

Legal Requirements & Technical Aspects of Redistricting in 2021

March 5, 2021



Marguerite Leoni
Nielsen Merksamer



Christopher Skinnell
Nielsen Merksamer



Douglas Johnson, Ph.D.
National Demographics Corporation

Redistricting in 2021 Under New California Rules and Federal Case Law

- Redistricting will be very different from 2011.
- An outline of what to expect from our discussion:
 - Developments in federal law **including the Census**
 - AB 849: new legislation that completely rewrites the state law rules governing the redistricting process for counties, starting 2020
 - AB 1276: modifies AB 849 (before it was ever used in a redistricting!)
 - **New SB 443, which proposes to modify those rules again**
 - Practical considerations for officials tasked with redrawing the lines

What's Going on With The Census?

- Latest information on projected delivery date
- Why the delay?
- Statutorily mandated adjustment of Census data = further delay
- Strategies for getting to work on redistricting before receipt of the Census data or right after

Drawing the Lines—Legal Considerations: State Law Process

- **Who draws the lines**
 - **THEN:** Board of Supervisors, except in some counties controlled by special statutory provisions.
 - **NOW:** Commissions can do the job –
 - Elections Code § 23001: “A local jurisdiction may establish by resolution, ordinance, or charter amendment an independent redistricting commission, a hybrid redistricting commission, or an advisory redistricting commission composed of residents of the local jurisdiction to change the legislative body’s district boundaries or to recommend to the legislative body changes to those district boundaries.

Drawing the Lines—Legal Considerations: State Law Process

- **Timing:**
 - **2011:** before the first day of November of the year following the year in which each decennial federal census is taken
 - **2021:** December 15, 2021:
 - **Major additional constraints for counties with delay in Census data. – S.B. 594 place holder for a fix**
 - When to start: Practical considerations to comply with new public outreach & public hearing procedures, to take advantage of redistricting commission option, and to accommodate referendum period.
 - Default to judicial process if deadline is missed

Drawing the Lines—Legal Considerations: State Law Process

- **Schedule Congestion:**
 - **2011: 150 to 200 jurisdictions redistricted**
 - Many had off-year (2011/2013) elections, and redistricted in early- to mid-2012
 - **2021: about 500!**
 - Almost all off-year elections have been eliminated, so virtually everyone will redistrict in 2021 and early 2022
 - **This will be a massive workload increase for the County Registrars** who receive and implement all the redistricting maps, and for the attorneys and demographers who assist jurisdictions with this process

Drawing the Lines—Legal Considerations: State Law Process

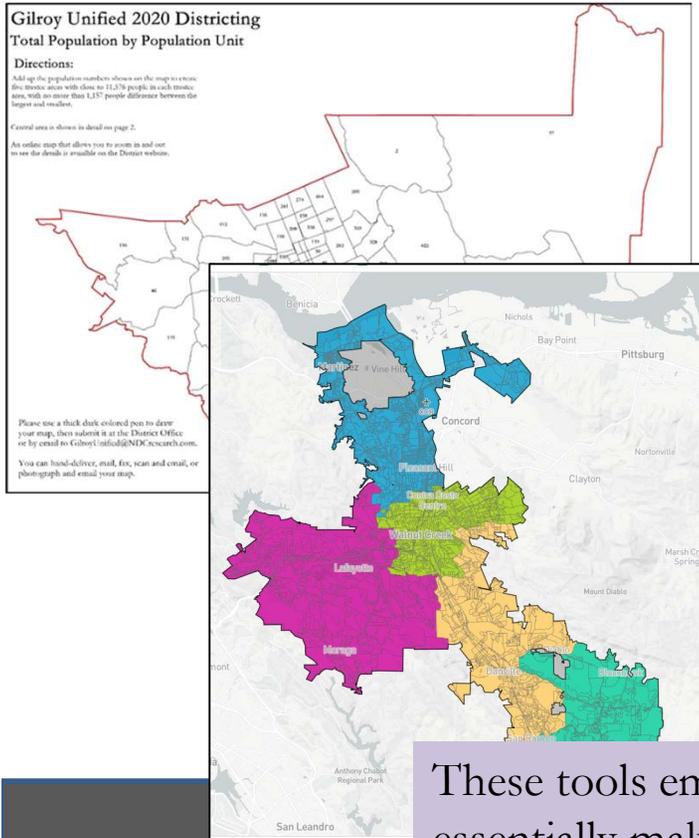
- **Hearings:**
 - **THEN:** one public hearing on the proposal prior to the public hearing at which the governing body votes to approve or defeat the proposal.
 - **NOW:** at least four public hearings: at least one before draft maps are drawn (and can be conducted by staff or consultant); at least two after draft maps are drawn; at least one on a Saturday, Sunday or after 6:00 P.M. Monday through Friday
 - Date, time and location must be posted online at least five days before the hearing or workshop
 - Hearings must be conducted at a time certain.
 - No maps published until three weeks after release of the prisoner-adjusted database
 - Only one week if 60-90 days remaining until deadline, and waived if fewer than 60 days
 - **Hearings to identify communities of interest can begin before Census data received**

Drawing the Lines—Legal Considerations: State Law Process

- **Public Outreach**
 - **THEN:** None in particular required, except compliance with Brown Act
 - **NOW:** jurisdiction must encourage public participation through
 - Media outreach
 - Good government, civil rights, civic engagement & community groups
 - Live translation, if requested 72 hours in advance of meeting
 - Publication of notices on the internet
 - Publication of notices of required public hearings five days before hearing
 - Publication of a draft map at least seven days before adoption
 - Publication of relevant demographic data
 - Receipt of maps or testimony from the public in writing or electronically

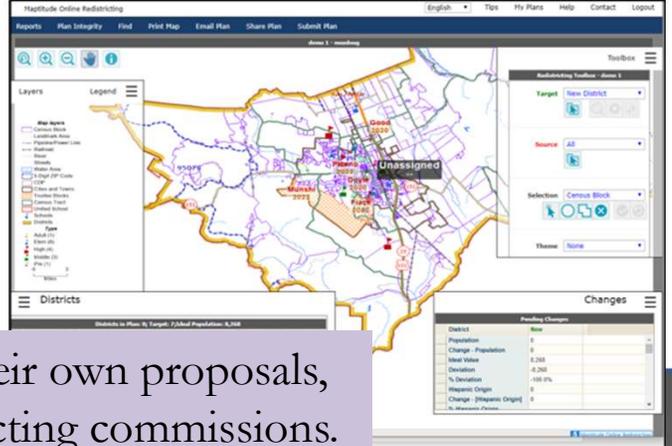
New & Improved Public Mapping Tools

In 2021, expect unprecedented demand for public empowerment in the redistricting process.



Quick Reference: Total Population & Deviation from Ideal by District		D1: 11,453 -93		D2: 11,733 157		D3: 11,650 104		D4: 11,377 -199		D5: 11,806 30	
District	Pop	Dev	Pop	Dev	Pop	Dev	Pop	Dev	Pop	Dev	
1	11,453	-93	11,733	157	11,650	104	11,377	-199	11,806	30	

Group	Category	1	2	3	4	5	Unassigned	Total	1	2	3	4	5	Unassigned	Total
Total Population	Total Pop	11,351	11,211	11,020	11,071	11,005	0	2,272	2,272	0%	0%	0%	0%	0%	0%
	Pop	43	17	104	100	30	0	294	11%	1%	1%	1%	1%	0%	15%
	Pop	1,115	1,011	1,010	1,000	1,000	0	10,000	90%	98%	98%	98%	98%	98%	85%



These tools empower residents to draw their own proposals, essentially making every resident a redistricting commissioner.

Drawing the Lines—Legal Considerations: State Law Process

- **Recordkeeping**
 - **THEN:** None in particular required
 - **NOW:** record of every public comment and governing body made available to the public within two weeks
 - Webpage maintained for 10 years in multiple languages:
 - An explanation of the redistricting process
 - Procedures for testifying or submitting written testimony
 - Calendar of all hearings and workshops
 - Notice and agenda for each hearing and workshop
 - Recording or written summary of each hearing and workshop
 - All draft maps & adopted map
 - *Secretary of State online template:* <https://www.sos.ca.gov/elections/helpful-resources/redistricting>

Drawing the Lines—Legal Considerations: State Law Process

- **Mid-Decade Redistricting**
 - **THEN:** At any time, based on a mid-decade Census or population estimates prepared by the State Department of Finance
 - **NOW:** Never, unless in conjunction with judicial proceedings, or jurisdictional boundary changes, and then with qualifications

Sample Step-by-Step Timeline

1	Initial Board discussion Options: Online mapping tool; Commission Creation, Recruiting, Onboarding	March - April
2	Create a website & public outreach plan	Spring 2021 (SOS templates)
3	Pre-Draft Map public forum(s) and hearing(s)	Summer 2021
4	Census Bureau population counts, demographic data	9/30/2021
5	SWDB releases prison adjusted counties; release of public participation tools	10/29/2021
6	Publish draft maps (note: maps cannot be published for one week if adjusted database received before 10/16/2021)	11/5/2021
7	Public hearing(s) on draft maps	At least two
8	Publish revised map(s)	7 Days prior to adoption
9	Final hearing and adoption	(Leave time for second reading if adopting by ordinance)
10	Current legal deadline to adopt (Registrars pushing for earlier completion)	12/15/2021 (E-174)
11	Candidate in-lieu petition forms (date can slide for each day plan is adopted after 11/17) Candidate filing begins	E-173 (12/16/2021) E-113
12	Election	June 2022

Federal Law Considerations

- Population Equality
- Voting Rights Act
- Equal Protection/Restrictions on Racial Gerrymandering

Drawing the Lines—Legal Considerations: Population Equality

- Overriding criterion is total population equality, *see Reynolds v. Sims*, 377 U.S. 533 (1964).
- Unlike congressional districts, local electoral districts do not require perfect equality—some deviation acceptable to serve valid governmental interests.
- Total deviation less than 10% presumptively constitutional. (Caution: the presumption *can* be overcome!)

Population Equality: What's Changed?

- As a matter of federal law, some clarification on population base, but questions remain.
 - *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)
 - *Burns v. Richardson*, 384 U.S. 73 (1966)
- As a matter of state law:
 - Total population is mandatory, except that incarcerated persons only count in specified circumstances. See Elec. Code §§ 21003, 21500(a)
 - **AB 1276 clarifies that total population must be based on last census, not ACS estimates or other population bases**

Population Equality: What's Changed?

- Elec. Code § 21500(a): “[A]n incarcerated person ... *shall not be counted as part of a county’s population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the county ...*”
- Federal prisoners not included in reapportionment base
- Status of prisoner enumeration

Drawing the Lines—Legal Considerations: Federal VRA

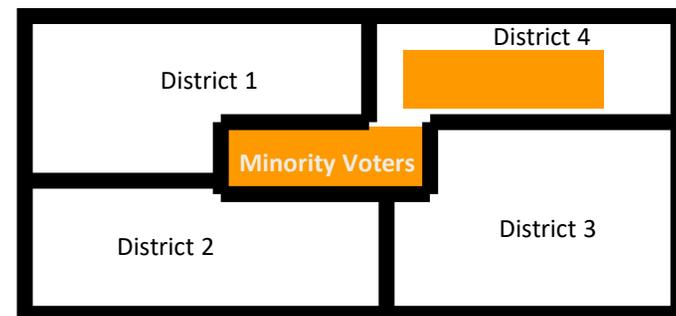
- Section 2 of the federal Voting Rights Act prohibits electoral systems (including district plans), which dilute racial and language minority voting rights by denying them an equal opportunity to nominate and elect candidates of their choice.
- “Language minorities” are specifically defined in federal law to mean persons of American Indian, Asian American, Alaskan Natives or Spanish heritage.
- Creation of minority districts required only if the minority group can form the majority in a single member district that otherwise complies with the law. *Bartlett v. Strickland*, 556 U.S. 1 (2009).

The Voting Rights Act

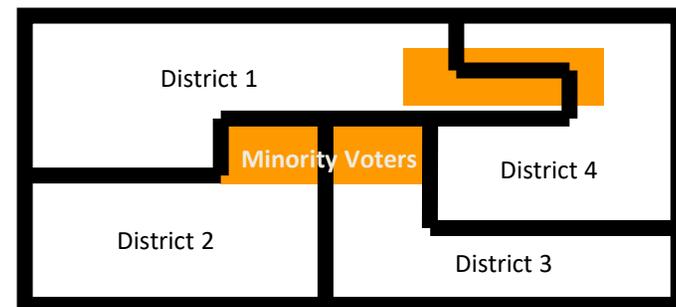
“‘Packing’ refers to the practice of filling a district with a supermajority of a given group or party. ‘Cracking’ involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts.”

-*Vieth v. Jubelirer*,
541 U.S. 267, 286 n.7 (2004)

Packing



Cracking

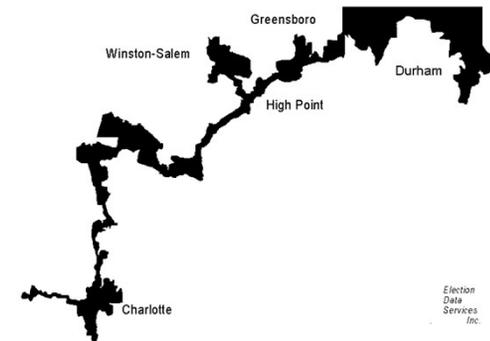


Voting Rights Act: What's Changed?

- Section 5 invalidated.
 - *Merced County v. Holder*, Case No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C. July 27, 2012) (three-judge court).
 - *Shelby County v. Holder*, 570 U.S. 529 (2013).
- Move to reduce minority-majority percentages—increased focus on “packing” claims.
 - Relates to racial gerrymandering developments

Legal Considerations: No Gerrymandering

- The Fourteenth Amendment restricts the use of race as the “predominant” criterion in drawing districts and the subordination of other considerations. *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995).
 - Such predominant use must be justified as narrowly tailored to fulfill a compelling state interest – *i.e.*, strict scrutiny
- Looks matter! Bizarrely shaped electoral districts can be evidence that racial considerations predominate. (See, *e.g.*, North Carolina CD 12, which stretched 160 miles across the central part of the State, for part of its length no wider than the freeway right-of-way.)
- But bizarre shape is not required for racial considerations to “predominate.”
- Fourteenth Amendment does not, however, prohibit all consideration of race in redistricting. *Easley v. Cromartie*, 532 U.S. 234 (2001).
 - **Focus on communities of interest.**



No Gerrymandering: What's Changed?

- Lots
 - *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015)
 - *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016)
 - *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017)
 - *Cooper v. Harris*, 137 S. Ct. 1455 (2017)
 - *Abbott v. Perez*, 138 S. Ct. 2305 (2018)
 - *North Carolina v. Covington*, 138 S. Ct. 2548 (2018)

AB 849 (vs Prior Law)

- Applies only to cities and counties
- Specifies criteria
- Mandatory (vs discretionary) criteria
- Ranked (vs unranked) criteria
- Exclusive?
- Prohibition on partisan gerrymandering
- Similar, but not identical, to state criteria

New Law (EC 21500(c))

(c) The board shall adopt supervisorial district boundaries using the following criteria as set forth in the following order of priority:

(1) To the extent practicable, supervisorial districts shall be geographically contiguous. Areas that meet only at the points of adjoining corners are not contiguous. Areas that are separated by water and not connected by a bridge, tunnel, or regular ferry service are not contiguous.

(2) To the extent practicable, the geographic integrity of any local neighborhood or local community of interest shall be respected in a manner that minimizes its division. A “community of interest” is a population that shares common social or economic interests that should be included within a single supervisorial district for purposes of its effective and fair representation. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(3) To the extent practicable, the geographic integrity of a city or census designated place shall be respected in a manner that minimizes its division.

(4) Supervisorial district boundaries should be easily identifiable and understandable by residents. To the extent practicable, supervisorial districts shall be bounded by natural and artificial barriers, by streets, or by the boundaries of the county.

(5) To the extent practicable, and where it does not conflict with the preceding criteria in this subdivision, supervisorial districts shall be drawn to encourage geographical compactness in a manner that nearby areas of population are not bypassed in favor of more distant populations.

(d) The board shall not adopt supervisorial district boundaries for the purpose of favoring or discriminating against a political party.

Redistricting under AB 849

- In the following order of priority:
 1. Federal criteria:
 - a. Equal Population
 - b. Federal Voting Rights Act (Section 2)
 2. State criteria:
 - a. Contiguity
 - b. Geographic integrity of Neighborhoods/Communities of Interest
 - c. Preservation of cities and Census-Designated Places (CDPs)
 - d. Easily identifiable natural and artificial boundaries
 - e. Compactness
 3. Additional criteria could (potentially) be considered as long as they are not in conflict/outweigh the prioritized criteria
 - a. For example: keeping district numbering/election sequencing constant for as many voters as possible
- Districts “shall not adopt boundaries for the purpose of favoring or discriminating against a political party.”

AB 849: Minimize Division of Neighborhoods/ Communities of Interest

Defining Communities of Interest

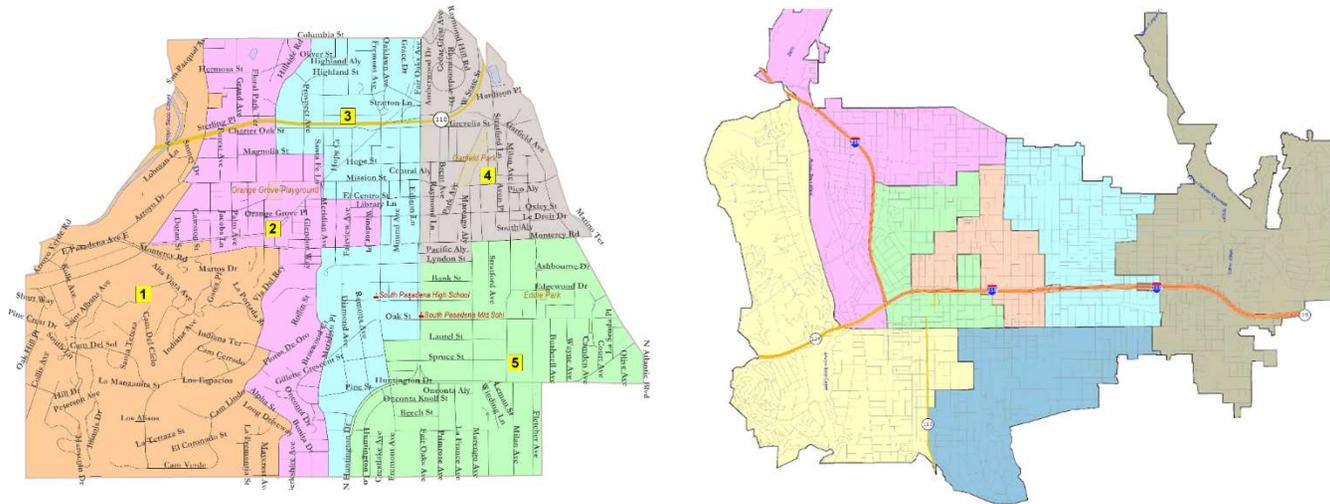
- AB 849 Definition: “a population that shares common social or economic interests that should be included within a single district for purposes of its effective and fair representation”
- What could this include?
 - Lifestyle: e.g., community character, recreation, shared social gatherings
 - Economy: e.g., major employer/industry, commercial areas
 - Demography: e.g., income, education, language, immigration status, housing, etc.
 - Geography: e.g., urban/suburban/rural, mountainous, coastal
 - Political subdivisions: school districts, planning areas, etc.
 - Place-based issues/needs: e.g., public safety (wildfire concerns), environmental (air pollution)
- NOT a community of interest: “Communities of interest do not include relationships with political parties, incumbents, or political candidates.”
 - *Compliance could be tough to prove in small population counties where everyone knows where everyone lives*

AB 849: Minimize Division of Neighborhoods/ Communities of Interest

Communities: State Commission Examples (2011)

- “Its primary **shared economic interest is agriculture**, both valley agricultural bases, such as wheat, corn, tomatoes, alfalfa and various tree crops, and the wine-growing regions of Napa, Lake, and Sonoma counties.”
- The district “includes communities of Crestline to Big Bear that share the **common lifestyle of the mountain forest area** of the county and **similar interests in wildlife and emergency services concerns regarding wildfire danger.**”
- “This district also joins a **community of interest made up of Asian Americans and Pacific Islanders with shared economic and social ties based on income status, housing, language, and immigration status**, including a large Hmong immigrant community.”
- “It includes the communities that surround Folsom Lake with its **shared recreational interests.**”
- “This district includes the **core neighborhoods containing the Lesbian Gay Bisexual Transgender (“LGBT”) community**, as well as several **lower-income, immigrant and working-class neighborhoods.**”
- “This district is characterized by the interests of the western Coachella Valley, and includes tourism, **a retirement community with needs for health care access**, and bedroom communities.”
- “The district reflects **shared concerns about education, safety, and economic interests, along with transportation interests** among cities that share the 605 Freeway as a major corridor”
- “This district is characterized by common interests of the communities of western Riverside County, **animal-keeping interests of Jurupa Valley and Norco**; and shared interests between Eastvale, Norco, and Corona. Corona and Norco **share a common school district.**”
- “Cities and communities surrounding LAX **work together in addressing jet noise mitigation** issues and managing airport traffic.”

AB 849: Minimize Division of Neighborhoods/ Communities of Interest Communities: Codifies a specific approach



AB 849: Minimize Division of Neighborhoods/ Communities of Interest

How might you identify community of interest boundaries?

- **Community testimony**
 - Demographic data: e.g., American Community Survey data, etc.

What bonds your community – what do you see as the common links in your community?

Where is your community located – what are the boundaries of your community?

Why should the community be kept together – or separate from another area?

State Law Criteria: What's Changed?

- Lots
 - Other than equal population, Voting Rights Act, and equal protection, criteria were formerly discretionary and permissive (the board “may” consider the others). Now appear mandatory.
 - Criteria now ranked in order of priority.
 - No longer clear that non-statutory criteria can be considered.
 - Consideration of incumbency and political parties now restricted – to what extent, unclear.
 - Exclusion of prisoners previously a policy choice; not now.
 - A.B. 443 (Newman), introduced on February 16, would change the rules again to model the rules applicable to the CRC. Referred to Senate Committee on Elections & Constitutional Amendments on February 25, 2021

Legal Requirements & Technical Aspects of Redistricting in 2021

March 5, 2021



Marguerite Leoni
Nielsen Merksamer



Christopher Skinnell
Nielsen Merksamer



Douglas Johnson, Ph.D.
National Demographics Corporation