

2021 Redistricting Is Here. And the Rules Have Changed Again.



Shalice Tilton
National
Demographics
Corporation

Moderator



Chris Skinnell
Nielsen Merksamer
Parrinello Gross &
Leoni

Attorney



Douglas Johnson
National
Demographics
Corporation

Demographer



Elio Salazar
Los Angeles County
Registrar of Voters

Geographic
Information Systems
Manager

POLLING QUESTION

Which best describes your city?

- a) already by-district and going to redistrict once the census data is available
- b) currently at-large but already decided to move to by-district elections once the census data is available
- c) currently at-large but thinking about moving to by-district elections
- d) currently at-large, no plans to move to by-district elections
- e) other

2021 Redistricting Is Here – and the Rules Have Changed (Yet) Again

*A Presentation for the City Clerks
New Law & Elections Seminar
December 18, 2020*

by

Chris Skinnell, Partner
Nielsen Merksamer Parrinello Gross & Leoni, LLP

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
 - AB 849: new legislation that completely rewrites the state law rules governing the redistricting process for cities, starting 2020
 - AB 1276: modifies AB 849 (before it was ever used in a redistricting!)
 - Practical considerations for officials tasked with redrawing the lines

POLLING QUESTION

Starting January 1, 2020, the California legislature put in place new rules for redistricting. The FAIR MAPS Act (adopted as AB849, revised by AB1276) significantly changed how city council election maps are drawn.

Which describes your situation:

- a) I and my Council have not yet been briefed on the new rules.
- b) I am aware of the new rules, but my Council has not yet been briefed on them.
- c) The Council and I are at least somewhat aware of the new rules.
- d) Other

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, 21601(a)(1) (general law cities), 21621(a)(1) (charter cities)
 - **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 §§ 21601(a)(2) & 21621(a)(2): “[A]n incarcerated person ... *shall not be counted as part of a city’s population, except for an incarcerated person whose last known place of residence may be assigned to a census block in the city ...*”
- Federal prisoners not included in reapportionment base
- Status of prisoner enumeration

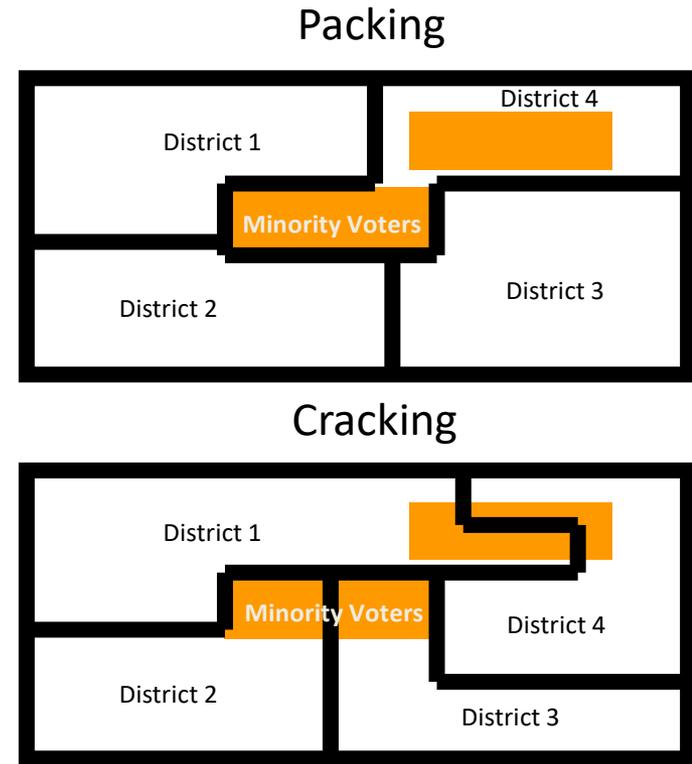
Drawing the Lines—Legal Considerations: Federal VRA

- 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)

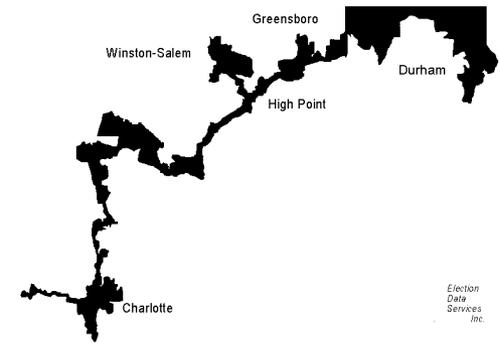


Voting Rights Act: What's Changed?

- 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 mandatory criteria
- Mandatory (vs discretionary) criteria
- Ranked (vs unranked) criteria
- Prohibition on partisan gerrymandering
- Similar, but not identical, to state criteria

New Law (EC 21601, 21621)

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

(1) To the extent practicable, council 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 council district for purposes of its effective and fair representation. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

(3) Council district boundaries should be easily identifiable and understandable by residents. To the extent practicable, council districts shall be **bounded by natural and artificial barriers**, by streets, or by the boundaries of the city.

(4) To the extent practicable, and where it does not conflict with the preceding criteria in this subdivision, council 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 council shall **not** adopt 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 & 1276: Application to Charter Cities

Explicitly made applicable to charter cities.

AB 1276 would exempt a charter city from the mandatory, prioritized criteria IF its charter:

- excludes consideration of other redistricting criteria OR
- provides two or more traditional criteria for redistricting
- Elec. Code § 21621(e)

AB 1276 would not exempt charter cities from the rules governing equal population (total population required, prisoners, etc.) or the rules prohibiting partisan considerations

- Obviously the federal VRA and state and federal constitutional rules apply.

Constitutional issues?

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.”

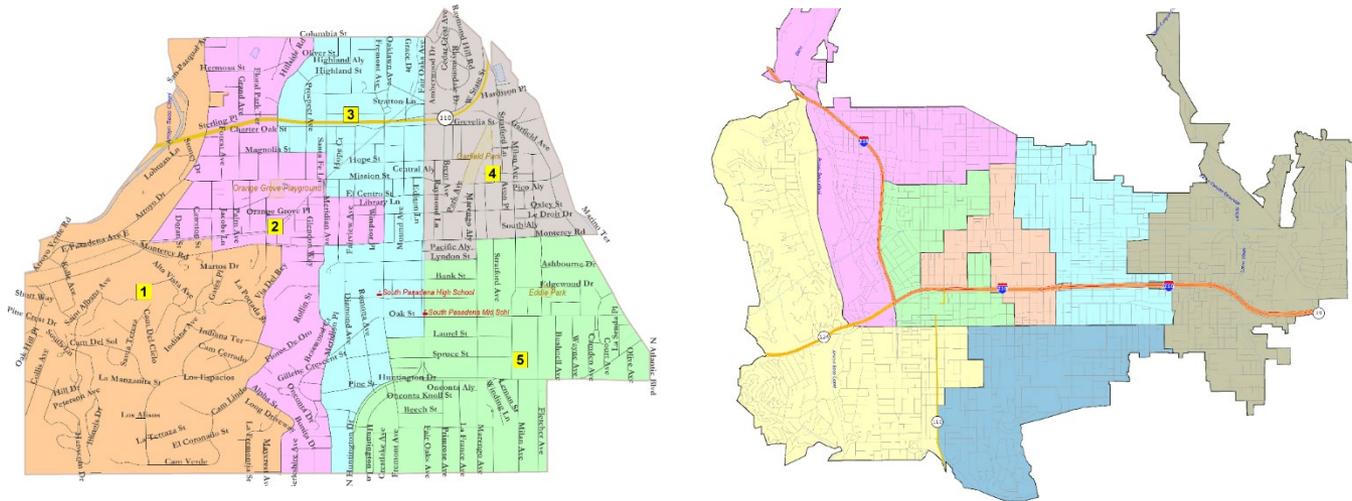
AB 849: Minimize Division of Neighborhoods/ Communities of Interest

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.

Drawing the Lines—Legal Considerations: State Law Process

- **Who draws the lines**
 - **THEN:** City Council, except in some charter cities
 - **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:** Either December 15, 2021, or April 17, 2022, depending on election date:
 - **12/15/21:** “For redistricting occurring before 2031 and where a city has a regular election occurring after January 1, 2022, and before July 1, 2022, the boundaries of the council districts shall be adopted by the council not later than 174 days before that election.”
 - **4/17/22:** “For redistricting occurring before 2031 and where a city does not have a regular election occurring after January 1, 2022, and before July 1, 2022, the boundaries of the council districts shall be adopted by the council not later than 205 days before the city’s next regular election occurring on or after July 1, 2022.”
 - Additional constraints with possible delay in Census data.
 - 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

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 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

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 to provide template by January 1*

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 City Council discussion Options: Online mapping tool; Commission Creation, Recruiting, Onboarding	December 2020 – January 2021
2	Create a website & public outreach plan	1/1/2021 (SOS releases templates)
3	Census Bureau population counts, prison-adjusted counts, demographic data, public participation tools	4/1/2021 - 6/1/2021 (could be delayed by four months)
4	Pre-Draft Map public forum(s) and hearing(s)	At least 60 – 90 days recommended for four hearings plus mapping time
5	Draft maps	
6	Publish draft maps	
7	Public hearing(s) on draft maps	
8	Publish revised map(s)	7 Days prior to adoption
9	Final hearing and adoption	14 Days (suggested for second reading if adopting by ordinance)
10	City deadline to adopt and submit map to Registrar (election 1/1/22 to 6/30/22) City deadline to adopt and submit map to Registrar (election 7/1/22 to 12/31/22)	12/15/2021 (E-174) 4/17/2022 (E-205)
11	Candidate in-lieu petition forms Candidate filing begins	E-173 E-113
12	Election	2022

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New Commission Options for 2021

Historically, only Charter counties, cities and school districts could create independent redistricting commissions.

2016: SB 1108 empowers cities and counties

2017: SB 1018 empowers schools and special districts

Advisory: Draws and recommends map(s)

Hybrid: Draws two or more maps and the legislative body must choose one without modification

Independent: Has power to adopt map

New Options in Elections Code 23000

- Authorizes Advisory, Hybrid and Independent Commissions
- Advisory:
 - ▣ Appointed by Council
 - ▣ No elected officials, family members or paid campaign staff
 - ▣ No extra mapping criteria
- Hybrid and Independent:
 - ▣ Council sets appointment process, but may not directly appoint
 - ▣ Extensive restrictions on commission members
 - ▣ “shall not draw districts for the purpose of favoring or discriminating against a
 - ▣ political party or an incumbent or political candidate.”

Local Commissions

Prior Commissions

1. Chula Vista
2. Dinuba
3. Downey
4. Escondido
5. Menifee
6. Menlo Park
7. Merced
8. Modesto
9. Pasadena
10. Pasadena Unified
11. San Diego
12. Seal Beach
13. Los Angeles *
14. San Francisco *

New for 20201 (so far)

1. Berkeley
2. Long Beach
3. Oakland
4. Sacramento (new form)
5. Rosedale
6. San Jose
7. Stockton
8. Santa Barbara County
9. San Bernardino County
10. Los Angeles County **
11. San Diego County **

* Commission is directly controlled by Councilmembers.

** Partisan commission was imposed by State Legislature

Handy Resource: www.localredistricting.org

Cautions

- All cities face the new mapping criteria
- Elections Code 23000(k): “The commission shall not draw districts for the purpose of favoring or discriminating against a political party or an incumbent or political candidate.”
 - *Compliance could be tough to prove in smaller cities where everyone knows where everyone lives.*

Clerks' Role

- The law requires that Council determine *how* the hybrid or independent commission will be appointed
- But the Council *cannot directly appoint* the commission.
- This could result in a big (and highly political) role for City Clerks in either selecting a pool of qualified applicants or directly picking the commissioners.
- Other options:
 - Select retired judges to act as the Commission
 - Have a panel of retired judges select the Commission
 - Identify a specific list of positions to be in the Commission pool, then have someone select from each pool



What Happens to Your Maps?

- Official Ordinance sent to County Registrar
- GIS “shapefile” and related technical files sent to County Registrar
- Registrar inputs lines into Registrar’s GIS system as a temporary map and redraws precincts to match *
- When there is no election lock in place, map is moved into production GIS system

* Process may vary from County to County.



When are voters lists available?

- Once the maps are in the final / production GIS System, voter lists are available to candidates in the usual manner
- Voter lists generally cannot be generated by demographers nor when the maps are only in the temporary GIS system stage

Contact Information



Shalice Tilton

National Demographics
Corporation

714-308-0726
stilton@NDCresearch.com

Chris Skinnell

Nielsen Merksamer
Parrinello Gross & Leoni

415.389.6800
CSkinnell@nmgovlaw.com

Douglas Johnson

National Demographics
Corporation

310-200-2058
djohnson@NDCresearch.com

Elio Salazar

Los Angeles County
Registrar of Voters

562-462-2704
ESalazar@rrcc.lacounty.gov