

Overview of Select Legal Considerations for Reapportionment and Redistricting

ASHER A. KILLIAN, CHIEF DEPUTY LEGISLATIVE COUNSEL, LEGAL DIVISION

SAMUEL J. QUAST, SENIOR DEPUTY LEGISLATIVE COUNSEL, LEGAL DIVISION

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What Is Redistricting?

Terms “redistricting” and “reapportionment” often used interchangeably

Apportionment is the division of a given number of members among established political subdivisions

- Distribution of 435 House seats to the states by Congress

Districting is the creation or revision of district boundaries for election districts

- Redrawing lines for the existing 21 Nevada State Senate seats

The Nevada Legislature can exercise both powers, but most commonly merely redistricts.

- Legislature may adjust the number of seats in the Legislature
- Legislature must periodically redraw existing boundaries for legislative seats

Why Does Redistricting Happen?

Both the U.S. and Nevada Constitution require redistricting.

- U.S. Const. Art. 1, sec. 2: Representatives to be apportioned among states based on population.
- U.S. Const. Amd. 14, sec. 1: Equal Protection Clause
- Nev. Const. Art. 1, sec. 13: Representation apportioned according to population
- Nev. Const. Art. 15, sec. 13: Census used as basis of representation in Legislature
- Nev. Const. Art. 4, sec. 5: Legislature required to redistrict at first session after Census

Despite constitutional requirements, districting was considered a political question with which the courts would not interfere for majority of history of US

- *Colegrove v. Green*, 328 U.S. 549 (1946)
- Many states paralleled the US and chose to use county lines or physical geography as the basis for representation in one or both houses of legislature

Why Does Redistricting Happen?

Baker v. Carr, 369 U.S. 186 (1962)

- Equal protection issues are separately justiciable from political questions
- Equal Protection Clause of US Constitution requires states to create election districts on basis of population and for districts to be roughly equal in population
- Origin of “one person, one vote” principle

Wesberry v. Sanders, 376 U.S. 1 (1964)

- *Baker* principle applies to Congressional districts
- Additionally, Congressional districts governed by U.S. Const. Art. 1, sec. 2

Reynolds v. Sims, 377 U.S. 533 (1964)

- *Baker* principle applies to state legislative districts

Avery v. Midland County, 390 U.S. 474 (1968)

- *Baker* principle applies to local government districts

How Does Redistricting Happen?

As discussed earlier, Nevada Constitution requires Legislature to draw lines at first session after Census

- 2021 Census delays resulted in Census results not being reported until after Legislature was constitutionally obligated to adjourn, so Legislature will hold special session to complete its duty

Legislature has delegated responsibility for local government districting to local governments by law

Legislature retains obligation to draw district lines for several entities

- U.S. Congressional seats in Nevada
- Members of the Nevada Assembly and Senate
- Members of the Board of Regents of the University of Nevada
- Nevada State Board of Education members (but made coterminous with Congressional seats by law)

How Does Redistricting Happen?

Traditional Nevada Method: List of Census geography

Sec. 19. NRS 218B.675 is hereby amended to read as follows:
218B.675 Assembly District 16 consists of, in Clark County:
~~1. Census tracts 001714, 002706, 002707, 002708, 002709, 002811, 002823, 002824 and 002825.~~
~~2. Census voting districts 1059, 1060, 7032, 7061, 7062, 7066, 7069, 7071, 7089, 7091 and 7092.~~
~~3. In census tract 001713, blocks 1000, 1001, 1010, 1011, 1013, 1014, 1015 and 2000.~~
~~4. In census tract 001717, blocks 1014, 1015 and 1016.~~
~~5. In census tract 002702, blocks 1014 and 3010.~~
~~6. In census tract 002809, blocks 4000, 4001, 4002, 4003, 4004, 4005, 4006, 4007, 4008, 4009, 4010, 4011, 4012, 4028, 4029, 4030, 4031, 4032, 4033, 4034, 4035, 4036, 4037, 4038, 4039 and 4040.~~
~~7. In census tract 002814, blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1012, 2000, 2001, 2002, 2003, 2004, 2005 and 2006.~~
~~8. In census tract 002830, blocks 1000, 1001, 1002, 1003, 1004, 1005, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038 and 1039.~~
1. Census tracts 001717, 002811, 002814, 002838, 002845 and 002848.
2. In census tract 001711, blocks 2004, 2005, 2006, 2007, 2008 and 2009.
3. In census tract 001712:
(a) Block group 2.
(b) Blocks 1000, 1007, 1009, 1010, 1011 and 1012.
4. In census tract 002504:
(a) Block group 3.
(b) Blocks 2000, 2001, 2003, 2007 and 2008.
5. In census tract 002706, block group 2.
6. In census tract 002707:
(a) Block groups 1 and 2.
(b) Blocks 3000, 3001, 3002, 3003, 3004, 3008, 3009, 3010, 3011 and 3012.
7. In census tract 002708, block group 2.
8. In census tract 002823, block group 2.
9. In census tract 002824, blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010 and 1011.
10. In census tract 002830:
(a) Block group 2.
(b) Blocks 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007 and 3023.

11. In census tract 002837:
(a) Block groups 3 and 5.
(b) Blocks 2000, 2001, 2006, 2007, 2008, 2009, 2010, 2018, 4000, 4001, 4002, 4003, 4004, 4005, 4006, 4007, 4008, 4009, 4011 and 4012.
12. In census tract 002843, blocks 1025, 1026, 1027, 1028, 1029, 2002, 2003, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2015, 2016, 2017, 2020, 2021, 2022, 2023, 2024 and 2025.
13. In census tract 002844, block group 1.
14. In census tract 002846:
(a) Block group 2.
(b) Blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012, 1017, 1018, 1019, 1020, 1021 and 1022.
15. In census tract 002847:
(a) Block group 2.
(b) Blocks 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1056, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1082, 1083, 1084, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103 and 1104.
16. In census tract 005311, blocks 2008, 2012 and 2013.
17. In census tract 005316, block 1005.
18. In census tract 005319, blocks 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1019, 1020, 1021, 2002, 2003, 2004, 2005, 2006 and 2007.
19. In census tract 005322, blocks 1000, 1001 and 1002.
20. In census tract 006800, blocks 4063, 4064, 4071, 4072, 4073, 4074, 4075, 4076, 4077, 4078, 4079, 4083 and 4084.

Minnesota Method: Adoption of GIS Shapefile

1.6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

1.7 Section 1. Minnesota Statutes 2010, section 2.031, subdivision 1, is amended to read:

1.8 Subdivision 1. **Legislative districts.** (a) The representatives in the senate and house

1.9 of representatives are apportioned throughout the state in 67 senate districts and 134 house

1.10 of representatives districts. Each senate district is entitled to elect one senator and each

1.11 house of representatives district is entitled to elect one representative.

1.12 (b) Legislative redistricting plan L1101-1, on file with the Geographic Information

1.13 Services Office of the Legislative Coordinating Commission and published on its Web site

1.14 on May 6, 2011, is adopted and describes the legislative districts within this state. Each

1.15 senate district is composed of the two house districts, A and B, of the same number.

How Does Redistricting Happen?

First, Legislature decides whether to reapportion any bodies over which it retains jurisdiction.

- Nev. Const. Art. 15, sec. 6: No more than 75 Legislators (currently 63)
- Nev. Const. Art. 4, sec. 5: Senators not less than $\frac{1}{3}$ or more than $\frac{1}{2}$ of Assemblymembers (currently $\frac{1}{2}$)
- Nev. Const. Art. 11, sec. 7: Offices and terms of Regents of State University set by Legislature
- NRS 385.021, sub. 1, para. (a): Certain members of State Board of Education elected

Next, Legislature decides how to draw lines for the appropriate number of seats for each body

- Some states prescribe constitutional rules that either constrain the legislature's authority or assign the duty of drawing district lines to a commission or other independent body
- Nevada, by contrast, gives plenary power to draw lines to the Legislature with one limitation: the Census must be used as the basis of representation in the Legislature.
- Despite this state constitutional grant of authority, Nevada's Legislature remains constrained by the U.S. constitution and federal law

Federal Requirements for Redistricting

Equal Population

- Pursuant to Equal Protection Clause, districts must consist of reasonably equal populations
- Population as counted on Census day deemed to exist until next Census
- Different standards for Congressional districts than all other districts

Equitable Treatment of Minority Groups

- Voting Rights Act of 1965 prohibits discrimination against minority racial and language groups
- VRA also requires preclearance for election changes in certain jurisdictions; however, Nevada is not subject to preclearance requirement, and preclearance portion of VRA not currently enforceable

Equal Population

Ideal Population – total state population divided by the total number of districts

Population deviation – degree by which a district's population differs from the ideal population

Overall range – population deviation from the smallest district to the largest district

- Assuming an ideal population of 100,000 people, if the largest district is 102,000 (+2%) and the smallest district is 99,000 (-1%), the overall range is 3%.

Different levels of scrutiny are applied by the courts

- As a result of U.S. Const. Art. 1, sec. 2, Congressional districts are subject to strict equality requirement
- Absent compelling justification, Congressional districts must be “as nearly equal as practicable”, resulting in any overall range greater than +/- 1 person potentially rendering a plan unconstitutional.
- State legislative districts are entitled to more flexibility to account for legitimate reasons for deviation
- State districts must merely have a “substantial equality of population” and any overall range of 10% or less is presumed to be a “minor deviation”

Equal Population – Congressional seats

If a plaintiff can show that any plan with a smaller range could have been drawn, the burden shifts to the state to demonstrate with specificity that the deviation was necessary to achieve a legitimate purpose

Legitimate purposes for deviation for Congressional districts recognized by U.S. Supreme Court:

- Avoiding contest between incumbents
- Making districts compact
- Preserving the core of prior district
- Respecting municipal boundaries

Takeaway: if a Congressional plan does not have exact mathematical equality, the plan is vulnerable because it's safe to assume a plan with a smaller overall range can be drawn.

Equal Population – Congressional seats

2010 Redistricting Deviation Table

	Ideal District Size	Percent Overall Range	Overall Range (# of people)		Ideal District Size	Percent Overall Range	Overall Range (# of people)		Ideal District Size	Percent Overall Range	Overall Range (# of people)		Ideal District Size	Percent Overall Range	Overall Range (# of people)
Alabama	682,819	0.0	1	Illinois	712,813	0.0	1	Missouri	748,616	0	1	Oregon	766,215	0.0	2
Alaska* ¹				Indiana	720,422	0.0	1	Montana* ⁸				Pennsylvania ¹¹	705,688	0.0	1
Arizona**	710,224	0.0	0	Iowa	761,589	0.0	76	Nebraska	608,780	0.0	1	Rhode Island	526,284	0.0	1
Arkansas	728,980	.06	428	Kansas	713,280	0.0	15	Nevada	675,138	0.0	1	South Carolina	660,766	0.0	1
California	702,905	0.0	1	Kentucky ⁶	723,228	0.0	334	New Hampshire***	658,235	0.0	4	South Dakota* ¹²			
Colorado	718,457	0.0	1	Louisiana	755,562	0.0	249	New Jersey**	732,658	0.0	1	Tennessee	705,123	0.0	1
Connecticut ²	714,819	0.0	1	Maine	664,181	0.0	1	New Mexico	686,393	0.0	0	Texas	698,488	0.0	32
Delaware*				Maryland*** ⁷	721,529	0.0	1	New York	717,707	0.0	1	Utah ¹³	690,971	0.0	1
Florida ³	696,345	0.0	1	Massachusetts	727,514	0.0	1	North Carolina ⁹	733,499	0.0	1	Vermont*,*** ¹⁴			
Georgia ⁴	691,975	0.0	2	Michigan	705,974	0.0	1	North Dakota*				Virginia	727,366	0.0	1
Hawaii ⁵	680,151	0.1	691	Minnesota**	662,991	0.0	1	Ohio ¹⁰	721,032	0.0	1	Washington**	672,454	0.0	19
Idaho**	783,791	0.1	682	Mississippi	741,824	0.2	134	Oklahoma	750,270	0.0	1	West Virginia***	617,665	.79	4,871
												Wisconsin	710,873	0.0	1
												Wyoming*	536,626	0.0	0.0

Equal Population – Congressional seats

2010 Redistricting Deviation Table

	Ideal District Size	Percent Overall Range	Overall Range (# of people)
Alabama	682,819	0.0	1
Alaska ^{*1}			
Arizona ^{**}	710,224	0.0	0
Arkansas	728,980	.06	428
California	702,905	0.0	1
Colorado	718,457	0.0	1
Connecticut ²	714,819	0.0	1
Delaware [*]			
Florida ³	696,345	0.0	1
Georgia ⁴	691,975	0.0	2
Hawaii ⁵	680,151	0.1	691
Idaho ^{**}	783,791	0.1	682

	Ideal District Size	Percent Overall Range	Overall Range (# of people)
Illinois	712,813	0.0	1
Indiana	720,422	0.0	1
Iowa	761,589	0.0	76
Kansas	713,280	0.0	15
Kentucky ⁶	723,228	0.0	334
Louisiana	755,562	0.0	249
Maine	664,181	0.0	1
Maryland ^{***7}	721,529	0.0	1
Massachusetts	727,514	0.0	1
Michigan	705,974	0.0	1
Minnesota ^{**}	662,991	0.0	1
Mississippi	741,824	0.2	134

	Ideal District Size	Percent Overall Range	Overall Range (# of people)
Missouri	748,616	0	1
Montana ^{*8}			
Nebraska	608,780	0.0	1
Nevada	675,138	0.0	1
New Hampshire ^{***}	658,235	0.0	4
New Jersey ^{**}	732,658	0.0	1
New Mexico	686,393	0.0	0
New York	717,707	0.0	1
North Carolina ⁹	733,499	0.0	1
North Dakota [*]			
Ohio ¹⁰	721,032	0.0	1
Oklahoma	750,270	0.0	1

	Ideal District Size	Percent Overall Range	Overall Range (# of people)
Oregon	766,215	0.0	2
Pennsylvania ¹¹	705,688	0.0	1
Rhode Island	526,284	0.0	1
South Carolina	660,766	0.0	1
South Dakota ^{*12}			
Tennessee	705,123	0.0	1
Texas	698,488	0.0	32
Utah ¹³	690,971	0.0	1
Vermont ^{*,***14}			
Virginia	727,366	0.0	1
Washington ^{**}	672,454	0.0	19
West Virginia ^{***}	617,665	.79	4,871
Wisconsin	710,873	0.0	1
Wyoming [*]	536,626	0.0	0.0

Equal Population – State legislative seats

“Substantial equality of population” is required, and a minor deviation in overall range of population does not create a prima facie case of discrimination

An overall range of 10% or less constitutes a minor deviation and is presumed constitutional

- Difficult to challenge, but not necessarily a safe harbor
- *Larios v. Cox*, 305 F.Supp.2d 1335 (N.D. Ga, 2004), *aff'd*, 542 U.S. 947: two Georgia state legislative plans with an overall range of 9.98% struck down
- *Larios*: drafter assumed 10% was a safe harbor; court found that drafters were primarily concerned with protecting rural areas and incumbents, rather than relying upon traditional districting principles, so variance was too large and no longer a minor deviation

Takeaway: overall range of less than 10% is not a safe harbor; clear goals based on traditional districting principles are required absent mathematic equality, and larger deviations require better articulation of goals

Equal Population – State legislative seats

Overall range of over 10% establishes a prima facie case of discrimination and the burden shifts to the state to justify the deviation.

To overcome the prima facie case, the state must:

- Articulate a rational state policy to justify the deviation
- Explain how the redistricting plan advanced this policy
- Show that the deviations did not exceed constitutional limits

Recognized rational state policies by U.S. Supreme Court and lower courts include preservation of political subdivisions and traditional districting principles.

Overall range which is “too large” violates Equal Protection Clause even if it advances a rational state policy

- No defined cutoff point, but Court has suggested that 16.4% may approach the upper limit

Equitable Treatment of Minority Groups

Bases for federal requirement:

- U.S. Const., Amd. 14, sec. 1: Guarantees all persons equal protection and due process under law
- U.S. Const., Amd. 15: Prohibits denial or abridgment of voting rights due to race or color
 - Successful challenge under 14th or 15th amendment requires showing BOTH discriminatory purpose AND discriminatory effect
- Voting Rights Act of 1965
 - Successful VRA challenge requires ONLY showing discriminatory effects

Section 2 of Voting Rights Act of 1965 prohibits state from imposing any electoral practice or procedure that results in the denial or abridgment of any citizen's right to vote on account of race, color or membership in minority language group

- Section 2 imposes a “results test”, so proof of intent to discriminate is not required
- Purpose is to prohibit “minority vote dilution”

Equitable Treatment of Minority Groups

Conditions for successful VRA Section 2 claim laid out in *Thornburg v. Gingles*, 478 U.S. 30 (1986)

- Minority group must be sufficiently large and compact to constitute a majority in single-member district
- Minority group must be politically cohesive
- Majority votes sufficiently as a bloc to defeat minority's preferred candidate

Section 2 claims which satisfy this test show, based on the totality of the circumstances, that a challenged practice or procedure gives members of a protected minority less opportunity to participate in the political process and elect representatives of their choice

Section 2 does not establish a right to have members of a protected class elected in numbers equal to their proportion in the population

Equitable Treatment of Minority Groups

“Packing” is the practice of concentrating a minority population into one or more districts where the population becomes a supermajority with the effect of minimizing the number of seats a minority population can win

“Cracking” is the practice of dispersing the minority population among several districts with the effect of prohibiting the minority population from winning a seat in any district

Racial gerrymandering occurs when:

- Race is the dominant and controlling rationale in drawing district boundaries
- Legislature subordinates traditional race-neutral districting principles to racial considerations
- No compelling state interest exists and district is not narrowly tailored to accomplish such interest

Compliance with Section 2 of VRA is a compelling interest, but state must have strong basis in evidence to conclude that it's necessary – race can, and sometimes must, play a role in districting, but may only be one factor alongside traditional race-neutral districting principles and political considerations.

Traditional Districting Principles

Compactness

Contiguity

Preservation of political subdivisions

Preservation of communities of interest

Preservation of cores of prior districts

Protection of incumbents

Compliance with Voting Rights Act

Emerging Districting Principles

District competitiveness

Use or prohibition of use of partisan data

Favoring or disfavoring of incumbents/candidates/political parties

Partisan gerrymandering

- Practice of drawing lines in a way that benefits or disadvantages a political party
- No longer justiciable in federal court (*Rucho v. Common Cause*, 588 U.S. ____ (2019))
- MAY be justiciable in state court – *Rucho* did not create a right, but explicitly did not interfere with any existing basis in state law and encouraged states and Congress to create such rules
- Likely not prohibited in Nevada: no case on point yet, but Nevada lacks a “free and equal elections” clause, and Nevada’s Equal Protection Clause is generally interpreted identically to federal Clause

Rules for Nevada 2021 Redistricting Plan

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Only constitutional requirement is for Census population to be used

- AB450 (2019) requires Nevada inmate populations to be redistributed to home address of inmates at time of incarceration

Federal requirements include “one person, one vote” and compliance with VRA

Outside of these requirements, the choice of principles to follow and the priority of such principles is a matter for the Legislature to decide; sometimes done in Joint Standing Rules (specifically, Rules 13-13.X), sometimes done in adherence to traditional practice

Interim study on redistricting in 2019-2020 interim made certain recommendations, but ultimately, the special session for redistricting will decide on its rules when it convenes

Summary of legal provisions

Redistricting, while constitutionally required, has only been enforced for the past 60 years

Mandatory principles include “one person, one vote” and Voting Rights Act

- Near-exact equality for Congressional districts, <10% for state legislative districts
- Compliance with section 2 of VRA required, but racial gerrymander also prohibited

Legislature to choose and prioritize other traditional districting principles when drawing maps

- May be done formally in Joint Standing Rules; may emerge through tradition and practice in considering maps

Partisan gerrymandering not justiciable in federal court, possibly also not in Nevada courts

- Possible lack of basis for such a suit under NV constitution

Questions?
