

Latino Voting and  
Drawing  
—Majority-Minority and  
Minority Ability  
Districts: An Arizona  
Case Study



# — A Brief Look at History

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## Early Arizona Political Makeup as Relied Upon By Historians

- Early period, Latinos held prominent roles in the community.
- Treaty of Guadalupe Hidalgo that ended the Mexican-American War, the United States conferred citizenship on the approximately 100,000 Hispanics living in Arizona.
- Western migration led to a reduced role, with most Latinos working at laborers with pay disparity.
- Inter-racial Latinos, who descended from Native Americans or African Americans, fared worse in the early years.

## Early Arizona

- In 1909, the Arizona territorial legislature required an English language literacy test as a prerequisite to voter registration.
- Past historians have determined that the test was specifically designed to prevent the territory's Hispanic citizens – who had lower English literacy rates than white citizens – from voting.
- Latinos were largely excluded from the drafting of the Arizona Constitution – there was only one Latino delegate.

## Early Arizona

- Upon Arizona becoming a state in 1912, the Legislature re-imposed an English literacy test that was again determined by historians to be used to limit Latino voting.
- The historical record reflects that Latino voters were frequently required to pass more difficult version of the literacy tests, without assistance and without error, compared to white voters.
- The literacy test was not repealed until 1972, two years after an amendment to the Voting Rights Act banned literacy tests nationwide.

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## 20th Century

- Latinos in the 1960s were the target of voter intimidation and challenges at the polls.
- Leading up to the 1970 election, the Arizona Legislature required all citizens to re-register, resulting in the undoing of voter registration outreach efforts in Latino communities.
- Latinos gained protection under the Voting Rights Act when Congress amended the statute in 1975 to include protection for “language minority groups,” a term defined to mean “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”

## — 20<sup>th</sup> Century, Continued.

- Although Latinos have held statewide elected offices in the modern era, statistics have shown that Latinos have held fewer elected and judicial offices compared to Whites.
- Until the VRA's coverage formula for pre-clearance was repealed by the United States Supreme Court, Arizona was still required to have any law that impacted elections, including its redistricting maps, pre-cleared by the Department of Justice.
- Arizona's prior redistricting plans, which received pre-clearance under Section 5, included two majority-minority congressional districts that allowed Latinos a better proportional opportunity to elect representatives.

# Latino Voter Registration Trends at a Glance

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## Recent Figures and Trends

- Latinos are the largest minority group in Arizona: they form 31% of the total population.
- However, Latinos make up a substantially smaller share of Arizona's citizen voting age population – 23%.
- Latinos are less likely to vote as cohesively as other minority groups do.

# Notable Latino Voting Rights Litigation

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*League of United Latin American  
Citizens v. Perry, 548 U.S. 399 (2006)*

- VRA Section 2 Vote Dilution Case.
- Texas drew congressional districts so as to increase Republican seats and protect a particular Republican incumbent in given district “against an increasingly powerful Latino population that threatened to oust him.”
- In the district at issue, “the increase in Latino voter registration and overall population, the concomitant rise in Latino voting power in each successive election, the near victory of the Latino candidate of choice in 2002, and the resulting threat to the incumbent's continued election were the very reasons the State redrew the district lines.”

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*League of United Latin American  
Citizens v. Perry, 548 U.S. 399 (2006)*

- The Court noted that Texas' statewide redistricting plan failed to accord Latinos proportional representation, and noted also that the changes to the challenged district "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive."
- "Against this background, the Latinos' diminishing electoral support for the incumbent indicates their belief he was unresponsive to their particularized needs. In essence, the State took away their opportunity because they were about to exercise it. . . . [T]he redrawing of District 23's lines was damaging to its Latino voters. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active."



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***Montes v. City of Yakima*, 40 F. Supp.  
3d 1377 (E.D. Wash. 2014)**

- VRA Section 2 Vote Dilution Case
- Plaintiffs challenged the City of Yakima's at-large voting system, alleging that it deprived Latinos of the right to elect representatives of their choosing to the Yakima City Council.
- Plaintiffs noted that no Latino had ever been elected to the City Council in the then-37-year history of the at-large system – despite the fact that Latinos accounted for approximately one-third of the City's voting-age population and approximately one-quarter of its citizen voting-age population.

*Montes v. City of Yakima*, 40 F. Supp.  
3d 1377 (E.D. Wash. 2014)

- “[A] § 2 plaintiff must make a prima facie showing that a bloc voting majority will usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group.”
- Applying the “*Gingles*” factors, the court concluded that:
  - Yakima’s Latino population was sufficiently large and geographically compact to allow it to form a majority of voters in a single-member district.
  - Looking to statistical analyses derived through ecological regression, Yakima’s Latino population constituted a politically cohesive minority group and voted as a bloc; and
  - The non-Latino majority voted sufficiently as a bloc to enable it to usually defeat the Latino minority's preferred candidate.

*Montes v. City of Yakima*, 40 F. Supp.  
3d 1377 (E.D. Wash. 2014)

- The court also looked to the totality of the circumstances in concluding that the at-large system violated § 2, including Yakima's prior failure to provide Spanish-language voting materials and voter assistance to Spanish-speaking voters and the systemic challenges in Yakima's system to Latinos electing candidates of their choice.

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## Key Considerations re: Latino Communities and Redistricting

- For purposes of redistricting law, Latinos are treated like other racial or language minorities under the Voting Rights Act and the Fourteenth Amendment. That is, the same legal principles guide the inquiry.
- But Latinos have a unique history of racial discrimination, and they display sufficiently distinct voting patterns that will often distinguish their claims in a state like Arizona from those of other minorities in voting rights cases elsewhere (i.e., blacks in the South).
- These trends inform application of the Voting Rights Act and the drawing of majority-minority and minority ability districts.



# — Requirements of the VRA

## Refresher: Section 2 vs. Section 5

“Section 2 is a legal *sword* that enables minority voters to *improve* their electoral position, while Section 5 is a *shield* that prevents minority voters’ position from *worsening*.”  
ELECTION LAW: CASES AND MATERIALS (6th ed. 2017).

	Section 5	Section 2
<i>Standard</i>	<b>Nonretrogression</b> ( <i>i.e.</i> , a minority group may not lose ground relative to its prior position)	Whether a group’s members “have <b>less opportunity</b> than other members of the electorate to <b>participate in the political process</b> and to <b>elect representatives of their choice</b> ”
<i>Scope of application</i>	Applied only to <b>covered jurisdictions</b>	Applies to <b>every voting jurisdiction</b>
<i>Initiation of proceedings</i>	<b>Preclearance</b> put onus on government	Without preclearance, <b>requires plaintiffs to bring challenges</b>

## — Refresher: Section 5 and retrogression

- Arizona was a covered jurisdiction under Section 5 preclearance until 2013, when the Supreme Court voided the preclearance formula in *Shelby County v. Holder*.
- This is the first redistricting cycle since the end of preclearance.
- While Section 5 no longer applies, a court could potentially consider retrogression as **evidence of vote dilution** in violation of Section 2 so long as it is supported by actual data (this concept has not been tested yet).

## Defining two types of districts: Majority-Minority District

- A particular minority group makes up a 50%+1 majority of the district's voters.
  - Probably must be majority of **citizen voting-age population (CVAP)**, not just voting-age population (VAP).<sup>1</sup>
- The DOJ counts **multi-racial voters** who identify as white and some other minority category as **members of the minority**. For multi-racial voters who identify as members of **two or more minority categories** (including Hispanic/Latino), the DOJ practices “iterative” allocation, analyzing them as members of each relevant minority group one at a time.

<sup>1</sup> See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 424–25 (2006) (Latino vote diluted when Texas reduced district to 46% Latino CVAP, even though district's overall Latino VAP remained over 50%).



## — Defining two types of districts: Minority “Ability” District

- A particular minority group is typically able to elect its preferred candidate, either with the help of white voters (“crossover”) or the voters of a different minority group (“coalition”).
- Requires “complex” expert analysis of “group voting patterns, electoral participation, election history, and voter turnout.”<sup>2</sup>

<sup>2</sup> *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1308 (2016).

## Defining two types of districts

- Majority-minority districts are **usually also ability districts**, but not always.
- A slightly majority-minority district by CVAP may still not be an effective minority ability district due to **disparities in voting patterns or access**.
- Experts can help determine whether a **higher minority CVAP threshold** may be required to ensure that the group can elect its preferred candidate in a particular district.

<sup>1</sup> See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 424–25 (2006) (Latino vote diluted when Texas reduced district to 46% Latino CVAP, even though district's overall Latino VAP remained over 50%).

<sup>2</sup> *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1308 (2016).

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## Defining two types of districts

- **Majority-minority districts** come into play in the *Gingles* framework for determining vote dilution under Section 2.
- **Minority ability districts** are important under both sections, but were especially relevant under Section 5 for determining retrogression.

## Refresher: The *Gingles* Framework

- **Step 1** – Is the minority group capable of electing a candidate of its choice in some hypothetical district? Must meet **three criteria**:
  - **First**, the minority group must be sufficiently **large** and **geographically compact** to constitute a majority in a hypothetical district.
  - **Second**, the minority group must be **politically cohesive**.
  - **Third**, the **majority** must vote sufficiently as a bloc to enable it to **usually defeat** the minority's preferred candidate.
- **Step 2** – Based on the **totality of the circumstances**, do the members of the minority group in fact have less opportunity to elect the candidate of their choice?
  - Look to factors listed in the Senate Report accompanying the 1982 amendments to the VRA.

“Racial polarization”

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graph LR; A["Racial polarization"] --> B[politically cohesive]; A --> C[usually defeat];
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# Refresher: The *Gingles* Framework

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- Step 1 (1/3): Sufficiently large and geographically compact to constitute a majority
  - Size
    - Must be actual majority – 50%+1 of CVAP.
    - “Crossover” votes from white voters **do not count** for this inquiry.
    - A “coalition” combining two minority groups **might count** if cohesive enough to be treated as one (unlikely).
  - Compactness
    - Is the minority group sufficiently concentrated that a district can be formed while still respecting traditional redistricting principles like communities of interest and political/natural boundaries?
    - A district that combines far-flung and disparate minority populations – like one group of Latino voters in the Austin suburbs with another group 300 miles away in the Rio Grande Valley – is not compact.<sup>1</sup>

<sup>1</sup> See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 432–35 (2006).

## Refresher: The *Gingles* Framework

- Step 1 (2/3): Politically cohesive

- “Whether the minority group has expressed clear political preferences that are distinct from those of the majority.”<sup>1</sup>
- Determined by analyzing **actual voting preferences in actual elections**, not speculation.
- Demonstrated using expert statistical analysis of prior election results.
- **No set quantitative threshold** for how cohesive a group must be.
  - Experts have used working cohesion thresholds of 60% or 67%, but in practice cohesion is often much higher.<sup>2</sup>

<sup>1</sup> *Gomez v. Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988).

<sup>2</sup> See *United States v. Blaine County*, 363 F.3d 897, 910, 910 n.20 (9th Cir. 2004).

## Refresher: The *Gingles* Framework

- Step 1 (3/3): The **majority** must vote sufficiently as a bloc to enable it to **usually** defeat the **minority's preferred candidate**
  - “Usually” means more than half of the time.
  - The “**minority's preferred candidate**” is the one who would win if the election were held only among the minority group in question, but **need not be a member of the group**.
  - **Results-oriented test** – no specific quantitative level of majority political cohesion is required, and discriminatory motives (or lack thereof) are irrelevant.
  - In the Ninth Circuit, the **ability** of a minority group to play **kingmaker** between two white candidates is less telling than its **inability** to elect primary or general election candidates from **within the group** against white opponents.<sup>1</sup>
  - Requires expert statistical analysis of prior election results.

<sup>1</sup> *Ruiz v. City of Santa Maria*, 160 F.3d 543, 553–54 (9th Cir. 1998) (noting that the VRA “means more than securing minority voters’ opportunity to elect whites”).

## Refresher: The *Gingles* Framework

- **Step 2:** Based on the **totality of the circumstances**, do the members of the minority group in fact have less opportunity to elect the candidate of their choice?
  - Look to a list of nine “**Senate Factors**” taken from the Senate Report accompanying the 1982 amendments to the VRA.
    - The Senate Factors focus on the **history and present effect of discrimination** against the minority group, both in voting/elections and generally.
  - Also look to **proportionality** – whether the number of minority ability districts statewide is proportional to the minority group’s overall statewide population share – for an upper limit to the VRA’s requirements.
    - Section 2 explicitly **does not** require a state to meet proportionality, let alone exceed it.
- In practice, a minority group that satisfies the three-part test in *Gingles’* Step 1 will almost always have **already shown enough** to succeed at Step 2.

## — Refresher: The *Gingles* Framework

- If both steps of the *Gingles* test are met, the minority group has **proven vote dilution** in violation of Section 2.
- The state or the court must draw one or more actual **majority-minority districts** to remedy the violation, not just minority ability districts.<sup>1</sup>

<sup>1</sup> *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009).

## What about the 14th Amendment?

- The Equal Protection Clause of the 14th Amendment prohibits states from drawing districts **predominantly** on the basis of race, or “**racial gerrymandering.**”
- Racial gerrymandering occurs when a state draws districts based on race **to the exclusion of traditional redistricting criteria** such as compactness, contiguity, communities of interest, or political boundaries.
  - For example, a district that connects narrow and disjointed minority communities across a large distance may be a racial gerrymander.<sup>1</sup>
- Compliance with a state’s obligations under the Voting Rights Act is **not** racial gerrymandering.

<sup>1</sup> See *Miller v. Johnson*, 515 U.S. 900, 906–10 (1995).





Questions?