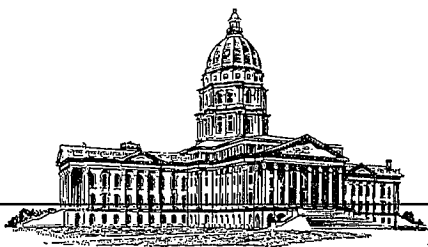


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Recent Case Law on Redistricting

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This memorandum summarizes the relevant and significant court cases that have been decided in the past ten years with respect to redistricting. In terms of relevance the cases fall into two categories: those involving Section 2 of the Voting Rights Act; and those involving unlawful gerrymandering.

Section 2 Cases

A Section 2 violation occurs when:

based on a totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of . . . [a racial, color, or language minority class] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. the extent to which members of a protected class have been elected . . . is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.¹

¹ 42 U.S.C. § 1973.

Violations typically occur through the use of vote dilution practices, such as the use of multimember districts, packing of minorities into a single district, or fracturing minorities into several districts. Each of these practices can have the effect of diluting the vote of the minority group so that the group has less of an opportunity to participate in the political process.

In *League of United Latin American Citizens (LULAC) v. Perry*², the Texas legislature attempted to redraw the congressional districts mid-decade. The new plan dismantled one district with a majority Hispanic population while creating a new district with a majority Hispanic population elsewhere in the state. The previous district had an Hispanic population that was more than 50% of the citizen voting age population (CVAP) of the district. Under the new plan that district had less than 50% CVAP. The plaintiff argued this was a Section 2 violation because of the dilution in Hispanic voting power in the district. The State countered that the reduction in Hispanic voting power was offset by the creation of a new majority Hispanic district elsewhere in the state.

The U.S. Supreme Court acknowledged that the State could use a majority-minority district (like the one it created) to compensate for the absence of another one when the minority group in each area had a Section 2 right and both could not be accommodated. However, the newly created opportunity district must still satisfy the *Gingles* preconditions to be lawful under the Voting Rights Act. In this case, the new opportunity district was comprised of two Hispanic communities that were widely separated geographically. The Court held that a noncompact district cannot remedy a Section 2 violation elsewhere in the state.

In *Bartlett v. Strickland*³, the North Carolina legislature attempted to justify splitting a county, which was a violation of the North Carolina constitution, by arguing that it had created an effective minority district in an effort to comply with Section 2. The new minority district was 39% Black in voting age population making it a “crossover” district” rather than a “majority-minority” district, which has a 50% or more minority voting age population.

The Court held that to pass the first *Gingles* prong by creating a “majority” district the plan must create an actual “majority-minority” district. Section 2 only requires the creation of a “majority” district. “Crossover” districts are not a requirement of Section 2 and, therefore, cannot

² 548 U.S. 399 (2006).

³ 556 U.S. 1 (2009).

be used as justification for an otherwise unlawful plan.

Gerrymandering Cases

In *Vieth v. Jubelirer*⁴, a plurality of the Court held that partisan gerrymandering claims were nonjusticiable because there is “no judicially discernable and manageable standards for adjudicating” such claims. The plan in question was a partisan redistricting plan crafted by the Republican-controlled legislature and signed into law by the Republican Governor.

The plurality opinion held that after 18 years of trying to apply the standard for unconstitutional partisan gerrymandering set forth in *Davis v. Bandemer*⁵, the standard had simply proved unworkable and should be rejected. While *Vieth* debates the effectiveness of alternative standards, it concludes that there is no effective standard for determining whether a partisan gerrymander is unconstitutional rendering the issue nonjusticiable and the case is dismissed.

Despite the ruling in *Vieth*, in *Cox v. Larios*⁶, the Court affirmed the district court’s decision holding Georgia’s redistricting plan unconstitutional as a partisan gerrymander. The Georgia plan attempted to secure Democrat members of the legislature, while leaving Republican members exposed in the next elections. The district court found that:

[w]hile Democratic incumbents who supported the plans were generally protected, Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible. In the House Plan, forty-seven incumbents were paired, including thirty-seven Republicans, which was 50% of the Republican caucus, but only nine Democrats, comprising less than 9% of that caucus (as well as one Independent). Because six of the twenty-one districts involved were multi-member districts, the end result was that a maximum of twenty-eight of the paired incumbents could be re-elected, and the remaining nineteen would be unseated. Similarly, the 2002 Senate Plan included six incumbent pairings: four Republican–Republican pairings and two Republican–Democrat pairings. In the 2002 general election, eighteen Republican incumbents in the House and four Republican incumbents in the Senate lost their

4 541 U.S. 267 (2004).

5 478 U.S. 109 (1986).

6 542 U.S. 947 (2004).

seats due to the pairings, while only three Democratic incumbents in the House and no Democratic incumbents in the Senate lost seats this way.⁷

The Court noted the district court's dismissal of the partisan gerrymandering claims on the grounds that such claims did not meet the standard under *Bandemer*, but added that the case would have satisfied the standard for justiciability of a partisan gerrymander claim had a standard been adopted in *Vieth*. The Court latched onto the alternative argument of an equal protection claim, and affirmed the lower court's decision with respect to that argument. The safe harbor for population deviations of less than 10% does not provide complete protection from equal protection claims. Where the population deviations cannot be justified under traditional redistricting principles, such as maintaining compact or contiguous districts, keeping counties whole, or preserving the cores of prior districts, then the plan may still be a violation of equal protection.

⁷ Id. at 948 (citations omitted).