10 percent, on the other hand, the courts consider the population disparity minimal, and the city, the county, or the school system “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.”¹⁶

Are you required to redistrict if the numbers show an imbalance of 10 percent or higher?

Yes, even though not all the statutes directly say so. For cities the applicable statute explicitly requires city councils to review the 2000 census data to “deter-

mine whether it would be lawful to hold the next election without revising districts to correct population imbalances.”¹⁷ For counties there is no *requirement* in the North Carolina statutes that they correct a population imbalance after the census; there is only *authorization* for them to do so. The statute provides that the county commissioners “may by resolution redefine the electoral districts.”¹⁸ By contrast, the statute for school systems appears to require redistricting: “The local board of education shall revise electoral district boundaries from time to time as provided in this subsection.”¹⁹

Even in the absence of a statutory requirement, however, city council members, county commissioners, and school board members are obligated by the oaths they take (in which they pledge to uphold the U.S. Constitution)—and should be motivated by the fear of liability in a lawsuit—to redraw districts promptly to redress imbalances.

Do you count people not eligible to vote?

Yes. Provisions in the North Carolina statutes call for substantial equality among districts based on total population. For cities the statute specifies “the same number of persons as nearly as possible”; for counties, the statute speaks of assigning “the population” to districts that are “as nearly equal as practicable”; and for school systems, the statute addresses “correcting population imbalances.”²⁰ In each case the statute clearly contemplates consideration of total population, which will include some people who are not eligible to vote. The largest group will be people under eighteen years of age.

To comply with these statutes, cities, counties, and school systems should use the census numbers that count all residents, whether or not they are eligible to vote. That is, in figuring whether there is a 10 percent deviation, you should count people under the age of eighteen and nonresident citizens, including military personnel assigned locally and inmates in state correctional or medical facilities.²¹

In the mid-1990s the voters of Mecklenburg County approved changes in the methods of election of their county commissioners and school board members, moving from at-large elec-

tions to a mix of at-large and single-member districts, using the same districts for both the commissioners and the school board members. The deviation between the most populous district and the least populous district was 8.33 percent, well within the 10 percent rule. But if the comparison had been based solely on voting-age population (that is, not counting people under age eighteen), the deviation would have been 16.17 percent. This difference arises because the proportion of people under eighteen is higher among nonwhites than among whites, so districts with high concentra-

council members, the county commissioners, and the school board members. For cities and school systems, no particular procedures are specified. For counties the statute sets out a requirement that the commissioners find as a fact “whether there is substantial inequality of population among the districts.”²³ The commissioners should by formal action make such a finding. For “substantial inequality” the board may rely on the 10 percent rule, described earlier. If the commissioners find that there is a substantial inequality, they may draw new districts.

Even in the absence of a statutory requirement, . . . city council members, county commissioners, and school board members are obligated by the oaths they take (in which they pledge to uphold the U.S. Constitution)—and should be motivated by the fear of liability in a lawsuit—to redraw districts promptly to redress imbalances.



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Left, a precinct official assists a voter with disabilities. Below, a young mother votes while her son looks on.

tions of nonwhites will have a lower proportion of voting-age people than districts with high concentrations of whites. In a lawsuit the claim was put forward that this 16.17 percent deviation among the voting age population violated the one-person/one-vote principle. The federal district court agreed, but the federal circuit court of appeals overturned the district court’s decision, holding that the constitutional requirements are satisfied by deviations under 10 percent based on total population as reflected in the census.²² This federal appeals court decision cites with favor the North Carolina total-population statutes.

What procedures are required?

The statutes clearly place the authority for redistricting in the hands of the city

Should you embody the new districts in an ordinance or a resolution or some other action?

For counties the statute requires that the redefined districts be set out in a resolution.²⁴ For cities and school systems, the statutes do not specify particular forms. Cities may employ either ordinances or resolutions; if the election districts were embodied in an ordinance the last time they were drawn, the city should stick to the ordinance format. School boards do not have the authority to adopt ordinances, so a resolution is the proper format.

For cities and counties, there are direct statutory requirements that city and county maps show the boundaries.²⁵ There is no corresponding requirement for school systems; nonetheless, a map is imperative.



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Should you have public hearings?

The answer to this question will depend on local circumstances. Cities, counties, and school systems are all free to adopt additional procedures if they wish. They might, for example, appoint a citizen advisory board to study the redistricting question and propose new boundaries. The danger, of course, is that the advisory board will come up with a plan that the governing board does not like, and the result is a political problem. The board might conduct public hearings or in some other way establish procedures for public comment.

There is no requirement that the board obtain public input, but doing so may be a very good idea for two reasons. First, it demonstrates that the board is responsive to the people on an issue as fundamental as the election of their representatives. Second, a hearing (or another input mechanism) may be helpful in achieving preclearance of the redistricting plan for cities, counties, and school systems subject to the requirements of Section 5 of the Voting Rights Act of 1965, discussed later.

A public hearing, if held, will likely be most effective if a couple of alternative plans are available for discussion. They will help focus the comments and provide a meaningful context. Citizens attending should be permitted to present their own plans.

Should you hire outside consultants?

There are valid reasons to consider hiring outside consultants and valid reasons not to do so. In some instances, of course, redistricting will not be necessary at all—where population change has not been great and the 10 percent rule is not violated. In some other instances, even where the imbalance does exceed 10 percent, it will be possible with relatively straightforward effort to bring the districts into compliance. The duty to come up with a proposal can be delegated to the manager or to the city's or county's planning staff, for instance, to work in conjunction with the unit's attorney. There is a political bomb waiting to explode, however, if the redrawing necessitates pitting incumbents against one another, and the manager or the staff may not wish to be involved.

Consultants, on the other hand, bring



two great advantages. First, if they are carefully chosen, they bring expertise. They should have skills in assessing the census data that exceed the skills likely to be found on the board or the staff. Also, they should be thoroughly familiar with the legal considerations involved in the one-person/one-vote principle, discussed earlier, and in the tricky notions of racial fairness and equal protection, discussed later. Second, consultants can lend the process a sense of fairness—they are outsiders brought in, not insiders protecting themselves—and they can be blamed if things go wrong.

Can you consider redistricting in closed sessions?

No. The open meetings law requires that meetings of public bodies be open to the public, except for particular subjects set out in the statute.²⁶ Redistricting is not an exception. If the board sets up a committee of board members to work on redistricting, the meetings of that com-

mittee too must be open. Work by staff on the project is not subject to the statute, however.

Can you keep drafts of tentative plans secret?

Not completely, no. The North Carolina Supreme Court has interpreted the state's public records law,²⁷ which gives citizens the right to see and copy most documents made or received in the course of the government's business, to include preliminary drafts of documents.²⁸ At what point a working document becomes a preliminary draft subject to the requirements of public inspection is a matter not fully settled in the law.²⁹ The safe procedure is to assume that once a redistricting map is recognizable as such, it is probably a public record.

May you protect incumbents?

Yes. The U.S. Supreme Court has recognized "incumbency protection, at least in the limited form of avoiding contests



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between incumbent[s], as a legitimate state goal.”³⁰ Expecting incumbent members of a city, county, or school governing board not to look out for their own interests is asking too much.

It is fully defensible to make every effort to ensure that, after redistricting, no two incumbents share a district. Demographics and other considerations may make it unavoidable, however, and in that case, incumbents will face one another. Board Member A, elected from District 1, may find himself, after redistricting, residing in District 2, along with Board Member B. In that case, until the next election, District 1 will have no member living within it and no one directly representing it. An effort should be made to avoid this undesirable situation, but it may occur. In no event, however, may the redistricting work to shorten any member’s term³¹ unless the redistricting is done by the General Assembly through a local act.

A problem may arise when, because of staggered four-year terms, only some members of the board will be up for reelection at the election immediately following redistricting and others will be up two years after that. In that instance Board Member A, whose residence is redistricted from District 1 to District 2 but who is not up for election at the next

For many jurisdictions, taking race into account in drawing new district lines will be the most difficult part of the redistricting process. Race is typically a politically challenging issue, and in the politics of redistricting, it is especially challenging.

election, may find himself with a choice down the line. If the District 2 seat is up at the next election, someone will be elected from District 2 in that election. Board Member A may choose to file to run then (perhaps against Board Member B, who has remained in District 2 all along, or perhaps against someone else). If Board Member A wins, then he becomes the representative from District 2, and a vacancy is created in District 1. If Board Member A loses, then he remains in office for two more years until his original term expires. At that point he has no seat to run for, since he resides in District 2 and the District 2 seat is not up then.

How do you take race into account?

For many jurisdictions, taking race into account in drawing new district lines will be the most difficult part of the redistricting process. Race is typically a politically challenging issue, and in the politics of redistricting, it is especially challenging. As difficult as the politics of the matter are, however, the legal issues involved may be even more difficult.

Why are the legal issues so difficult?

In 2001 the nation finds itself at the uneasy intersection of two important legal standards: the Voting Rights Act of 1965 and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The law under the Voting Rights Act has been developing for more than three decades, and jurisdictions faced with redistricting after the 1990 census focused on its requirements as a primary legal concern. In the 1990s, however, a body of law began developing under the Equal Protection Clause. It is not yet fully formed, but it has drawn directly into question the former legal interpretations of the requirements of the Voting Rights Act.

Table 2. North Carolina Counties Subject to Section 5 of the Voting Rights Act

Anson	Edgecombe	Hoke	Person
Beaufort	Franklin	Jackson	Pitt
Bertie	Gaston	Lee	Robeson
Bladen	Gates	Lenoir	Rockingham
Camden	Granville	Martin	Scotland
Caswell	Greene	Nash	Union
Chowan	Guilford	Northampton	Vance
Cleveland	Halifax	Onslow	Washington
Craven	Harnett	Pasquotank	Wayne
Cumberland	Hertford	Perquimans	Wilson

Note: All cities and school systems within these counties also are subject to the pre-clearance requirement.

Below, college students register voters during a campus drive. Redistricting will not require already-registered voters to re-register.

Are you covered by the Voting Rights Act?

Yes, you are covered by the Voting Rights Act, along with every other part of the United States, but that answer is a little misleading. Frequently when people say, “We are covered by the Voting Rights Act,” or “We are a Voting Rights Act county,” they are using shorthand to mean that their jurisdiction is covered by a particular part of the act known as Section 5.³² Section 5 applies only to certain governmental units that had especially low voter-registration rates when the Voting Rights Act was passed. In effect, those jurisdictions were presumed to have been discriminating. Most southern states are entirely under Section 5, but only forty North Carolina counties are subject to it.

To prevent the introduction of new election procedures that adversely affect minority voting, governmental units subject to Section 5 must obtain approval from the U.S. Department of Justice before making any change in election procedures. The approval procedure is commonly referred to as “preclearance.”³³

In a Section 5 county, do you have to submit your redistricting plan for preclearance?

Yes. Any change in election procedures in any of those forty counties must be pre-cleared. (For the identities of the counties, see Table 2. The requirement applies to all governmental units within these



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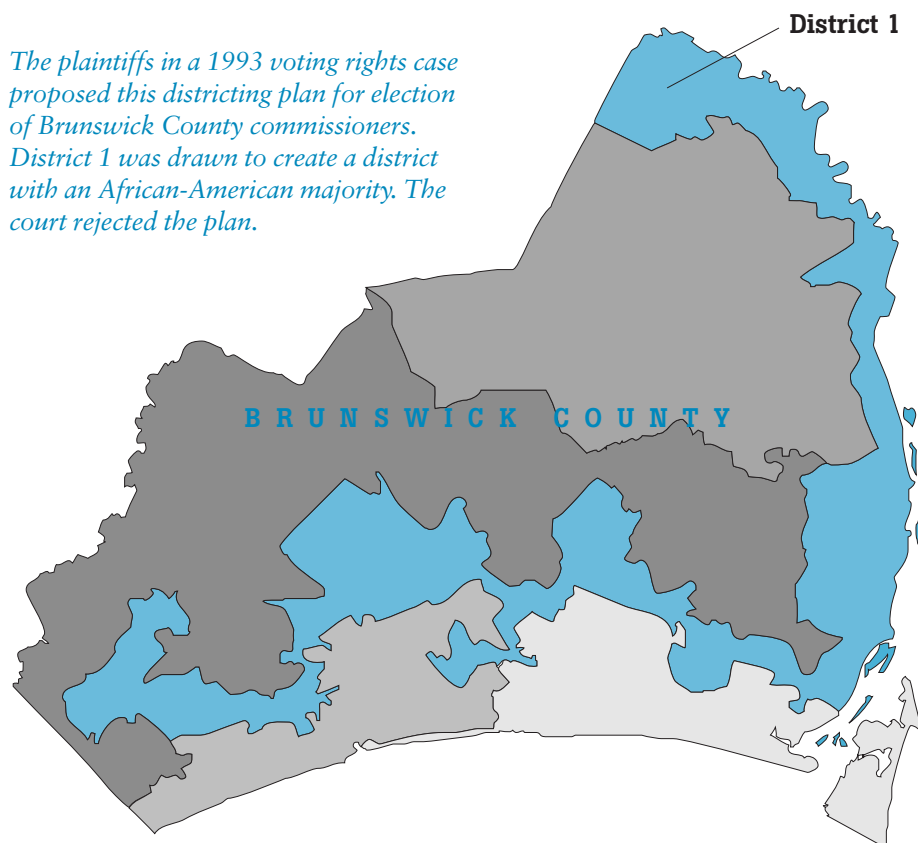
counties, including cities and school systems.) Examples include a switch to or from an at-large election system, any change in the term of office for an elected position, municipal annexations, moving of polling places or precinct lines, new office hours for the board of elections, conversion from paper ballots to voting machines, and, of course, redistricting. Because any statewide election law or procedure change obviously affects those forty counties, all such changes must be pre-cleared before they can become effective.

The Justice Department reviews each such change to determine whether the

change makes it less likely that African-Americans or other minorities will be able to elect candidates of their choice. This standard is known as “retrogression.”³⁴ The question, in effect, is whether the change makes things worse for minorities. The department objects to few changes, but it is most likely to challenge certain kinds of changes, including annexations, changes in the method of election (from district to at-large elections, for example), and alterations in district lines. An objection from the department may be the start of negotiations between the governmental unit and federal officials to alter the proposed change to

Figure 1. Districting Plan Proposed in 1993 for Election of Brunswick County Commissioners

The plaintiffs in a 1993 voting rights case proposed this districting plan for election of Brunswick County commissioners. District 1 was drawn to create a district with an African-American majority. The court rejected the plan.



If, for example, 30 percent of a county's population consists of African-Americans but none have ever been elected to the five-member board of commissioners, that is strong evidence that the method of election is discriminatory.

The two issues at the heart of such lawsuits are the extent to which African-Americans have been elected to office under the election system being challenged and whether voting is polarized along racial lines. If, for example, 30 percent of a county's population consists of African-Americans but none have ever been elected to the five-member board of commissioners, that is strong evidence that the method of election is discriminatory. If, in addition, statistical analysis shows that whites seldom vote for African-American candidates in that county—generally the case in North Carolina—then the court will need to consider requiring an election method that provides African-Americans with an opportunity to elect candidates without depending on white support. The leading U.S. Supreme Court decision setting out these Section 2 requirements, *Thornburg v. Gingles*,³⁸ involved North Carolina's multimember districts for electing members of the General Assembly.

Traditionally in North Carolina, most governing boards were elected at large. In cities, counties, and school districts that have significant African-American populations but a sparse record of electing African-Americans to the board, Section 2 lawsuits—or threats of Section 2 lawsuits—have been used to force a conversion to a different method of election. The courts' usual remedy has been to require the jurisdiction to switch to a system in which it is divided into sever-

Source: Michael Crowell, of Tharrington Smith, Raleigh, LLP, attorneys for Brunswick County in the 1993 case

make it acceptable. If a change is made without department approval or without ever having been submitted for preclearance, the department is likely to go to court to stop its implementation.

How does the submission work?

State law sets the responsibility for submitting changes for preclearance.³⁵ The State Board of Elections is responsible for submitting statewide changes that affect all governmental units in the state. City and county attorneys are responsible for those that apply only to their jurisdictions. Changes concerning school systems are to be submitted by the board attorneys.

The rules for making a preclearance submission are found in the Code of Federal Regulations.³⁶ No change can go into effect until it has been precleared. Once the submission is made, the Justice Department has sixty days either to object to the change (as retrogressive) or to ask for more information.

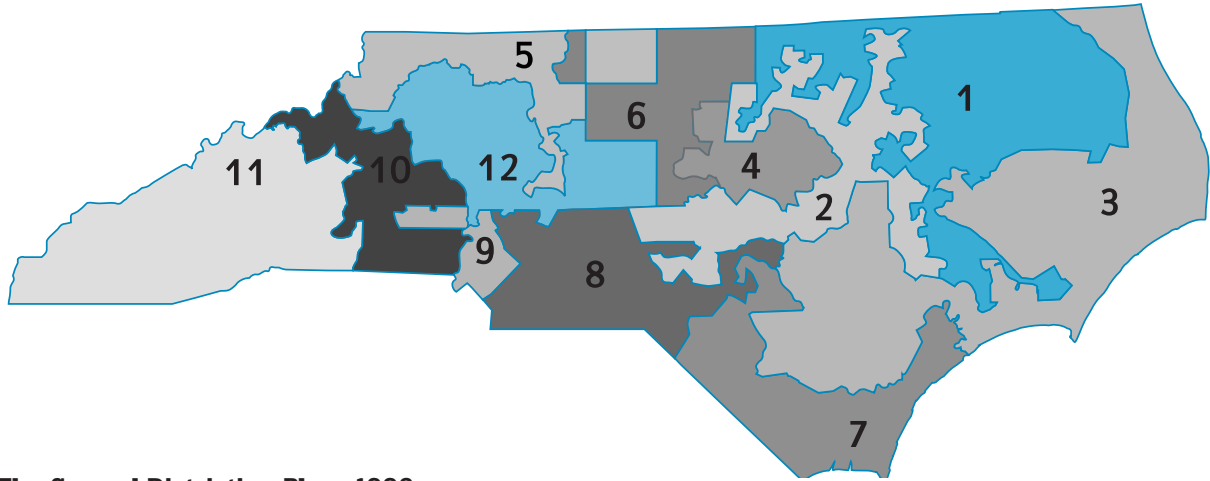
Once the Justice Department makes its final decision on a local preclearance request, the notification letter must be filed by the local attorney with the North Carolina Office of Administrative Hearings for publication in the *North Carolina Register*.

What if you are not in a Section 5 county?

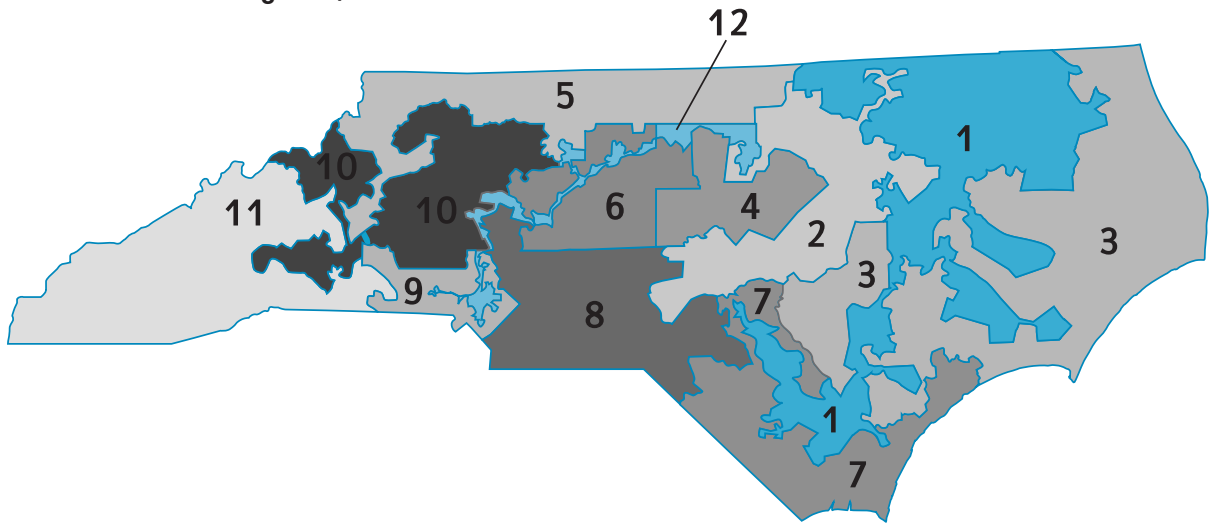
You still are covered by the major part of the Voting Rights Act, Section 2.³⁷ Section 2 prohibits all states, cities, counties, and other political units from setting voting qualifications or using election procedures that deny or abridge the voting rights of minorities. A person who believes that any governmental unit has such a qualification or procedure may sue in federal court to have it invalidated under Section 2.

The most common subject matter for these lawsuits is a challenge to methods of conducting elections that make it harder for African-Americans to be elected, especially the use of at-large elections.

Map 1. The Original Districting Plan for Electing North Carolina's Representatives to the U.S. House, 1991 (following the 1990 census)



Map 2. The Second Districting Plan, 1992



al districts and only the voters of each district vote for the seat representing that area—single-member districts. By creating districts with predominantly African-American populations, the court can give African-Americans a much better opportunity to elect candidates of their own choosing than they would have with an at-large election system.

Because of the outcomes in these cases, advice given to units of local government typically ran like this: If you can draw a district boundary for creating a district with an African-American majority, do so. Then draw the other districts around that district to fit. If you can draw two districts with African-American majorities, do so, and draw the remaining districts to fit. Following this advice, cities, counties, and school systems sometimes came up with oddly

shaped districts (see Figure 1, page 11).

This common advice came into question—and the creation of the oddly shaped districts slowed down dramatically—when another North Carolina districting case came to the U.S. Supreme Court in the mid-1990s. That case, *Shaw v. Reno*,³⁹ looked at the intersection of the requirements of Section 2 of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

What happened in the *Shaw* case?

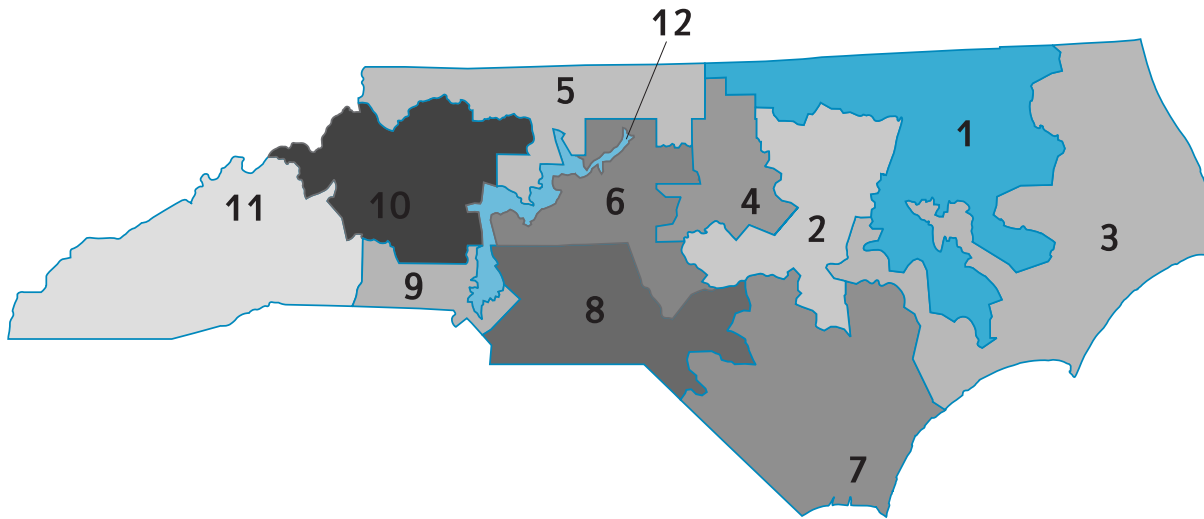
In 1991, following the national census of 1990, the General Assembly drew the districts for electing the state's twelve members of the U.S. House of Representatives, creating 11 that had white majorities and 1, district 1, that had an African-American majority (see Map 1). In so doing, the legislature was applying

the advice described earlier, commonly given for complying with Section 2 of the Voting Rights Act.

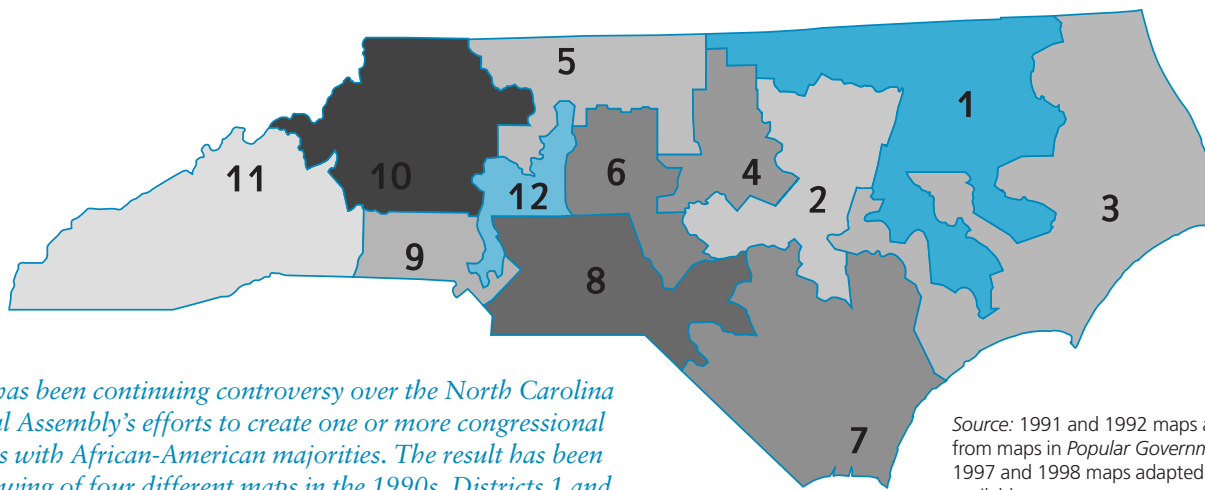
That districting plan was submitted for preclearance, and the Justice Department disapproved the plan. It would have been possible, the Justice Department said, to create two districts with African-American majorities, and the failure to do so was a violation of Section 2.

So in 1992 the General Assembly adopted a second plan, creating two districts with African-American majorities, districts 1 and 12, both with very odd shapes (see Map 2). The Justice Department approved the new plan, but several white citizens sued, claiming that the General Assembly had made an unconstitutional use of race in drawing the lines. In *Shaw v. Reno* the U.S. Supreme Court held that the use of race in draw-

Map 3. The Third Districting Plan, 1997



Map 4. The Fourth Districting Plan, 1998



There has been continuing controversy over the North Carolina General Assembly's efforts to create one or more congressional districts with African-American majorities. The result has been the drawing of four different maps in the 1990s. Districts 1 and 12 have been the focus of much of the attention.

Source: 1991 and 1992 maps adapted from maps in *Popular Government* archives; 1997 and 1998 maps adapted from maps available at www.ncga.state.nc.us/Redistricting/Dist_Plans/distplanshome.html

ing district lines may in fact constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, especially when, to achieve African-American majority districts, the shape of the districts must be drawn very oddly.

The matter came back to the Supreme Court in 1996, and in *Shaw v. Hunt*,⁴⁰ the Court held that the districting plan did in fact violate the Equal Protection Clause. As a result, in 1997 the General Assembly adopted yet another plan (its third), with one majority African-American district, district 1, and one district nearly evenly split but majority white, district 12 (see Map 3). The Justice Department approved the new plan, but in early 1998 a federal district court struck it down as violating the Equal Protection Clause and ordered the General Assembly to redraw the lines once again. The General As-

sembly did so (its fourth 1990s plan—see map 4), but it appealed the order striking down the 1997 plan. The Supreme Court sent the matter back to the federal district court to consider again, and in early 2000 the district court once more declared it unconstitutional. The state appealed, and in April 2001 the Supreme Court found the plan constitutional, holding that political considerations, not race, were dominant in drawing the plan.

What do the Shaw decisions mean for you in drawing districts?

The *Shaw* decisions mean at least two things. First, there is a violation of the Equal Protection Clause if a board, in drawing the district lines, makes race the “dominant and controlling” consideration.⁴¹ Second, the creation of very oddly shaped “majority-minority districts”

(districts in which a minority group is the majority) will be considered as strong evidence of unlawful consideration of race. As the Supreme Court said,

[W]e 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.⁴²

What do you do?

The task for cities, counties, and school systems in areas with sizeable minority



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populations is difficult. To satisfy your Section 2 obligations, in drawing your districts, you must take race into account to determine whether the African-American population is found in areas that can be incorporated into districts obeying normal district-drawing principles: they are reasonably compact, they incorporate natural dividing lines such as major roads, and they bring together people with common interests. If you can do that, it is probably lawful to take race into account. If you cannot, then you must not go further to try to draw majority-minority districts. Creating non-compact districts for the sake of achieving majority-minority districts is almost certainly, in the words of the Supreme Court, allowing race to become the dominant and controlling factor.

The task is especially great for cities, counties, and school systems that are subject to Section 5's preclearance requirements under the retrogression standard. If a jurisdiction has created majority-minority districts in the past, with less-than-compact design, how can it in 2001 both (1) avoid a *Shaw* problem by not drawing unusually shaped districts again and (2) avoid retrogression? Unfortunately, the answer is not clear.

How do you use the census numbers?

The U.S. Bureau of the Census counted the nation's population in April 2000. It spent the following months sorting

To satisfy your Section 2 obligations, in drawing your districts, you must take race into account to determine whether the African-American population is found in areas that can be incorporated into districts obeying normal district-drawing principles. If you can do that, it is probably lawful to take race into account.

and analyzing the data that it had accumulated. By April 2001 the Census Bureau expects to have available the data that cities, counties, and school systems will need for redistricting. Those data go

by the term "P.L. 94-171 data," after Public Law 94-171, which set out the information-reporting requirements. The bureau will produce paper maps showing the information.

The data can be used in conjunction with what are known as TIGER (Topologically Integrated Geographic Encoding and Referencing) files.⁴³ The TIGER files are not maps. They contain digital data describing geographic features such as railroads, rivers, lakes, political boundaries, and census statistical boundaries. A jurisdiction can purchase the relevant TIGER files from the bureau for a nominal price.

To use the TIGER files and the population data, a jurisdiction will need mapping or Geographic Information System software that can incorporate all the information. In larger jurisdictions, planning departments already may have software capable of analyzing the information. Other jurisdictions may wish to purchase it from commercial vendors. The National Conference of State Legislatures has identified seven vendors that have demonstrated their services for drawing districting plans. They can be found at <http://www.tlc.state.tx.us/tlc/research/ncls/vendors.htm>.

In small jurisdictions or in jurisdic-

tions where the population change has been small, it may be possible to rely totally on census data provided in paper form combined with paper maps. In more complex situations, the versatility of the software programs may be very helpful. Jurisdictions that purchase the software and undertake the manipulation of the data themselves must keep in mind the lessons of *Shaw* with respect to the use of racial data. The ease of manipulation—figuring the exact racial makeup and drawing practically any boundary desired—may result in unconstitutional considerations of race.

Finally, a potential resource exists at the General Assembly. As mentioned at the outset of this article, the legislature is responsible for redrawing the districts for elections to the state House of Representatives, the state Senate, and Congress. For those purposes it has purchased sophisticated hardware and software. In the 1990 redistricting, legislative staff assisted several local jurisdictions in drawing district boundaries, and they stand available again. A request for such assistance must be received by the staff from a member of the legislature, and it must be worked into available staff time. This capability may be a very valuable resource.

By what date must you have completed the redistricting?

Counties should have their new districts drawn in time for the beginning of candidate filing for county commissioner seats in January 2002. School systems generally have their elections at the same time as counties, so they also should have their new districts drawn by January 2002.

Cities have a special problem in that their candidate-filing period begins in July 2001.⁴⁴ Because drawing new districts and preclearing them (if necessary) by the candidate-filing deadline might not be possible, the General Assembly passed a statute permitting delay of the 2001 elections to 2002 if necessary and spelling out how that will work.⁴⁵

Notes

1. Section 160A-101 of the North Carolina General Statutes for cities, Section 153A-58 for counties. Hereinafter the North Carolina General Statutes will be referred to as G.S.

2. *Dusch v. Davis*, 389 U.S. 112 (1967); *Dallas County, Ala. v. Reese*, 421 U.S. 477 (1975).

3. G.S. 153A-23(g).

4. G.S. 160A-23(b) for cities, G.S. 153A-22 for counties, and G.S. 115C-37(i) for school systems.

5. Technically, a local bill is one that affects fewer than fifteen counties, and a public bill is one that affects fifteen or more counties. For a discussion of local acts, see JOSEPH S. FERRELL, *THE GENERAL ASSEMBLY OF NORTH CAROLINA: A HANDBOOK FOR LEGISLATORS* 28–34 (7th ed., Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1997).

6. The statutes are G.S. 160A-101 through -111 for cities and G.S. 153A-58 through -64 for counties.

7. G.S. 160A-23(b) for cities, G.S. 153A-22 for counties, and G.S. 115C-37(i) for school systems.

8. G.S. 160A-23 for cities and G.S. 153A-23 for counties.

9. G.S. 115C-37(i).

10. G.S. 160A-23(b) for cities, G.S. 153A-22 for counties, and G.S. 115C-37(i) for school districts.

11. *Baker v. Carr*, 369 U.S. 186 (1962).

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

13. *Reynolds*, 377 U.S. at 555.

14. *Avery v. Midland County*, 390 U.S. 474 (1968).

15. See *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (involving county commission and school board districts for Mecklenburg County, N.C.); *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (involving municipal election districts).

16. *Daly*, 93 F.3d at 1220 (internal quotation marks omitted), quoting *Reynolds*, 377 U.S. at 577.

17. G.S. 160A-23.1.

18. G.S. 153A-23(b).

19. G.S. 115C-37(i).

20. G.S. 160A-101(6) for cities, G.S. 153A-22(c) for counties, and G.S. 115C-37(i) for school systems.

21. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990); *Davis v. Mann*, 377 U.S. 678 (1964).

22. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996).

23. G.S. 153A-22.

24. G.S. 153A-23(b).

25. G.S. 160A-23(a) and 163A-22 for cities and G.S. 153A-20 for counties.

26. G.S. 143-318.9 through -318.17.

27. G.S. 132-1 through -10.

28. *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

29. See David M. Lawrence, *PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS* 11–15 (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1997).

30. *Bush v. Vera*, 517 U.S. 952, 964 (1996) (internal quotation marks omitted).

31. The county statute, G.S. 153A-22(c), specifically so provides: “No change in the boundaries of an electoral district may affect the unexpired term of office of a commissioner residing in the district and serving on the board on the effective date of the resolution.” The city and school system statutes do not contain such an explicit provision, but there also is no authorization anywhere in the statute for boards to shorten members’ terms.

32. 42 U.S.C. § 1973c.

33. It also is possible to seek preclearance in federal district court in Washington, D.C. Further, it is possible for a jurisdiction, such as a city, a county, or a school system, to “bail out,” or remove itself, from the preclearance requirements of Section 5. Generally, to bail out, the jurisdiction must show the federal district court for the District of Columbia that, for the previous ten years, (1) it has not been found in violation of the Voting Rights Act, (2) it has not used a discriminatory procedure, (3) it has precleared all changes that were required to be precleared, and (4) it has taken positive steps to increase participation by minorities in the election process. The necessary showing is generally considered onerous and is seldom undertaken.

34. See *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000), for a recent discussion by the Supreme Court of retrogression.

35. G.S. 120-30.9A through -30.9I.

36. 28 C.F.R. pt. 51.

37. 42 U.S.C. § 1973.

38. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

39. *Shaw v. Reno*, 509 U.S. 630 (1993) (“*Shaw I*”).

40. *Shaw v. Hunt*, 517 U.S. 899 (1996) (“*Shaw II*”).

41. *Shaw II*, 517 U.S. at 905. See also *Miller v. Johnson*, 515 U.S. 900 (1995).

42. *Shaw I*, 509 U.S. at 647.

43. *TIGER Overview* (visited Jan. 14, 2001), available at <http://www.census.gov/geo/www/tiger/overview.html>.

44. G.S. 163-291 and -294.2.

45. G.S. 163-23.1.