Redistricting: An Overview of Federal Law

Long Beach Independent Redistricting Commission

Myrna Pérez February 3, 2021



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 goodfaith effort to achieve population equality."



- **➤ Voting Rights Act of 1965 (VRA)**
- Section 5

Section 2



Section 5

Requires "preclearance" for certain jurisdictions

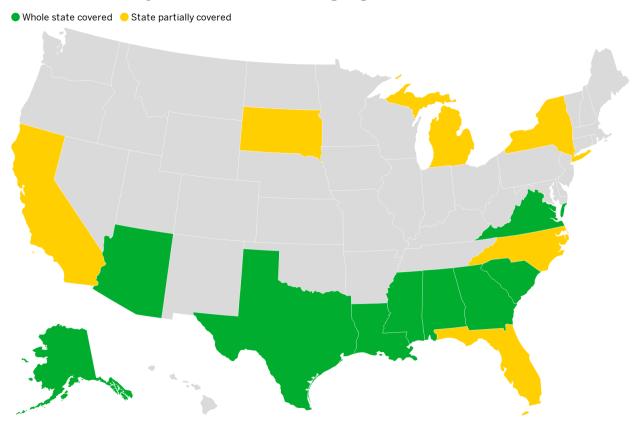
- Covered jurisdictions must prove that new district map:
 - Is not intended to dilute strength of minority votes

AND

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



States Covered by Section 5 of the Voting Rights Act Prior to June 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





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