Arizona Independent Redistricting Commission Legal Overview

July 8, 2011

By: Joseph Kanefield and Mary O'Grady

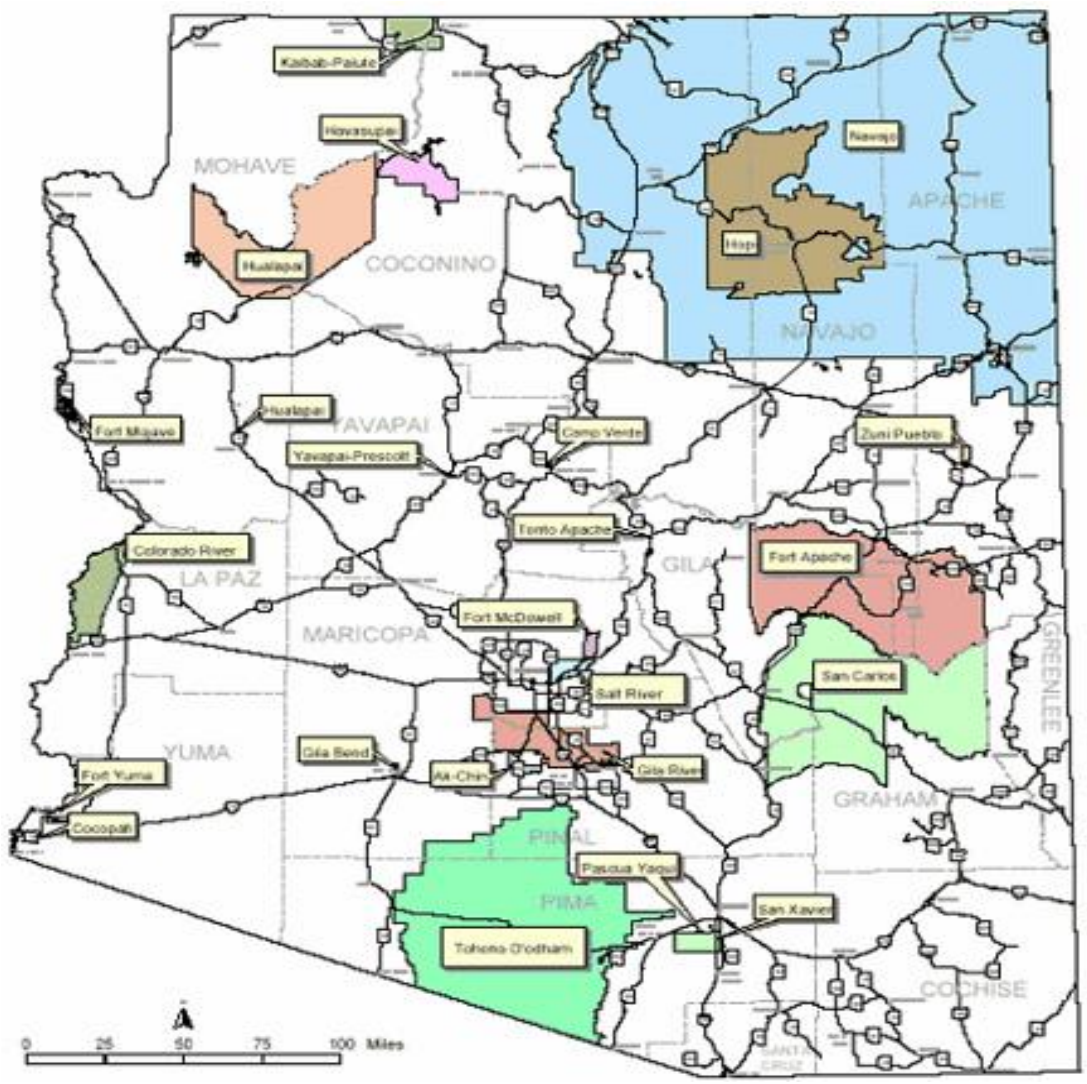

TABLE OF CONTENTS

PAGE

I. ARIZONA CONSTITUTION

A. Proposition 106

In November 2000, Arizona voters passed Proposition 106, a citizen initiative that amended the Arizona Constitution by removing the power to draw congressional and state legislative districts from the state legislature and reassigning this task to the newly created Independent Redistricting Commission (IRC).

II. INDEPENDENT REDISTRICTING COMMISSION

A. Role of Commissioners

Under the Arizona Constitution, the sole task of the IRC is to establish congressional and legislative districts. The Constitution permits no more than two members of the IRC to be from the same political party and requires that the fifth commissioner not be registered with any party represented on the IRC at the time of appointment. Candidates must demonstrate a commitment to performing the IRC's charge in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process.

All IRC members must be registered Arizona voters who have been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment.

B. Establishing Congressional and Legislative Districts

The IRC must create districts of equal population in a grid-like pattern across the State. Working from that map, the IRC must next adjust the grid as necessary to accommodate the following six goals:

- Districts shall comply with the United States Constitution and the United States voting rights act;
- Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;
- Districts shall be geographically compact and contiguous to the extent practicable;
- District boundaries shall respect communities of interest to the extent practicable;
- To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts; and
- To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

Throughout the process of navigating through those first two phases, the IRC must exclude party registration and voting history data . . . from the initial phase of the mapping process, but may use that data to test maps for compliance with the above goals.

Following the completion of phases one and two, the IRC shall proceed to the third phase, during which it must advertise a draft map of both congressional and legislative districts to the public for at least thirty days to permit public comment. During the comment period, either or both bodies of the legislature

may make recommendations to the IRC, and those recommendations "shall be considered by the independent redistricting commission."[1] After these stages have been perfected, the IRC establishes final district boundaries, in accordance with the fourth phase of the framework.

C. Scope of Judicial Review

In 2005, the Arizona Court of Appeals considered a challenge to the IRC's redistricting plan.[2] The court held that the IRC acts as a legislative body when it draws district lines. And, because courts generally afford substantial deference to legislative enactments, the court applies a deferential standard of review when reviewing a challenge to the legislative lines drawn by the IRC.

The court will ask if the party challenging the redistricting plan has demonstrated that no reasonable redistricting commission could have adopted the redistricting plan at issue. The fact that a better plan exists does not establish that the plan at issue lacks a reasonable basis. The court's review of IRC actions involves a two-part analysis to determine (1) whether the IRC followed the constitutionally mandated procedure and (2) whether the IRC adopted a final plan that satisfies substantive constitutional requirements.

When reviewing whether the IRC failed to follow the constitutionally mandated *procedure* for complying with any of its six listed goals, the challenger must establish that the IRC failed to engage in a deliberative effort to accommodate the goal or goals. The court will end its inquiry if the record demonstrates that the IRC took the goal or goals into account during its deliberative process.

The court, however, will apply an elevated level of judicial scrutiny to a redistricting plan if a challenge is brought alleging that the plan violates the Equal Protection Clause because these claims generally involve the alleged deprivation of fundamental rights.[3]

In *Arizona Minority Coalition*, the Arizona Supreme Court suggested that the IRC's advertised map should make adjustments for all six of the goals specified in subsections 1(14)(A) through (F), rather than addressing the sixth and final goal of competiveness only after receiving public comment on the first advertised map, as the IRC did in 2002.

---

1 Ariz. Const., Article VI, part 2, §1(16).

2 *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 121 P.3d 843 (App. 2005).

3 *See* U.S. Const. amend XIV, § 1, *see also Reynolds v. Sims*, 377 U.S. 533 (1964) (vote dilution); *Shaw v. Reno*, 509 U.S. 630 (1993) (racial gerrymandering).

III. THE FOUR PHASES OF ARIZONA'S REDISTRICTING PROCESS

Sources: Arizona Constitution, Article IV, part 2, § 1(14)-(16); *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 121 P.3d 843 (Ariz. 2005).

A. The Grid – The Commission must first create "districts of equal population in a grid-like pattern across the state."[4] "Party registration and voting history data" are excluded from "the initial phase of the mapping."[5]

B. Adjusting the Grid – Next, the Commission must adjust the grid "as necessary to accommodate" six goals:

1. U.S. Constitution and Voting Rights Act – "Districts shall comply with the United States Constitution and the United States voting rights act;"

2. Population Equality – "Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;"

3. Compactness and Contiguity – "Districts shall be geographically compact and contiguous to the extent practicable;"

4. Communities of Interest – "District boundaries shall respect communities of interest to the extent practicable;"

5. Geographic Features, Political Boundaries, Census Tracts – "To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;"

6. Competitiveness – "To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals."[6]

C. Advertising Draft Maps – After adjusting for the factors above, the Commission must "advertise a draft map" of both congressional and legislative districts to the public for at least thirty days to permit public comment.[7] "Either or both bodies of the legislature" may make recommendations to the Commission during this time.[8]

D. Establishing Final District Boundaries – After the public comment period, the Commission "establish[es] final district boundaries."[9] It certifies the new districts to the Secretary of State.[10]

---

4 Ariz. Const. art. IV, pt. 2, § 1(14).

5 *Id.* at (15).

6 *Id.* (14)(A)-(F).

7 *Id.* at (16).

8 *Id.*

9 *Id.*

10 *Id.* at (17).

IV. ONE PERSON ONE VOTE

Congressional districts must comply with the "one person one vote" requirement under Article I, § 2 of the United States Constitution as nearly as practicable. The requirement for equally populated legislative districts derives from the Fourteenth Amendment of the United States Constitution, which allows more flexibility in population deviations than those associated with Congressional districts. Minor deviations of less than 10% from absolute equality among legislative districts are presumptively valid. Because of Arizona's population increase since 2000, the congressional and legislative districts are likely unconstitutional.

V. VOTING RIGHTS ACT OVERVIEW

The Voting Rights Act is landmark civil rights legislation that protects the right of minority voters to participate in the electoral process. It was enacted in 1965 and amended and extended in subsequent years. The Act's two major provisions that concern redistricting are Sections 2 and 5. Commissioners should also be aware of the Act's language requirements.

A. Section 5

1. Arizona Redistricting Plans Require Preclearance. Section 5 requires that certain jurisdictions obtain approval from either the U.S. Attorney General or the District Court of the District of Columbia before implementing any change that affects voting.[11] Arizona is a "covered" jurisdiction under Section 5 and, therefore, the IRC must obtain this approval before its redistricting plans are enforced. Although federal law permits jurisdictions to obtain approval through a declaratory judgment action in the District Court of the District of Columbia, typically states seek preclearance from the Department of Justice, Civil Rights Division.

2. The IRC's Burden of Proof Under Section 5. The State has the burden of proving that a redistricting plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group."[12] A redistricting plan cannot "have the effect of diminishing the ability of any citizens . . . on account of race, color or membership in a language minority group to elect their preferred candidates of choice . . . ."[13]

a. Discriminatory Effect

i. No Retrogression. A change has a discriminatory effect for the purposes of section 5 "if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change)."[14]

ii. The Benchmark for Analyzing Retrogression. To determine whether the new redistricting plan is retrogressive, the new plan is compared "with the last legally enforceable" redistricting plan.[15] The plans are compared "based on the conditions existing at the time of the submission."[16]

---

11 42 U.S.C. § 1973c(a).

12 28 C.F.R. § 51.52(a).

13 28 C.F.R. § 51.54(d).

14 28 C.F.R. § 51.54(b).

15 *Id.* at (c)(1).

16 *Id.* at (c)(2).

iii. The Benchmark for Arizona's Redistricting. For the Section 5 analysis, the benchmarks for the new redistricting plans are the legislative and congressional districts that the Department of Justice precleared following the last census. The precleared congressional districts have been used since 2002, and the precleared legislative districts have been used since 2004.

b. Discriminatory Purpose. *Any* discriminatory purpose is unacceptable under Section 5. The Attorney General relies on the factors in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977):

- Whether the impact of the official action bears more heavily on one race than another;
- The historical background of the decision;
- The specific sequence of events leading up to the decision;
- Whether there are departures from the normal procedural sequence;
- Whether there are substantive departures from the normal factors considered;
- The legislative or administrative history, including contemporaneous statements made by the decision makers.

c. Factors the U.S. Attorney General Considers When Making Section 5 Decisions.

i. Factors Relevant to All Section 5 Changes:

- The extent to which a reasonable and legitimate justification for the change exists;
- The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;
- The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change;
- The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change;
- The factors specified above for determining whether there was an unlawful purpose.[17]

[17] 28 C.F.R. § 51.57.

ii. Additional Factors Considered for Redistricting Plans

- The extent to which malapportioned districts deny or abridge the right to vote of minority citizens;
- The extent to which minority voting strength is reduced by the proposed redistricting;
- The extent to which minority concentrations are fragmented among different districts ("cracking");
- The extent to which minorities are over concentrated in one or more districts ("packing");
- The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered;
- The extent to which the plan departs from the jurisdiction's objective redistricting criteria, ignores factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries;
- The extent to which the plan is inconsistent with the jurisdiction's stated redistricting standards.[18]

iii. No obligation to maximize number of majority-minority districts. "A jurisdiction's failure to adopt the maximum possible number of majority-minority districts may not be the sole basis for determining that a jurisdiction was motivated by a discriminatory purpose."[19]

d. The Preclearance Process

i. The State's Submission. The preclearance process begins when the Voting Section of the Civil Rights Division receives a written request for preclearance that conforms with the requirements in the regulations. The regulations detail the contents and form of the State submission.[20] The required contents include a specific explanation of "the anticipated effect of the change on members of racial or language minority groups."[21]

---

18 28 C.F.R. 51.59(a).

19 *Id.* at (b).

20 28 C.F.R. §§ 51.20, 51.24, 51.27.

21 28 C.F.R. § 51.27(n).

ii. Information Needed for Redistricting Plan. Additional demographic information and maps are specifically required for redistricting submissions.[22] They also request primary and general election returns and voter registration data.[23]

iii. Information on Publicity and Participation. For "controversial or potentially controversial changes," the submission should document "public notice, of the opportunity for the public to be heard, and of the opportunity for interested parties to participate in the decision to adopt the proposed change and an account of the extent to which such participation, especially by minority group members, in fact took place."[24] Examples of evidence of public participation may include, newspaper articles about the change, public meeting notices, minutes, comments from the general public, and public statements or speeches.[25]

iv. Minority Group Contacts. In states with significant minority populations, the regulations recommend including names and contact information of racial or language group members "who can be expected to be familiar with the proposed change or who have been active in the political process."[26]

(a) Availability of the Submission. The submission includes copies of notices announcing the submission and information to the public that a copy is available for inspection and information about where the public notices appeared.

v. Communications from Interested Parties to the Department. Any interested person or group may provide written comments to the Department of Justice about a pending submission.[27]

vi. Department's Decisions Regarding Submissions. The Department has 60 days to act on a preclearance submission.[28]

(a) Requests for Supplemental Information. The 60-day period for acting on a submission may be extended if the Department requests supplemental information from a jurisdiction.[29] Oral requests do not suspend the 60-day period.[30] A new 60-day period begins

---

22 *Id.* at (q) (requiring information specified in § 51.28(a)(1), (b)(1)).

23 28 C.F.R. § 51.28(a)(2), (d).

24 *Id.* at (f).

25 *Id.* at (1)-(6).

26 *Id.* at (h).

27 28 C.F.R. § 51.29.

28 28 C.F.R. § 51.37(b).

29 *Id.* at (b)(3).

30 *Id.* at (a)(1).

when the Attorney General receives the State's information in response to a written request for supplemental information.[31]

(b) Objections. If the Department is not persuaded that a jurisdiction has satisfied its burden of proof under Section 5, then it will send a letter to the jurisdiction objecting to the change. The letter must advise the jurisdiction of the reason for the decision.[32]

(c) Requests for Reconsideration. A jurisdiction may ask the Attorney General to reconsider an objection by making a written request.[33]

B. Section 2

1. Section 2's Protections. Section 2 prohibits voting practices that "result[] in a denial or abridgement of the right of any citizen . . . to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) (language issues).[34]

2. Totality of Circumstances Analysis. A violation of Section 2 "is established if, based on the totality of circumstances, . . . the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by minority voters "in that minority voters "have less opportunity . . . to participate in the political process and to elect representatives of their choice."[35]

3. History of Electing Members of Protected Class. The extent to which minority candidates have been elected to office may be considered in evaluating a Section 2 claim, but "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[36]

4. The Senate Factors for Analyzing Totality of Circumstances.

In applying the totality of circumstances analysis under Section 2, courts have used factors specified in the legislative history, which include:

- the extent of the history of official discrimination touching on the minority group participation in the democratic process;
- Racially polarized voting;

---

31 *Id.* at (b)(3).

32 28 C.F.R. § 51.44.

33 28 C.F.R. § 51.45.

34 42 U.S.C. § 1973(a).

35 42 U.S.C. § 1973(b).

36 42 U.S.C. § 1973(b).

- The extent to which the State or political subdivision has used unusually large election districts, majority vote requirements, anti-single-shot provisions, or other voting practices that enhance the opportunity for discrimination;

- Denial of access to the candidate slating process for members of the class;

- The extent to which the members of the minority group bear the effects of discrimination in areas such as education, employment and health that hinder effective participation;

- Whether political campaigns have been characterized by racial appeals;

- The extent to which members of the protected class have been elected;

- Whether there is a significant lack of responsiveness by elected officials to the particular needs of the group; and

- Whether the policy underlying the use of the voting qualification, standard, practice or procedure is tenuous.

5. Test for a Vote Dilution Claim.

To establish a vote dilution claim under section 2, courts analyze whether (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group is politically cohesive; and (3) in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.

VI. LANGUAGE ASSISTANCE REQUIREMENTS

Federal law requires that Arizona provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, . . . in the language of the applicable language minority group as well as in . . . English."[37] "Language minorities" include "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage."[38] Two separate provisions impose this language requirement, Sections 4(f)(4) (42 U.S.C. § 1973b(f)(4)) and 203(c) (42 U.S.C. § 1973aa) of the Voting Rights Act. Section 4(f)(4) applies to districts that are subject to preclearance.

The objective of this requirement is "to enable members of applicable language minority groups to participate effectively in the electoral process."[39] To fulfill its purpose, it "should be broadly construed to apply to all stages of the electoral process, from voter registration through activities related to conducting elections . . . ."[40] The two standards that the U.S. Attorney General applies to determine compliance are (1) "that materials and assistance should be provided in a way designed to allow members of applicable language groups to be effectively informed of and participate effectively in voting-connected activities"; and (2) "that an affected jurisdiction should take all reasonable steps to achieve that goal."[41] "A jurisdiction is more likely to achieve compliance . . . if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group."[42]

Arizona is covered statewide for Spanish. Greenlee, Maricopa, Pima, Santa Cruz and Yuma counties are also covered for Spanish. Apache, Coconino, Gila, Maricopa, Navajo, Pima, Pinal and Yuma are also covered for various Native American languages.[43]

---

37 42 U.S.C. § 1973b(f)(4).

38 28 C.F.R. § 51.2.

39 28 C.F.R. § 55.2(b).

40 28 C.F.R. § 55.15.

41 28 C.F.R. § 55.2.

42 28 C.F.R. § 55.16.

43 28 C.F.R. Pt. 55, App. Under the Arizona Constitution, English is the official language of the State, Ariz. Const., art. XXVIII, § 2, but this constitutional provision does not limit the use of languages other than English when necessary to comply with federal law. State law requires that "official actions . . . be conducted in English." *Id.* at § 4. Official action specifically excludes actions required by federal law (*id.* at § 1(2)(b)), any use of Native American languages (*id.* at § 1(2)(g)), certain translations (*id.* at § 1(2)(h)), and "actions necessary to preserve the right to petition for the redress of grievances" (*id.* at § 1(2)(i)). This State constitutional provision does not limit the ability of the Commission to translate materials into different languages and provide translation services at public meetings.

VII. GERRYMANDERING

A. Partisan Gerrymandering

Definition: Partisan (or political) gerrymandering is "the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."[44]

Although politics are inherent in any redistricting plan, the issue raised by partisan gerrymandering claims is whether the gerrymandering has reached a level that violates the Equal Protection Clause of the Fourteenth Amendment.

History: The use of partisan gerrymandering to provide one political party with an advantage over another predates the election for the First U.S. Congress, long before the term "gerrymandering" was ever used.

The term "gerrymandering" was coined by the *Boston Gazzette* in 1812 as a means of describing an unusually-shaped state senate election district drawn by the Massachusetts Legislature, and approved by Governor Elbridge Gerry, in order to favor the Democratic-Republican party. The district was said to resemble the shape of a salamander. Thus, by combining Governor Gerry's name with salamander, the term "Gerry-mander" was born. Soon, the term was used to generally describe the drawing of irregularly-shaped districts for partisan gain. The use of the term was later expanded to include the manipulation of district lines for racial purposes as well.

1. Court-Review of Partisan Gerrymandering Claims

The United States Supreme Court has struggled with the issue of whether or not courts should even entertain partisan gerrymandering claims, or whether these claims are "non-justiciable," meaning that they are inappropriate claims for review by a court. In the 1986 case, *Davis v. Bandemer*,[45] the United States Supreme Court held that such claims are justiciable under the Equal Protection Clause, thereby allowing courts to hear and rule on claims that a redistricting plan impermissibly discriminates against a political party.

2. Proving Partisan Gerrymandering Claims

Although the Supreme Court has held that partisan gerrymandering claims are justiciable, the Court has been unable to agree on the standard that should be used to adjudicate these claims.

Four of the nine Justices in the *Bandemer* case concluded that in order to prevail on a partisan gerrymandering claim, a plaintiff must prove both discriminatory intent and actual discriminatory effect

---

[44] *Vieth v. Jubelirer*, 541 U.S. 267, 271 n.1 (2004) (citation omitted).

[45] 478 U.S. 109 (1986).

against an identifiable political group.[46] How a plaintiff can prove the discriminatory effects prong of this standard is still unclear.

In its 2004 decision in *Veith v. Jubelirer*, the Supreme Court revisited the issue of what standard to apply in partisan gerrymandering cases, but again was unable to settle on a workable standard.[47] Four of the nine justices indicated that because no judicially discernable and manageable standard for adjudicating partisan gerrymandering claims exist, they would overrule *Bandemer* and hold these claims non-justiciable.[48] Three separate standards were proposed by four of the other justices, and the final justice stated that although the pending case was non-justiciable, he could not state that all partisan gerrymandering claims are non-justiciable. As a result, the Court dismissed the claim.

The Court once again addressed a partisan gerrymandering claim in the 2006 case, *League of United Latin American Citizens v. Perry*.[49] The Court failed, however, to provide any further guidance on a standard for adjudicating partisan gerrymandering claims.

B. Racial Gerrymandering

Definition: Racial gerrymandering is "the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes."[50] Although race may be considered in a redistricting plan, racial gerrymandering occurs when all other redistricting principles are subordinated to race so that race becomes the dominant and controlling rationale in drawing lines.

History: Racial gerrymandering was first used to circumvent the application of the Fifteenth Amendment in the post-Civil War South. In the 1870s, minorities were packed into a single district in Mississippi in an effort to limit minority representation in Congress. And, in 1960, racial gerrymandering was used in Alabama to create a 28-sided district that excluded African Americans. More recently, racial gerrymandering has been used to increase minority representation.

1. Court-Review of Racial Gerrymandering Claims

In *Shaw v. Reno*, the United States Supreme Court considered the North Carolina congressional plan that created additional minority districts to increase minority representation. The Court acknowledged that racial gerrymandering involves two very complex and sensitive issues: the constitutional right to vote and the propriety of race-based legislation designed to benefit minorities.[51]

---

46 *Id.* at 127.

47 541 U.S. 267.

48 *Id.* at 281.

49 548 U.S. 399 (2006).

50 *Reno*, 509 at 640 (1993) (internal quotation marks and citation omitted).

51 *Id.* at 633.

2. Proving Racial Gerrymandering Claims

In order to protect the rights guaranteed by the Fourteenth Amendment, the Supreme Court held that race-based redistricting demands strict scrutiny. In other words, any "legislation that expressly distinguishes among [its] citizens because of their race [must] be narrowly tailored to further a compelling government interest."[52]

In several other challenges following the 1990 census, the Supreme Court clarified the proof required to sustain a racial gerrymandering challenge: a plaintiff must first prove that he/she has standing; then prove that the plan was racially gerrymandered; and then determine whether there was a compelling government interest and if the district was narrowly tailored to achieve that interest.

In *United States v. Hays*, the Supreme Court held that in order to establish standing, a plaintiff must establish: (1) that he/she has suffered an injury-in-fact that is concrete and particularized and actual or imminent; (2) that there is a causal connection between the conduct and the injury; and (3) that it is likely that the injury will be redressed by a favorable decision.[53] An individual will have standing if he/she resides in a racially gerrymandered district or has been injured by the racial classification.

To prove the existence of racial gerrymandering, a court will consider evidence of the district shape, testimony regarding the motives in drawing the district and the nature of the redistricting data used. Once a court established racial gerrymandering it must apply strict scrutiny. The Supreme Court has held that remedying past discrimination and complying with Sections 2 and 5 of the Voting Rights Act can be compelling government interests.[54] A redistricting plan would be narrowly tailored if it achieved the desired goal, but did not go beyond want was reasonably necessary to do so.[55]

---

52 *Id.* at 643.

53 515 U.S. 737, 743 (1995).

54 *See Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Beer v. United States.*, 425 U.S. 130 (1976).

55 *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

VIII. LEGISLATIVE PRIVILEGE

A. Legislative Immunity

The United States Supreme Court has held that common law legislative immunity similar to that embodied in the Speech or Debate Clause of the United States Constitution exists for state legislators acting in a legislative capacity. This common law immunity is also preserved in Arizona's Constitution.[56]

- United States Constitution Speech and Debate Clause: "[F]or any Speech or Debate in either House, [senators and representatives] shall not be questioned in any other Place."[57]
- Arizona Speech and Debate Clause: "No member of the Legislature shall be liable in any civil or criminal prosecution for words spoken in debate."[58]

B. Testimonial and Evidentiary Privilege

Legislative immunity also functions as a testimonial and evidentiary privilege so that a state legislator engaging in legitimate legislative activity may not be forced to testify about those activities, including the motivation for his or her decisions.[59]

C. Legislative Privilege Covers Certain Matters Beyond Speech and Debate

The legislative privilege extends to matters beyond pure speech or debate in the legislature only when such matters are an integral part of the deliberative and communicative processes relating to proposed legislation or other matters placed within the jurisdiction of the legislature, and when necessary to prevent indirect impairment of such deliberations. The legislative privilege does not extend to the performance of administrative tasks.[60]

D. Applicability to the Arizona Independent Redistricting Commission

1. Applicability to Commissioners. The Arizona Court of Appeals has explicitly held that the IRC "performs legislative acts when formulating a redistricting plan."[61] Therefore, the legislative privilege applies to the IRC commissioners "for actions that are an integral part of the

---

56 *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 137 ¶ 16, 75 P.3d 1088, 1095 (App. 2003).

57 U.S. Const., art. I, § 6, cl. 1.

58 Ariz. Const. art. IV, pt. 2, § 7.

59 *Id.* at ¶ 17.

60 *Id.* at ¶ 18.

61 *Id.* at 139 ¶ 23, 75 P.3d at 1097.

deliberative and communicative process utilized in developing and finalizing a redistricting plan, and when necessary to prevent indirect impairment of such deliberations." [62]

2. Applicability to Consultants. The Arizona Court of Appeals has held that because "a legislator may invoke the legislative privilege to shield from inquiry acts of independent contractors retained by that legislator that would be privileged legislative conduct if performed by that legislator," to the extent that the IRC engages consultants "to perform acts that would be privileged if performed by the commissioners themselves, these acts are protected by legislative privilege."[63]

3. Applicability to Documents. "[T]o the extent the legislative privilege protects against inquiry about a legislative act or communications about that act, the privilege also shields from disclosure documentation reflecting those acts or communications."[64]

---

62 *Id.* at ¶ 24 (internal quotation marks and citation omitted).

63 *Id.* at 140 ¶ 30, 75 P.3d at 1098.

64 *Id.* at 141 ¶ 32, 75 P.3d at 1099.