

Redistricting: Legal Overview

City of Meza, Arizona

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Why re-draw district lines?

Legal reasons

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

Illegal reasons

- Suppress minority votes

Practical & prudential reasons

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

Federal Redistricting Law

Two Main Sources of Federal Rules

- **U.S. Constitution**
 - **Population equality**
 - **Rules on race**

- **Voting Rights Act of 1965 (VRA)**

Constitutional Requirements: Population Equality

- (Substantially) equal population:
 - No requirement of “mathematical exactitude”- some deviation (<10%) permitted to serve legitimate governmental interests (e.g., keeping a neighborhood or subdivision together)
 - Current accepted, universal practice is to use total population.

Constitutional Requirements: Race

- Two distinct requirements:
 - **No intentional discrimination** based on race, color or membership in a language minority group (Fourteenth and Fifteenth Amendments).
 - **No excessive consideration of race** (racial gerrymandering – analyzed under a predominance standard).

Voting Rights Act of 1965 (VRA)

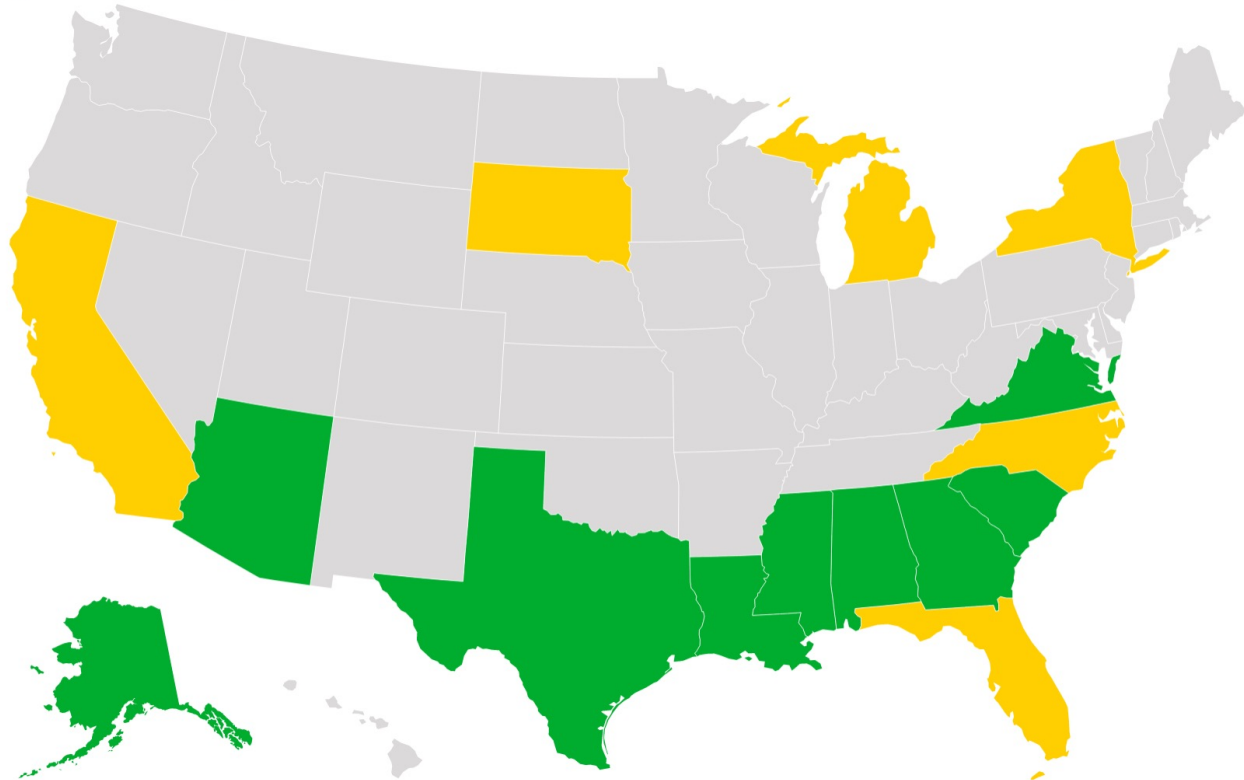
➤ Section 5

➤ Section 2



States Covered by Section 5 of the Voting Rights Act Prior to June 2013

● Whole state covered ● State partially covered



Section 5 Preclearance

Required certain jurisdictions (including AZ) to get pre-approval of election-law changes:

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

AND

- Did not leave minority voters worse off (regardless of intent)
- *But ended (now now at least) 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 because Congress has not enacted a new “coverage formula.”
- Leaves Section 2 as the main federal protection against voting rights discrimination

Section 2 of the VRA

- Still in effect and, unlike Section 5, applies nationwide
- Applies to discriminatory *intent* and discriminatory *effect*
- Requires drawing of district electorally favorable to a community of color if certain prerequisites are met
- BUT Does not mandate proportional representation

Complying with the Voting Rights Act

1. **Compactness:** Is the minority group sufficiently large and geographically compact to be able to draw a 50%+1 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

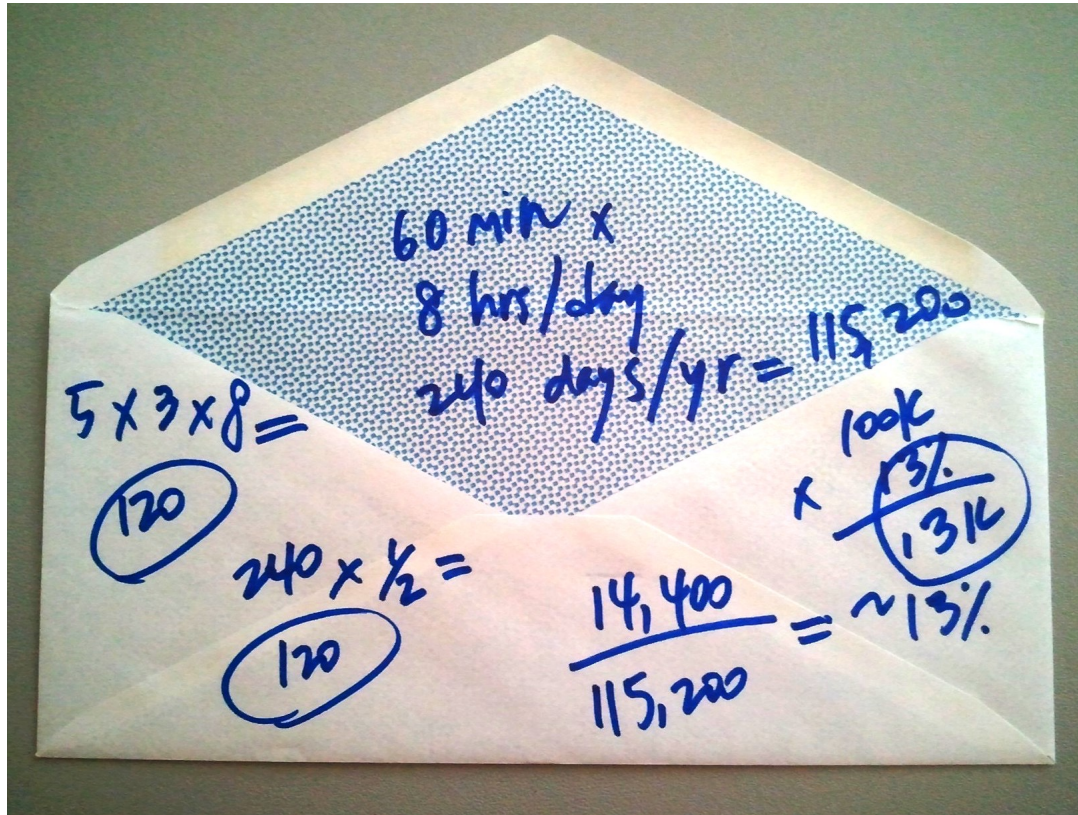
Section 2 in the Supreme Court

- *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

Section 2 is Not a Back of Envelope Calculation



Constitutional Prohibition: Racial Gerrymandering

- Constitutional claim that dates to the 1990s.
- Districts cannot be drawn **predominately** on the basis of race.
 - Note: Discriminatory intent not required.
- Sometimes has been hard for courts to apply in practice (race vs. politics).

Racial Gerrymandering: TX-30 in 1991



But Consider: *Cooper v. Harris* (2016)

1. A plaintiff succeeds at this stage even if the evidence reveals that a legislature elevated race to the predominant criterion in order to advance other goals, including political ones. See *Bush v. Vera*, 517 U.S. 952, 968–970, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion) (holding that race predominated when a legislature deliberately “spread[] the Black population” among several districts in

Local Rules

What's Required

First and foremost, follow federal law. The Supremacy Clause (Article VI, para. 2):

- "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

What's Required

City Charter, Article II, Section 201(A)(5):

- "Substantially equalized by geography and population"
- Incumbent council members cannot be removed from district they were elected to represent
- Process must be completed before filing of nominating papers begins

What's Not (Specifically) Covered by Law

- Communities of interest
- Competitiveness
- Compactness
- Other political subdivisions
- Contiguity

(In other words, a whole lot)

Types of Communities of Interest

- Share similar living standards
- Use the same transportation facilities
- Have similar work opportunities
- Have access to the same media of communication

Examples of Communities of Interest

- Neighborhoods
- Students
- Organized student housing
- Shared age
- Shared racial demographics

BUT NOT

relationships with political parties, incumbents, or political candidates.

Looking Ahead: Possible Changes

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)

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

For the People Act (HR 1/ S 1)

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



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