

Redistricting: An Overview of Federal Law

Long Beach Independent Redistricting Commission

Myrna Pérez
February 3, 2021

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FOR JUSTICE

Why re-draw district lines?

Practical & prudential reasons

- Population moves, creating lopsided districts where some people have far more representation than others.

Legal reasons

- Constitutional mandate
- Compliance with non-discrimination requirements of Voting Rights Act

Illegal reasons

- Suppress minority votes

Redistricting vs. Gerrymandering

- Language is important
- Racial gerrymandering: Prohibited
- Partisan gerrymandering: Outside federal courts' reach

But...

- Using race as a proxy for political interests is nonetheless prohibited

Federal Redistricting Law

Basic Federal Redistricting Requirements

- (Substantially) equal population: one person, one vote
- No requirement of “mathematical exactitude”- some deviation (<10%) permitted to serve legitimate governmental interests
- No discrimination based on race, color or membership in a language minority group

Federal Redistricting Laws

➤ **U.S. Constitution**

➤ **Voting Rights Act of 1965 (VRA)**

U.S. Constitution

- **Apportionment Clause (Article I, Section 2)**
 - Apportionment based on the Census
- **14th Amendment**
 - Equal Protection Clause & Anti-discrimination
- **15th Amendment**
 - Citizens' right to vote shall not be denied or abridged on account of race or color

Constitutional principles applied to redistricting cases

- *Wesberry v. Sanders* (1964) & *Reynolds v. Sims* (1964): State legislative districts must have roughly equal population (“One person, one vote”)
- *Karcher v. Daggett* (1983): State redistricting plan unconstitutional because was “not the results of a good-faith effort to achieve population equality.”

➤ **Voting Rights Act of 1965 (VRA)**

➤ **Section 5**

➤ **Section 2**

Section 5

Requires “preclearance” for certain jurisdictions

- Covered jurisdictions must prove that new district map:
 - Is not intended to dilute strength of minority votes

AND

- Does not leave minority voters worse off
- *But ended in 2013*

Shelby County v. Holder (2013)

- **2013:** U.S. Supreme Court struck down part of the VRA that determined which jurisdictions must “preclear” changes
- Section 5 still exists, but no jurisdictions are subject to its requirements
- Leaves Section 2 as the main federal protection against voting rights discrimination

Section 2 of the VRA

- No denial or abridgement of right to vote on account of race, color or membership in a language minority group
- Applies to “vote dilution” as well as “vote denial”
- Applies to discriminatory *intent* and discriminatory *effect*
- Does not mandate proportional representation

Interplay of VRA & 14th Amendment

- VRA prohibits jurisdictions from drawing electoral districts that dilute the votes of protected minorities
- At the same time, the Equal Protection Clause may prohibit jurisdictions from redistricting to *favor* protected minorities
- SO: Must consider race, but race should not be the “predominant factor.”

Complying with the Voting Rights Act

1. **Compactness:** Is the minority group sufficiently large and geographically compact to be able to draw a district?
2. **Minority cohesiveness:** Do minorities vote cohesively (*i.e.*, prefer the same candidates)?
3. **Racial polarization:** Do whites tend to vote for sufficiently as a bloc such that they usually defeat the minority group's preferred candidate?

If “yes” to all 3, look at “totality of the circumstances”

“Totality of the circumstances”

- Based on the totality of the circumstances:
 - Including the social and historical conditions linked to race discrimination
 - Is the political process equally open to minority voters?

“Totality of the circumstances”

- Factors to consider include:
 - History of official discrimination in the jurisdiction affecting the right to vote
 - Degree of discrimination against minorities in socioeconomic areas (education, employment, health)
 - Extent to which minority candidates have won elections
 - Whether policy justification for redistricting plan is tenuous

Race as the predominate factor

- Considered items
 - Legislative testimony with sole focus on race
 - Population data much more detailed for race
 - Shape explained by race, but not by “traditional distancing factors”

Section 2 in the Supreme Court

- *Thornburg v. Gingles* (1986): Vote dilution claims require an “intensely local appraisal” based on the “totality of the circumstances”
- *Johnson v. De Grandy* (1994): “The ultimate right of Section 2 is equality of opportunity, not a guarantee of electoral success for the minority-preferred candidates”

Section 2 in the Supreme Court

- *Cooper v. Harris* (2017): Even where racial identification is highly correlated with political affiliation,” courts must make a “sensitive inquiry” into all “circumstantial and direct evidence of intent” to determine whether plaintiffs “have managed to disentangle race from politics”
- *Abbott v. Perez* (2018): Legislatures are entitled to a presumption of good faith in redistricting cases

Looking Ahead

Section 2 Under Examination

Brnovich v. Democratic National Committee

- Arizona case currently before the U.S. Supreme Court
- DNC challenged two Arizona voting laws/policies as being unconstitutional and violating Section 2 of the VRA
- Now, the State of Arizona and others are claiming that Section 2 itself may be unconstitutional

New Voting Rights Laws on the Horizon

- **For the People Act (HR 1)**
- **John Lewis Memorial Voting Rights Act of 2020**
 - (f/k/a the Voting Rights Advancement Act of 2019)

For the People Act (HR 1/ S 1)

- Ban gerrymandering
- Set uniform national rules for map drawing
- Require independent commissions to draw all congressional districts (beginning in 2031)

John Lewis Voting Rights Act

- Already passed in the House of Representatives in 2019
- Revives Section 5 by creating new formulas to determine which jurisdictions subject to preclearance
 - Two sets of criteria: historical and practice-based
 - Any redistricting must be pre-cleared if any racial or language minority group has experienced a population increase over the past decade of at least 10,000 or 20% of the voting age population of the jurisdiction



Myrna Pérez

(267) 879-1543

perezm@brennan.law.nyu.edu