NEBRASKA REDISTRICTING 2021

Redistricting and Minority Rights

A redistricting primer from the Legislative Research Office

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This is the third in a series of primers to be released by the Legislative Research Office in conjunction with the 2021 redistricting process.

The redistricting process that takes place in the states every ten years is universally understood to be a legislative prerogative, political in nature and therefore not generally suitable for judicial attention. Since the 1960s, two recurring issues have rendered the legislatively driven process susceptible to what has often been high profile intervention by the judiciary.

The first issue is the requirement that political districts fashioned by state legislatures demonstrate a high degree of population equality when compared with one another. The second is the requirement that political districts be drawn in such a way that minority groups are given a fair chance to effectively participate in the electoral process. Of the two issues, the minority rights issue has proven to be the most resistant to enduring judicial resolution.

Equality Proves Elusive

In theory, the right of racial minorities in this country to equal participation in the electoral process has been guaranteed since the ratification of the Fourteenth and Fifteenth Amendments to the U.S. Constitution in 1868 and 1870, respectively. The Equal Protection Clause of the Fourteenth Amendment prohibits states from intentionally discriminating between people based on race. Under the Fifteenth Amendment, it is unlawful for the government of the United States, or of any state, to deny anyone the right to vote "on account of race, color, or previous condition of servitude." In practice, for years, the constitutional protection envisioned by the Fifteenth Amendment proved elusive in some areas of the country for as states instituted mechanisms such as poll taxes, literacy tests, and the use of "grandfather" clauses, all of which served to deny African Americans the right to vote. Not until almost 100 years after the guarantee of voting rights for all races was added to the Constitution, did Congress use its authority under the Fifteenth Amendment to enforce this article through appropriate legislation.

The 1965 Voting Rights Act

At the outset, the Voting Rights Act focused on simply securing the right of African Americans to cast their ballots without impediment and targeted the states that comprised the Confederacy during the Civil War for corrective action.

As time has passed, the impact of the Voting Rights Act has been felt throughout the nation through judicial decisions and amendments to the Act. Additionally, voting rights protections have been extended to "language minorities," defined to include Native Americans, Asian Americans, Alaska Natives and Hispanics.

Redistricting and Voting Rights

Two principal parts of the Voting Rights Act—Section 2 and Section 5—are closely intertwined with the historical development of redistricting jurisprudence.

Section 2

Section 2 prohibits any state or political subdivision from instituting a standard or practice that denies or abridges an individual's right to vote based on race, color or membership in a language minority group. In general, lawsuits brought under this Section are based on claims that the electoral process is not open to minorities, often because political districts have been drawn using techniques that minimize the voting strength of minority populations. Two such techniques known as fracturing (often referred to as "cracking") and packing have been subject to enhanced scrutiny by the courts.

Cracking occurs when district boundary lines are drawn so that a sizeable and geographically concentrated minority group is fragmented into smaller groups, each of which is then assigned to a different political district dominated by the majority racial group. If, as a result, there are fewer districts containing a minority-race voting majority—known in redistricting parlance as "majority minority" districts—the voting strength of the minority-race population may have been illegally "diluted." Stated simply, cracking results when a minority population is split up and then dispersed between multiple districts that are dominated by the majority race.

Packing, on the other hand, results if a large minority population is confined to a single district when it could have more voting impact if it were distributed throughout multiple districts. In such a case, the minority group that is "packed" into a single district comprises a super voting majority in that district (one in excess of 51 percent). If, instead, the group were divided up and placed into more than one district, its voting strength could be maximized. A court might find that a failure to do this causes an illegal dilution of the group's voting strength. Packing results in concentrating the influence of minority group voting in such a way that the smallest possible number of candidacies is affected by it.

Section 5

A majority of states, including Nebraska, were never subject to the provisions of Section 5 of the Voting Rights Act. The Section required that certain states and political subdivisions with a prior history of racially discriminatory election laws or practices receive federal approval before changes in their election laws could take effect—a procedure known as "preclearance." Among the changes that needed to be precleared were alterations made in the boundaries of political districts during redistricting.

In 2013, the U.S. Supreme Court in the case of *Shelby County v. Holder*, 570 U.S. 529 (2013), removed preclearance requirements nationwide. The Court declared the coverage formula in Section 4 of the Voting Rights Act, which was used to identify a state's prior racial discrimination in voting to determine whether pre-clearance was required, unconstitutional. Without Section 4, the Court found Section 5 of the Voting Rights Act to be unenforceable.

Additional Considerations

Through its rulings, the U.S. Supreme Court has established numerous redistricting tenents to protect minority voting rights. A brief discussion of some of these follows.

Discriminatory Results Enough

In 1980, the U.S. Supreme Court held in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that plaintiffs challenging redistricting plans on the basis of vote dilution had to prove that map makers intended to discriminate as they drew new district boundaries. Congress disagreed. In 1982, it passed amendments to Section 2 of the Voting Rights Act that eliminated the intent requirement.

The Supreme Court gave its seal of approval to this standard in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In that decision the Court held that anyone challenging a redistricting plan on the basis of vote dilution under Section 2 did not have to prove discriminatory intent, but merely discriminatory results.

The "Effective Voting Majority"

In determining whether a redistricting plan results in illegal vote dilution, the court must decide how large the affected minority population needs to be in order to constitute an effective voting majority. If the minority population in a geographic area is not large enough to constitute an effective voting majority under any circumstance, a vote-dilution challenge to the redistricting plan will not succeed.

The effective voting majority concept is difficult to pin down and courts have largely eschewed the use of a predetermined percentage opting to look at a variety of factors in each case.

The Court's ruling in the *Gingles* case sets out three criteria that must be met to successfully challenge a redistricting plan under Section 2 of the Voting Rights Act: (1) that the minority is large enough and geographically compact enough to constitute a majority in a single-member district; (2) that the group is politically cohesive and (3) that the candidates preferred by the minority group are usually defeated as a result of bloc voting by the majority.

Crossover Districts

In a decision handed down in 2009, *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Supreme Court addressed what it meant by "majority" in the first prong of the *Gingles* test. The Court declined to require the state of North Carolina to include a minority population in a single district when that population would comprise less than 50 percent of the voting age population of the district. In so doing, the Court rejected the idea that Section 2 protects "crossover districts"—districts in which although it does not comprise a majority of the voting-age population, a minority group has the potential to elect its preferred candidates by attracting cross-over votes by some members of the majority group.

Influence Districts

The *Strickland* Court reiterated its 2006 ruling that Section 2 does not protect so-called "influence districts." These are districts in which a minority population has enough voting strength to influence the outcome of elections but not to elect its preferred candidates.

Racial Gerrymandering

The Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment as prohibiting racial gerrymandering without sufficient justification. The Court invokes strict scrutiny review of equal protection claims, requiring "state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Shaw v Reno*, 426 U.S. 630, 643 (1993). In addition, quoting *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U. S. 252, 266 (1977), the *Shaw* Court held that this also applies to redistricting plans that are race neutral but "on their face, are unexplainable on grounds other than race."

Minority Participation

Legislators charged with developing nondiscriminatory redistricting plans must make sure that the redistricting process is open to minority participation. If a state's plan is challenged under the Voting Rights Act, the Court will examine the state's actions, looking at whether or not minorities were included in the process; whether information was freely shared with interested members of minority groups; and whether the opinions of minority groups were given due consideration as the redistricting plan was developed.