

THE REDISTRICTING PROCESS: AN INTRODUCTION



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The redistricting process is inherently political and typically takes place every 10 years after the results of the decennial Census are delivered to the States. Its goal is to reallocate (“reapportion”) the population of each jurisdiction with elected representative bodies so that the population of each district is approximately equal to that of all the others. That reapportionment is accomplished by changing the boundary lines of the existing districts. And, all of that should be done in compliance with constitutional standards and laws.

This paper describes the process of redistricting and addresses the constitutional and legal standards that govern it.

THE REAPPORTIONMENT AND REDISTRICTING PROCESS

The Constitution of the United States calls for an “actual Enumeration” of the people of the United States every ten years (Article I, Section 2). That “Enumeration,” which we know as the Census, drives the reapportionment of congressional delegations and legislative bodies throughout the country.

The Census is conducted in the first year of each new decade, and its results are distributed to the States in the first quarter of the following year. Redrawing congressional and legislative districts is a practical necessity because the Census will show that the State’s population, its distribution, or both, have changed. The redrawing process uses both the total and voting-age population figures from the Census, which are sorted geographically.

Redrawing begins by putting the new population figures into the old district lines. The old maps will be shown to be malapportioned as a result of the changes in population and its distribution over the preceding 10 years. The districts then are either redrawn to correct that

The Reappointment and Redistricting Process *(continued)*

malapportionment, or the process is taken over by a federal court to avoid an election appearing to violate the one-person, one-vote standard.

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State legislative lines need to be redrawn as well. Whether the new lines are needed at the same time as those for congressional districts depends on the length of the term and where the seats fall in the cycle. For example, when the term of a legislative body is two years, as they are in Georgia's House, those districts will be on the same schedule as congressional districts. For districts with four-year terms, the elections may come two years or four years after the new decade begins.

The drawing of new lines to accommodate population changes and distribution customarily proceeds against the backdrop of guidelines adopted by the legislative committees or a redistricting commission. Foremost among them is the obligation to comply with constitutional one-person, one-vote standards and with federal law.

The guidelines also often require respect for community boundaries and communities of interest. Community boundaries are likely to give way in response to efforts to meet one-person, one-vote standards. The 2011 Alabama Redistricting Guidelines defined communities of interest as “including but not limited to racial, ethnic, geographic, governmental, regional, social, partisan, or historic interests; county, community, or voting precinct boundaries; and commonality of communications.” Viewed that way, they are sufficiently subjective and malleable as to be “beauty in the eye of the beholder.”

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When the legislature is responsible for redistricting, the new plans must garner a legislative majority (and gubernatorial concurrence) to become law. To accomplish that, the plan drafters must accommodate the wishes

The Reappointment and Redistricting Process *(continued)*

of a majority of the members of the affected house. Tension can arise when the Governor and one or more houses of the State Legislature are controlled by different political parties, as is now the case in North Carolina and Virginia.

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The Supreme Court’s one-person, one-vote ruling came about as a result of the failure of certain states, including Tennessee and Alabama, to redraw their legislative district lines for more than 50 years, benefitting rural areas at the expense of urban ones. The rigorous application of the one-person, one-vote standard for more than 50 years now has the benefit flowing in the opposite direction, that is, toward the urban areas and corridors.

The Supreme Court has held that the Constitution requires congressional districts be drawn to achieve population equality as nearly as is practicable. In one case, a New Jersey plan with a deviation between the most and least populated districts of 0.684% had to be redrawn.

The Court has also held that redistricting plans for state and local legislative bodies need not be drawn with the same precision as congressional plans. Instead of mathematical precision, state and local plans may constitutionally be drawn with an overall deviation of up to $\pm 5\%$. Nothing precludes a state or local body from using a tighter tolerance as Alabama Republicans did in the 2010 cycle when they used a deviation of $\pm 1\%$.

THE CONSTITUTIONAL AND LEGAL STANDARDS

As discussed above, the Supreme Court has found a constitutional requirement for representative districts to be approximately equal in population. The Court has also addressed the consideration of race in the

The Constitutional and Legal Standards *(continued)*

redistricting process, both as a matter of constitutional law and statutory interpretation. In short, while the Court has concluded that both the Constitution and the Voting Rights Act call for the consideration of race, a violation can result by giving race too much or too little consideration. Finding the “Goldilocks” spot, one at which there are neither too few nor too many minority voters according to a reviewing court, is a difficult task for states and localities to reach.

Essentially, the Voting Rights Act (VRA) prohibits voting practices that result in the “denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” It further provides that “[a] violation . . . is established if, based on the totality of the circumstances,” citizens protected by the Act “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”

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The VRA includes a “results” test. Only results that occur “on account of” or because of race or color, based on the “totality of the circumstances” and which provide “less opportunity” to minority voters than other voters violate the statute.

The Supreme Court also has established three criteria for identifying when a jurisdiction should draw a majority—minority district, that is, one in which a racial or ethnic group forms the majority of the district’s total population:

1. the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district;”
2. the minority group must be “politically cohesive;” and

The Constitutional and Legal Standards *(continued)*

3. absent unusual circumstances, the majority typically votes sufficiently as a bloc to defeat the (already politically cohesive) minority's preferred candidate.

Plan drafters often look first for a group of minority voters large enough to constitute a “majority” in a single-member district. While this should not occur often because the test has now been operating for more than 30 years, it is an exercise worth undertaking to preempt a lawsuit claim.

In contrast, when the minority population in a district that is predominantly comprised of that minority has declined relative to other parts of the state, it will need to grow geographically or, if lacking sufficient population, be combined with a neighboring district.

In this context, a majority is a majority, that is, more than 50% of the district's population. The drafters are under no legal obligation to create a majority-minority district with a minority population that is less than 50% of the total. In fact, The Supreme Court has rejected the contention that the VRA required North Carolina to draw a district in which the minority population was only 39.6% of the total.

REDISTRICTING IN THE COURTS

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The law is unclear, and the political stakes are high. This specialized, and expert-driven litigation frequently involves claims of racial “gerrymandering” and is as inherently political as the redistricting process. Gerrymandering has been defined as drawing the boundaries of electoral districts to favor one party or interest over another. The word is used pejoratively by opponents of a

The Constitutional and Legal Standards *(continued)*

particular districting plan. Those opponents may be right, but they have an obligation to prove their case.

The Supreme Court has held that the “deliberate segregation of voters into separate and bizarre-looking districts on the basis of race” violates the Constitution. More recently, it has been the “deliberate segregation of voters . . . on the basis of race” without regard to how the districts look that has driven the litigation.

As Justice Thomas has explained, “States . . . have been whipsawed, first required to create ‘safe’ majority-black districts, then told not to ‘diminish’ the ability to elect, and now told they have been too rigid in preventing any ‘diminishing’ of the ability to elect.”

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