Preface

This is not the definitive legal guide to redistricting after the 2010 census. That guide cannot yet be written—at least not without a crystal ball. Some of the most important legal issues that will affect the redistricting process have not been decided by the Supreme Court. In the meantime, the lower courts are “all over the map.” Moreover, even those questions that have been decided by the Supreme Court hinge on the vote of a single justice. Today’s majority opinion could easily become tomorrow’s dissent.

Rather than trying to pretend to be definitive, we offer the realist’s guide to redistricting.

The realist understands that the very foundations of redistricting law have been shaken to their core in the last couple of decades—both because of deep divisions in the U.S. Supreme Court and because of a lack of consensus among the lower courts about how to balance the delicate issues of race, party, and politics.

The realist understands that arguments that prevail in court, or in one state, or under one set of circumstances, may fall flat when mechanically replicated elsewhere.

The realist understands that a state that zealously seeks to comply with any one of the laws that constrain redistricting—whether it be “one-person, one-vote,” the Voting Rights Act, or the “Shaw doctrine”—may inadvertently subject itself to liability under another of those laws.

And perhaps, above all, the realist understands that states simply cannot draw districting plans that will go unchallenged in the courts. The best that realistically can be hoped for is to draw plans that will not be successfully challenged. At a time when Democrats and Republicans are polarized and—despite the election of the first African-American president in U.S. history—the politics of race and ethnicity remain contentious, the stakes in redistricting are simply too high to avoid litigation altogether. The only realistic goal for a state is to win. And
the only alternative to winning is to replace the traditional, once-a-decade redistricting process with a ten-year-long series of skirmishes, each resulting in yet another set of newly reconfigured districts. No one profits from such instability, least of all the voters who will be thrown into a new district before they even get to know the representative of their former district.

This realist’s guide, then, is designed to warn the reader of the legal pitfalls that surely lie ahead. States must understand and fully respect each of the legal constraints described in this guide—the “one-person, one-vote” standard, Sections 2 and 5 of the Voting Rights Act, and the constitutional limits on racial and partisan gerrymandering that flow from the Equal Protection Clause of the Fourteenth Amendment. These constraints are invariably in tension with each other—and often with the redistricters’ political and partisan goals. A district drawn to satisfy one requirement may violate another. The challenge lies in finding a way to satisfy all these requirements simultaneously. This guide, we hope, will serve as a useful first step.

As should be obvious from the relative brevity of this guide, it is not intended to be a comprehensive treatise on the law of redistricting. We have written this guide to acquaint our readers with the fundamentals of redistricting law—and to identify some of the internal conflicts that make redistricting such a difficult enterprise.

The legal guidelines for proper redistricting have long varied from state to state and from federal court to federal court and, nowadays, they seem to vary from month to month. Only the timely advice of experienced counsel can be relied upon to navigate these ever-changing waters.

Every statewide redistricting plan—whether for Congress or for either house of the state legislature—may be challenged in a three-judge federal district court, with a right to appeal directly to the United States Supreme Court. By statute, the Supreme Court is required to decide these cases, but often it rules on them “summarily,” that is, without full briefing or oral argument and often without issuing any written opinion explaining its ruling. Because these summary decisions have limited precedential value, and because the Supreme Court plays such a pivotal role in so many redistricting cases, this field of law is unique. Thus, redistricting counsel must possess not only a realistic understanding of current law, but also a nuanced feel for the coming trends in the Supreme Court, where shifting majorities and fragile alliances are the norm.
This guide, of course, is by no means intended to present fully such a nuanced, specialized view. It simply is designed to highlight a few of the problems and questions that will face states as they prepare for the post-2010 round of redistricting. We hope you find it helpful.

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