The Voting Rights Act

**Short Definition:** Under certain circumstances, minority opportunity districts must be drawn that have at least 50% minority voting-age population (VAP).

**How to Determine Compliance in DistrictBuilder:**
DistrictBuilder's sidebar statistics include the number of minority opportunity districts in the plan used in the past decade and the number in the plan being drawn. Legal plans generally should have at least the same number of minority opportunity districts as the plan used for the past decade.

If and when minority opportunity districts are proposed by a redistricting authority or other organization, such as the NAACP or MALDEF, we hope to make these districts available as a template from which software users can draw the remainder of a state.

The Voting Rights Act is an important federal redistricting requirement that ensures our representatives reflect America's racial and ethnic diversity. It enjoys overwhelming bipartisan congressional support. The U.S. Department of Justice and the NAACP Legal Defense Fund's Redrawing the Lines are excellent sources of information about the Voting Rights Act. Please bear in mind that the law regarding the Voting Rights Act is intricate and cannot possibly be covered in full depth here. Here are some of the important highlights.

**Why have a Voting Rights Act?**

Following the Civil War, the United States adopted three important amendments to the U.S. constitution. Among these is the 15th Amendment, which states that "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

Immediately following the Civil War, the North occupied the South during a period known as Reconstruction. The North enforced the U.S. constitution, and as a result, many African-Americans were elected to state offices across the South. When the North withdrew its forces, White Southerners regained political power at first through violent intimidation during elections to repress African-American voting. Once in power, Whites amended their state constitutions and adopted election laws designed to prevent African-Americans from voting. Some of these rules may be familiar, such as the poll tax or discriminatory application of voter registration and literacy tests. A more obscure discriminatory device was racial gerrymandering.

The Voting Rights Act addressed all of these discriminatory election rules to
ensure that our legislatures at all levels of government reflect the racial and ethnic diversity of the people they represent. Provisions of the Voting Rights Act have been amended and reauthorized several times to address changing legal and political environments. The most recent reauthorization for another twenty-five years passed by wide bipartisan margins in 2007 -- when Republicans controlled the U.S. Congress and George W. Bush was president. The Voting Rights Act is seen as one of the most successful pieces of legislation, being credited with the election of 9,000 African-Americans, 5,000 Latinos, and numerous Native Americans to local, state, and national offices.

The Voting Rights Act applies to redistricting to prevent states and localities from drawing districts that deny minorities a chance to elect a candidate of their choice. There are two important provisions. Section 2 applies nationally, and Section 5 applies only to certain "covered jurisdictions" which are located primarily in the South. These provisions are discussed in detail below. To understand how Section 2 and Section 5 apply, it is first important to understand how racial gerrymandering works.

What is Racial Gerrymandering?

To understand how to do a racial gerrymander, consider a hypothetical state with thirty-six people in it, which we will call Gerryland. Sixteen Gerrylanders are of a racial minority (represented by tan colored circles) and twenty are the racial majority. There are four districts to be drawn. (Thanks for Justin Levitt, formerly at the Brennan Center for Justice at New York University Law School, for these diagrams.)

Racially polarized voting is when all the minorities always vote for their preferred candidate and all the majorities always vote for their preferred candidate. If racially polarized voting exists, it is possible to gerrymander with brutal efficiency to ensure minorities have little or no representation in a four-seat legislature. There are two gerrymandering strategies, known as cracking and packing. The same strategies apply to both racial and partisan gerrymandering.

Cracking is when the minority community is fragmented into several districts, none of which have a majority of minorities. When there is racially polarized voting, minorities will be unable to elect a candidate of their choice to the legislature in any district. The cracking strategy in Gerryland might look something like this.
Stacking is when the minority community is concentrated into a small number of districts so that their votes are wasted in a district that their preferred candidate will win by an overwhelming margin. The packing strategy in Gerryland might look something like this, where the minority community is concentrated into one district.

In practice, things are more complicated than the simple Gerryland example. Communities do not fit into nice squares, so the federal courts are fairly lenient on what minorities districts may look like. Some of the ugliest looking district ducklings are beautiful swans in the eyes of the courts. For example, the Illinois 4th Congressional District drawn in the 2000’s decade is often called the "earmuff" district for obvious reasons. The western portion of this district actually travels along the northbound lane of Interstate 294! But, this district has a very important purpose. It was initially created in the 1990s to elect the first Latino representative to Congress from the Midwest.

The 4th congressional district has its funny shape because there is an African-American community sandwiched between two Latino communities. The African-American community is represented by the 7th Congressional district, which is designed to elect an African-American candidate of choice. The 4th district was wrapped around the 7th district so that both African-American and Latino communities could have congressional representation.
When Must a Minority Opportunity District Be Draw?

The ideal district has just the right percentage of minorities to elect a minority candidate of choice. The percentage of minorities cannot be too low, lest cracking occurs, and cannot be too high, lest packing occurs. Determining the legally acceptable minority percentage requires the following steps:

1. First, perform a statistical analysis of election results to determine the degree of racially polarized voting.
2. Second, draw a district with enough minority population to elect a minority candidate of choice, given the statistical analysis.

The Supreme Court recently ruled in *Bartlett v Strickland* that in order for a district to be constitutionally required, minorities must constitute at least 50% of a minority opportunity district's voting-age population. Some have further interpreted this to mean that minorities must constitute at least 50% citizen voting-age population of a minority opportunity district. This is not to say that states cannot draw districts what are known as influence districts, where the minority community is a near majority, just that they are not required to do under federal law if they cannot draw a 50% district.

The most accessible population data to assess when a minority opportunity district must be drawn is voting-age population. The Census Bureau releases two types of data: total population, used to ensure districts are of equal population, and voting-age population, to ensure compliance with the Voting Rights Act. In the DistrictBuilder software, we have made available the voting-age population data by race and ethnicity. (The issue of citizen-voting age population is a complicated one; more on this soon.)

There are two important sections of the Voting Rights Act that apply to the creation of minority opportunity districts, Section 2 and Section 5.

**Section 2**

Section 2 applies nationally. Essentially, Section 2 requires that if there is racially polarized voting and if a minority opportunity district can be drawn, then it must be drawn. (There is a further consideration, known as the "totality of the circumstances," which involves the history of past discrimination in the jurisdiction in question.)

**Section 5**

Section 5 applies only to covered jurisdictions. These jurisdictions must clear any electoral change -- from moving a polling place to redistricting -- with the Department of Justice or the District Court of DC before it can take effect. (The Department of Justice is the overwhelming pathway of choice.) This federal oversight is intended to ensure that a change does not have a discriminatory effect. In the context of redistricting, Section 5 requires that the number of minority opportunity districts cannot decrease during redistricting. This is called retrogression.

The Department of Justice has 60 days to review a redistricting plan to ensure compliance with Section 5. It may request another 60 days for additional review. If a redistricting plan is not cleared in a timely manner, or worse it is rejected and the state or locality has insufficient time to correct deficiencies, courts may impose their own plans for use in the next election. State law may allow or forbid a subsequent "re-redistricting." Because Section 5 only applies to covered jurisdictions, federal courts are not required to clear their plans before they take effect.

The Department of Justice has released "**Guidance Concerning**
Redistricting Under Section 5 of the Voting Rights Act." To underscore the importance of the Public Mapping Project to minority voting interests, the Department of Justice states

In considering whether less-retrogressive alternative plans are to plans that were actually considered or drawn by the submitting jurisdiction, as well as plans presented or made known to the submitting jurisdiction.

Thus, plans drawn by the public may factor into the Department of Justice's decision to approve a redistricting plan submitted by a covered jurisdiction.

What Is Required in Practice

In practice, Section 2 and Section 5 essentially require that at least the same number of minority opportunity districts in a previous redistricting plan must be drawn in a new redistricting plan. Section 5 explicitly requires this, and Section 2 has been litigated in most parts of the country. There are two exceptions:

1. In areas where minority populations have grown, such as Latino communities in Texas, more minority opportunity districts may be required under Section 2. The Supreme Court has ruled that it is permissible for states and localities to draw such districts to avoid litigation.
2. In areas where minority populations have decreased, it may be impossible to draw a minority opportunity district. In this case, a minority opportunity district may not be required.

How and where minority opportunity districts must be drawn will not become clear until racial polarization analyses are conducted, districts are drawn, and in certain circumstance, the Department of Justice and the courts review the evidence.

It is beyond the capabilities of most ordinary citizens -- and sometimes even redistricting authorities! -- to comply with all the intricacies of the Voting Rights Act. To provide clues as to whether or not your districts are in compliance, on the statistics sidebar on the righthand side of the plan editor, we report the number of districts with more than 50% minority voting-age population (VAP) in the plan used for the previous decade and the number in the plan you are drawing. Typically, you should have at least the same number in your plan as in the previous plan.