Arizona Redistricting History and Litigation

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Today, the right to vote in this country and the state of Arizona is a fundamental right of citizenship.[1] The act of voting is one of the most elemental forms of democratic participation.[2] But participation in our democracy is more than the act of casting a vote. The vote must be meaningful in the sense that it can be aggregated with voters having compatible goals. As Justice Powell said in *Davis v. Bandemer*, "The concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."[3] If you live anywhere in the United States, you live in geographic districts from which all federal, state, and some local officers are elected.[4] The geographic dimensions of those districts have

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1. *See, e.g.*, Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978) (explaining that "[s]uffrage [in State elections], for example, always has been understood to be tied to an individual's identification with a particular State"); Ana Henderson, *Citizenship, Voting, and Asian American Political Engagement*, 3 U.C. IRVINE L. REV. 1077, 1078 (stating that "[v]oting in the United States is an important right . . . because access to the vote is a key expression of citizenship and a symbol of national membership"); Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (overruling a prior case that held that Native Americans in Arizona could not vote due to their federal status as "under guardianship," despite having been statutorily granted citizenship in 1924).

2. Despite the indisputability of this principle, oddly the United States and Arizona Constitutions offer little mention of the right to vote. Neither the original federal Constitution, nor the 14th Amendment, secured even the basic right to vote. And the Arizona Constitution is the only state constitution that does not explicitly grant the right to vote. *See* Joshua A. Douglas, *The Right To Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95–96, 101 n.73 (2014). In fact, most of the provisions of both constitutions addressing voting are phrased in the negative without an affirmative grant of voting rights. *E.g.*, U.S. CONST. amend. XV, § 1 (stating "[t]he right to citizens of the United States to vote shall not be denied or abridged . . . on account of race"); ARIZ. CONST. art. VII, § 2 (stating "[n]o person shall be entitled to vote . . . unless" the individual meets the citizenship, residency, and age requirements). *See also* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY, LEGAL STRUCTURE OF THE POLITICAL PROCESS, 15–17 (5th ed. 2016).

3. 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part).

4. The enactment of the Apportionment Act of 1842 for the first time established that every instance where a state was entitled to more than one Representative, those Representatives were to be elected in districts composed of contiguous territories. Apportionment Act of 1842, ch. 47, 5 Stat. 491.

always affected electoral outcomes, but they have changed markedly since our country was founded and Arizona became a state.[5]

This comment will provide a brief history of Arizona's reapportionment battles that eventually brought about the establishment of the Arizona Independent Redistricting Commission. Discussion follows of the Arizona federal district court redistricting litigation in 2002 and 2012, after the creation of the IRC. Finally, some reflections on Arizona redistricting will be offered.

I. ARIZONA'S POPULATION GROWTH

At the time of statehood in 1912, Arizona was composed of farmers, ranchers, and treasure seekers in search of veins of copper, gold, and silver, along with the Native Americans who had traveled the region since antiquity.[6] In the desert, the ancient Native Americans are now represented in the Pima, Maricopa, Ak-Chin and Tohono O'Odham tribes, while in northern Arizona there are the Hopi, Zuni, Apache, and Navajo tribes to name a few of the twenty-one tribes that occupy 27% of Arizona lands.[7]

In large part because of railroads, tourism in the 1920s dramatically increased, and Arizona played a significant role in the two world wars which perpetuated a population boom.[8] Arizona's hot dry climate created a draw for those (including my parents) suffering from the national tuberculosis epidemic and other ailments relieved by the climate.[9] But most likely, starting

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5. In the colonial era, the territorial boundaries for voting often were towns and counties or groups of towns and counties. Doug Spencer, *What Is Redistricting?*, ALL ABOUT REDISTRICTING, LOY. L. SCH., https://redistricting.lls.edu/redistricting-101/what-is-redistricting/ [https://perma.cc/6V7U-AHL4]. For example, New York State's 1777 Constitution contemplated that nine representatives would be drawn from New York City and county, ten from Albany city and county, four from Queens county, and two from Kings county, to name a few. *Id.*

6. *See The 5 C's*, ARIZ. ST. LIBR., ARCHIVES, & PUB. RECS. ARIZ. ALMANAC, https://azlibrary.gov/collections/digital-arizona-library-dazl/arizona-almanac/5-cs [https://perma.cc/A4UN-PUH4].

7. Lattie F. Coor, *Introduction* to ARIZONA 13–14 (2019). Lattie F. Coor, a native of Arizona, served as a university president for twenty-six years, including twelve at Arizona State University.

8. The multitude of air bases and associated sites caused the birth of many aviation and manufacturing industries in Arizona. *Id.* at 17.

9. Roger Naylor, *A Century Before Coronavirus, Arizona Was a Haven for People Fleeing Another Fearsome Disease*, ARIZ. REPUBLIC (May 11, 2020, 12:41 PM), https://www.azcentral.com/story/travel/arizona/road-trips/2020/05/11/arizona-tuberculosis-history-sunnyslope-sanatoriums-doc-holliday/3101543001/ [https://perma.cc/L7ZH-B45G].

in approximately 1950, the advent of domestic air conditioning was the primary accelerant for the explosive population growth.[10]

Since statehood, Arizona has often been the fastest growing state.[11] In 1912, Arizona's population was 220,000 while the 2020 population, when the census is finalized, is anticipated to be 7,151,502.[12] This dramatic population surge significantly affected Arizona's reapportionment history, because the population explosion was highly concentrated in urban rather than rural areas.[13]

II. ARIZONA'S REAPPORTIONMENT HISTORY

Arizona's apportionment of its state legislature began with the Constitutional Convention in 1910 when the task was assigned to the Committee on Legislative Department, Distribution of Power, and Apportionment.[14] Counties were recommended as the unit for apportionment, which was approved by the delegates at the Convention along with the composition of the state Senate at 19 members, and the state House at 35 members.[15]

Between 1910 and 1953 the apportionment plan was modified twice. First in 1918, by initiative, a constitutional amendment was approved giving each county House seats based on the number of votes cast in the prior governor election, but no county's delegation could be reduced.[16] Then in 1932, again

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10. Coor, *supra* note 7, at 17. Prior to air conditioning, we were fond of trying to come up with the most amusing hot-climate humor. Like, "You know you are in Arizona when you realize that asphalt has a liquid state," or, "You know a swamp cooler is not a happy hour drink." And yes, we Arizonans all know of at least one person who tried in the summer, with some success, to fry an egg on the sidewalk.

11. *See, e.g.*, Garrett Archer, *Arizona Is the Fastest Growing State in the Nation*, ABC 15 ARIZ. (Sept. 26, 2019, 11:19 PM), https://www.abc15.com/news/state/arizona-is-the-fastest-growing-state-in-the-nation [https://perma.cc/9NJB-XWA7]; Sam Roberts, *Arizona Displaces Nevada as Fastest-Growing State*, N.Y. TIMES (Dec. 22, 2006), https://www.nytimes.com/2006/12/22/us/22census.html [https://perma.cc/STR8-E2KP].

12. In 1960 it increased to 1,302,161. In 2002, it increased to 5,541,000. In 2012, the population was 6,555,500. *Quick Facts Arizona*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/AZ# [https://perma.cc/G6F4-HFTZ].

13. In 1940, 35% of the state population was urban. *See* J.L. POLINARD, *Arizona*, *in* REAPPORTIONMENT POLITICS: THE HISTORY OF REDISTRICTING IN THE 50 STATES 36. (Leroy Hardy et al. eds., 1981). It has been estimated that, at present, more than 80% of Arizona citizens live in the cities of Phoenix and Tucson. Coor, *supra* note 7, at 17–18.

14. POLINARD, *supra* note 13, at 36–37.

15. *Id.*; *see also* David J. Cantelme, *Redistricting and Voting in Arizona*, ARIZ. ATT'Y, Nov. 2020, at 29, https://www.azattorneymag-digital.com/azattorneymag/202011/MobilePagedReplica.action? [https://perma.cc/7CQQ-WJKF].

16. POLINARD, *supra* note 13, at 37.

by initiative, the number of votes required for a county to receive new House seats was increased, but a county's delegation could be reduced if not enough votes were cast, which enhanced representation in the urban areas.[17] This plan of apportionment continued until 1953, when a comprehensive modification was made.[18] Governor John Howard Pyle sought an apportionment that would increase the power of the less-populated counties, purportedly for political reasons.[19] It had become apparent that the urban population was a threat to the prewar balance that had favored the less populated, rural interests.[20] The proposal was approved by the legislature and the public by a narrow margin.[21] Surprisingly, it passed in the most populous urban county, Maricopa, but barely.[22]

The year 1962 marked the beginning of the reapportionment revolution when the Supreme Court held for the first time that Equal Protection challenges to malapportionment were justiciable.[23] Thereafter, the Supreme Court articulated the one-person, one-vote, equal-population rule that came to require that a state's population be equally split among the districts for the House of Representatives,[24] as well as the districts for state legislative bodies.[25]

At the time the Supreme Court was ushered into judicial policing of state electoral malapportionment, the Arizona Senate was described as the nation's third worst apportioned senate.[26] As one commentator later noted, as of the start of the Supreme Court's intervention, "Earl Warren notwithstanding, Arizona's legislators represented trees and acres, not people."[27]

From the outset of the one-person, one-vote revolution, the Arizona Legislature was ill-disposed to engage in reapportionment. In January 1965,

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17. *Id.* at 37–38.
18. *Id.*
19. *Id.* at 37.
20. *Id.* at 37–38.
21. *Id.* at 38.
22. *Id.*
23. Baker v. Carr, 369 U.S. 186, 209–10 (1962). This decision was thought by some to be the most profoundly destabilizing opinion in Supreme Court history because shortly after it was issued, litigation was commenced in most states, including Arizona. ISSACHAROFF ET AL., *supra* note 2, at 178.
24. Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (holding that districts for the United States House of Representatives are unconstitutional).
25. Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that the malapportionment of state legislative districts was unconstitutional and ordering the state of Alabama to reapportion its districts).
26. POLINARD, *supra* note 13, at 38. Based on the way the Arizona senate was apportioned, it was theoretically possible for 12.8% of the population to elect a senate majority. 111 CONG. REC. 28,186 (1965).
27. POLINARD, *supra* note 13, at 36.

the legislature adopted a memorial sent to the United States Congress imploring Congress to call a constitutional convention for the purpose of amending the Constitution to allow all states to apportion as they pleased.[28]

What followed were a number of unsuccessful attempts by the Arizona Legislature to reapportion, likely because the legislators did not want to apportion themselves out of office.[29] Then, in 1964, the first reapportionment lawsuit was filed by a very bright law student, Gary Peter Klahr, arguing the apportionment of the Arizona Legislative and Congressional districts was unconstitutional in violation of the Equal Protection Clause of the United States Constitution.[30] A three-judge panel was convened.[31] The litigation continued for two years, in which "[s]undry proposals to reapportion" were considered by the Arizona Legislature without resolution.[32] Eventually, the court held that despite giving the legislature sufficient time to reapportion, the proposed senate redistricting bill "bears evidence of having been thrown together as a result of considerations wholly apart from those laid down as compulsory by the decisions of the Supreme Court."[33] The court then, with approval of all parties, reapportioned the Congressional districts and both houses of the Arizona Legislature, which allowed for the 1966 elections to proceed, and the Republican Party for the first time in Arizona history swept the state.[34]

The 1967 legislative attempt at redistricting was also held unconstitutional, again by a three-judge panel,[35] largely because some of the districts deviated considerably from equal population.[36] Then in 1969, a legislative committee prepared a plan for the 1970 election which, after considerable effort, was submitted to the three-judge panel for approval and the court ruled, though unconstitutional, it could be used, but only for the 1970 elections.[37]

The legislature then set out again to draw constitutional districts and, "as had been the case in two previous sessions, the Republican majority largely

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28. *Id.* at 40.

29. *Id.*

30. Klahr v. Goddard, 250 F. Supp. 537, 538 (D. Ariz. 1966).

31. The panel was composed of Ninth Circuit Judge Walter Pope, Arizona District Judge James Walsh, and Southern District of California Judge William Mathes. *Id.*

32. *Id.* at 539.

33. *Id.* at 541.

34. POLINARD, *supra* note 13, at 41–42.

35. Senior Ninth Circuit Judge Gilbert Jertberg and Arizona District Judges James Walsh and Walter Craig. Klahr v. Williams, 303 F. Supp. 224, 225 (D. Ariz. 1969).

36. Klahr v. Williams, 313 F. Supp. 148, 150–51 (D. Ariz. 1970), *aff'd sub nom.* Ely v. Klahr, 403 U.S. 108 (1971).

37. POLINARD, *supra* note 13, at 42; *Klahr*, 313 F. Supp. at 153.

ignored the Democratic minority."[38] In 1972, a three-judge court[39] accepted the legislature's plan for Congressional districts but rejected the plan for state legislative districts because it diluted the voting power of the Navajo tribe stating: "Nowhere in the record is there any adequate explanation for the change in [the plan] as introduced which resulted in the dismemberment of the [Navajo] Reservation in apportioning legislature membership."[40] The court pressed the point by finding the change was made only to "destroy the possibility" that Navajos might elect someone of their choosing, and continued, there is "ample basis to suspect" the "Indians were done in."[41]

Legislative plans in 1981 to redistrict were again deemed unlawful by a three-judge panel court,[42] finding the legislative plan was unenforceable for failure to obtain preclearance under the Voting Rights Act, and the congressional plan failed to meet constitutional numerical equality.[43] This redistricting effort and court opinion is notable because again, the state legislature sought to divide an Indian reservation, this time the San Carlos Apache Reservation.[44] Eventually the parties reached agreement, approved by the court, with the finding that the plan, "which places the San Carlos Apache Reservation in a single congressional district, resolves any constitutional issues."[45]

The endless partisan struggles over redistricting in Arizona continued after the 1990 Census was issued. The Arizona legislature revised the federal and state district boundaries after taking account of the significant population increase since the prior census.[46] The plan was approved by Governor Fife Symington and sent to the Department of Justice (DOJ) for approval, but it was not approved because of the adverse effect on Hispanic voters.[47] The legislature attempted to resolve the DOJ's objections, but a lawsuit followed, and after a lengthy trial, a three-judge panel[48] approved the Congressional

38. POLINARD, *supra* note 13, at 43.

39. Senior Ninth Circuit Judge Gilbert Jertberg and Arizona District Judges James Walsh and Walter Craig. Klahr v. Williams, 339 F. Supp. 922, 923 (D. Ariz. 1972).

40. *Id.* at 927.

41. *Id.*

42. Ninth Circuit Judge J. Clifford Wallace, Chief Judge Charles Muecke of the Arizona District Court, and Arizona District Judge Valdemar Cordova. Goddard v. Babbitt, 536 F. Supp. 538, 539 (D. Ariz. 1982).

43. *Id.* at 543.

44. *See id.* at 541.

45. *Id.* at 543.

46. Rhonda L. Barnes, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 ARIZ. ST. L.J. 575, 576 (2003).

47. *Id.*

48. The three-judge panel was composed of Ninth Circuit Judge Charles E. Wiggins and Arizona District Judges Stephen M. McNamee and Alfredo C. Marquez. Arizonans for Fair Representation v. Symington, 828 F. Supp. 684, 686 (D. Ariz. 1992).

district plan and authorized the use of the legislative district plan, but only on an interim basis.[49]

After the 1992 election, the legislature again revised the plan, which was submitted to the DOJ and approved in 1994.[50]

III. NATIVE AMERICANS AND REAPPORTIONMENT

During the first 50 years of statehood, Native Americans were either not allowed to vote because they lacked citizenship, or they were precluded from voting because of various voting requirements. When our country was founded, Indian tribes were considered separate sovereigns, and Native Americans were citizens of their tribes rather than the United States.[51] In 1831, the Supreme Court referred to Native Americans as domestic dependent nations,[52] and the Civil Rights Act of 1866 excluded them as United States citizens.[53] It was not until the passage of the Indian Citizenship Act in 1924 that Native Americans were declared United States citizens.[54] But they continued to face significant obstacles to voting in Arizona, including the state's refusal to establish voting places on the reservations and the practice of determining on a "case-by-case" basis whether Native Americans met the eligibility requirements, including literacy.[55] It is plausible that if Native Americans had been declared citizens and allowed to freely vote during the first 50 years of Arizona's statehood, the power structure in Arizona might well have been different.[56]

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49. *Id.* at 693. *See also* Cantelme, *supra* note 15, at 33.

50. Barnes, *supra* note 46, at 576. *See also* Cantelme, *supra* note 15, at 33.

51. *See* Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1101 (2015) (recounting the history of Indian citizenship).

52. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

53. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981); *see also* Ferguson-Bohnee, *supra* note 51, at 1103 (citing Elk v. Wilkins, 112 U.S. 94, 103–04 (1884)).

54. Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)); *see also* Ferguson-Bohnee, *supra* note 51, at 1103.

55. Ferguson-Bohnee, *supra* note 51, at 1104.

56. When Arizona became a state in 1912, Native Americans comprised 14.3% of the total state population. *Id.* But the percentage was markedly higher in certain counties. For example, in Apache county the population was approximately 66% Native American—6,131 Native Americans in a total population of 9,196. *Id.*

IV. ARIZONA INDEPENDENT REDISTRICTING COMMISSION

From 1960 until 2000, redistricting in Arizona was in a partisan shambles, with limited compromise and conciliation—even in federal court litigation. The Arizona voters answered with an initiative to amend the Arizona Constitution, in an attempt to take politics out of redistricting.[57]

In 2000, many civil groups, including the League of Women Voters, Common Cause, and the Arizona School Board Association, along with a bipartisan group of political leaders, proposed Proposition 106 to the voters, 56% of which approved.[58] It created the bipartisan Arizona Independent Redistricting Commission (IRC) whose job was to create new legislative and congressional districts after each census.[59] Though the new law includes a dizzying array of rules and procedures, of note is the requirement that the IRC is precluded from protecting incumbents, and competitiveness is one of the ideals.[60] Also, of significance, the legislature cannot approve or disapprove the IRC's maps.[61] It has a bipartisan membership with two Democrats and two Republicans, selected by the leadership of the House and Senate, and no more than two can reside in the same county.[62] In turn, these four commissioners choose the fifth commissioner who must not be either a registered Republican or Democrat, and who, once selected, becomes the chair of the IRC.[63]

The constitutionality of the IRC was challenged in 2015 in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, but the Supreme Court rejected the challenges, affirming in the process that "legislature" means any kind of law-making that is authorized by the state's constitution, and that initiatives, like Arizona's, are democratically legitimate because of the popular involvement.[64] Though it is not without some criticism, including public spats over the hiring process of the firm drawing

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57. Proposition 106 was aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections." Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 792 (2015).

58. ARIZ. SEC'Y OF STATE, PROPOSITION 106, at 56–58 (2000) [hereinafter PROPOSITION 106], https://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf [https://perma.cc/MBE6-2QPW]; ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS 16 (2000), https://apps.azsos.gov/election/2000/General/Canvass2000GE.pdf [https://perma.cc/6QND-4YRL].

59. PROPOSITION 106, *supra* note 58, at 56.

60. *Id.*

61. *See id.* at 55.

62. *Id.* at 54.

63. *Id.*; *see also* Barnes, *supra* note 46, at 579 (providing an in-depth analysis of the IRC's rules and procedures).

64. 576 U.S. at 813–14.

the maps and the independence of the IRC chair, the IRC has become a model for many states.[65]

V. REAPPORTIONMENT FEDERAL LITIGATION FOLLOWING ESTABLISHMENT OF THE IRC

After the 2000 and 2010 censuses, the IRC reapportioned the congressional and Arizona legislative districts but federal three-judge panel lawsuits followed, challenging the new maps on constitutional grounds.[66] I was randomly drawn as the presiding judge for both cases. What does one do as the presiding judge?

Title 28 U.S.C. § 2284(a) provides a panel of three judges must be convened when the constitutionality of congressional and state legislative districts is challenged. Once a suit is filed, an initial district judge is drawn and it is incumbent on that judge to "immediately notify" the Chief Judge of the Ninth Circuit whose responsibility is to designate two more judges, one of which must be a Ninth Circuit judge.[67] Fortunately, in the first case, *Navajo Nation v. Arizona Independent Redistricting Commission*,[68] the Chief Judge of the Ninth Circuit was Judge Mary Schroeder,[69] a longtime friend whose office was just around the corner from me. After informing her of the suit, Judge Schroeder designated Ninth Circuit Judge Marsha Berzon. Then, after some thought, Judge Schroeder asked me to inquire of Judge Susan Bolton whether she could commit to the litigation. Because Arizona then had one of the five highest criminal and civil caseloads in the United States, the decision to undertake this responsibility, which could extend for many months, was not an easy one. However, Judge Bolton agreed to the assignment.[70]

A unique aspect of three-judge panel reapportionment litigation is the urgency of immediate resolution. Circumstances were particularly dire in

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65. David Gartner, Arizona State Legislature v. Arizona Independent Redistricting Commission *and the Future of Redistricting Reform*, 51 ARIZ. ST. L.J. 551, 561 (2019). See also BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA'S POLITICAL REFORM QUANDARY 118–43 (2015); David Cantelme & Joseph Kanefield, *The Arizona Redistricting Fight: Round Five*, ARIZ. ATT'Y, Sept. 2011, at 24–30, for a discussion of various Arizona experiences with non-partisan redistricting commissions and the perpetuation of redistricting by the judiciary.

66. Navajo Nation v. Ariz. Indep. Redistricting Comm'n, 230 F. Supp. 2d 998, 1003 (D. Ariz. 2002).

67. 28 U.S.C. § 2284(b)(1).

68. 230 F. Supp. 2d at 998.

69. Now Senior Ninth Circuit Judge.

70. Judges Berzon, Bolton, and I comprised the first and only, all female, three-judge court in Arizona's reapportionment history. All three-judge panels in Arizona lawsuits have been composed, perhaps as a matter of tradition or convenience, of two district judges and one Ninth Circuit judge.

2002 because in the state court proceedings that preceded the filing of the federal litigation, the Maricopa County Superior Court judge continued a trial originally scheduled to occur before the election to a date after the election. The Arizona Secretary of State was readying for the primary elections to be held in September, and the candidates expressed considerable uncertainty regarding ambiguous district boundaries and the rapidly approaching June petition filing date. And the state Senate bill that was passed to resolve the boundaries and filing issues had not received DOJ preclearance, so it was a dead letter. What is more, the IRC and attorneys were still awaiting the decision from the DOJ on whether the final state district map had been precleared pursuant to the Voting Rights Act.[71]

Two separate actions were filed and eventually consolidated.[72] First, the Navajo Nation and San Carlos Apache Tribe filed suit against the IRC and the Secretary of State, arguing the IRC Plan would diminish their voting strength.[73] Second, the IRC brought suit to enjoin the Secretary of State from using the 1994 legislative districts, mandating she implement a constitutional plan.[74]

The first essential order of business was for the court to send a letter to the Arizona United States Attorney's Office, inviting the appropriate DOJ representative to appear at the next hearing and provide a comprehensive report on the status of preclearance. Because DOJ approval of the plan was required, but still pending, it would have been a bootless errand for the court to engage in weeks of litigation only to have the court's final decision be undone by DOJ because the original plan was rejected pursuant to the Voting Rights Act. Next, the court appointed a special master to assist in analyzing the IRC Plan and creating a substitute plan if necessary. The DOJ representative appeared at the following hearing and stated the DOJ had denied preclearance of the IRC Plan based on five Arizona legislative districts. The DOJ representative explained that because the IRC Plan was a single indivisible unit, piecemeal preclearance could not be approved. The representative made clear, however, only certain areas were problematic Arizona's Hispanic share of the population increased from 18.8% in 1990 to 25.3% in 2000, and the IRC's original Plan did not establish that minority

71. At that time the Voting Rights Act, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified as amended at 52 U.S.C. § 10304), required Arizona obtain preclearance from the DOJ, which was the rule since November 1, 1972. *See* Arizona v. Reno, 887 F. Supp. 318, 319 (D.D.C. 1995). In 2013, in *Shelby County v. Holder*, 570 U.S. 529 (2013), the Supreme Court ruled such compliance is no longer required.

72. *Navajo Nation*, 230 F. Supp. 2d at 1003.

73. *Id.*

74. *Id.*

voters would be able to elect candidates of their choice in those districts.[75] Accordingly, the IRC requested a recess which was granted to allow the parties to attempt to resolve the issues raised by DOJ.[76]

Emergency orders were issued to resolve candidates' filing dates and other urgent election matters. The parties and their counsel then diligently engaged in extensive public hearings and negotiations to come up with a joint acceptable interim plan to allow the September 2002 elections to proceed. They succeeded and filed the plan with the court, stating all parties, including the IRC, completely agreed on the new plan and jointly asserted it addressed the concerns of DOJ, the Constitution and applicable federal laws. A hearing was held at which two experts testified, one on behalf of the IRC and one for the Minority Coalition. They explained the agreed upon revised plan would alter some features of the three designated districts to satisfy the DOJ mandate and allow Hispanics to elect candidates of their choice. The solution included extending boundaries to remove certain towns of the three designated districts and expanding them by including various Hispanic communities.[77] Three well-regarded Hispanic elected officials testified and confirmed, without disputed evidence, that the newly created districts would be effective for electing Hispanics.[78] This resolution of the lawsuit was optimal because the elections would occur on time and it eliminated the need for the court to configure its own plan.

But what happened in the 2002 elections? The IRC plan approved by the court "did not bring a windfall to minority communities."[79] Arizona voters only elected six minorities to the Senate and thirteen to the House.[80] Some argued this was a poor result for the significant time, effort, and cost that went into the creation of the IRC.[81] Further, the 2002 Arizona general election results demonstrated that the expectation of fair districts from the IRC may

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75. Barnes, *supra* note 46, at 597. The 2000 decennial census showed Arizona's population continued its surge. In 1990 the population was 3,665,228 and in 2000 it was 5,130,632. U.S. CENSUS BUREAU, RESIDENT POPULATION AND APPORTIONMENT OF THE U.S. HOUSE OF REPRESENTATIVES 1 (2000), https://www2.census.gov/library/visualizations/2000/dec/2000-resident-population/arizona.pdf [https://perma.cc/YT68-BX38].

76. *Navajo Nation*, 230 F. Supp. 2d at 1005. The Native American parties requested dismissal without prejudice, which was granted because the DOJ essentially precleared the districts to which they had objected. *See id.* at 1003, n.5.

77. *See* Barnes, *supra* note 46, at 592–93.

78. *Id.* at 593–94. The parties and the court recognized that the IRC's task of achieving a plan that met U.S. and Arizona Constitutions, and DOJ mandate, was hampered because the Arizona Constitution required districts be drawn without regard to incumbency, a "clean slate." *Navajo Nation*, 230 F. Supp. 2d. at 1015.

79. *See* Barnes, *supra* note 46, at 597.

80. *Id.* at 596.

81. *Id.*

not have been realized. And it was not without subsequent legal challenge. A decision of the Maricopa County Superior Court followed, holding the district lines for the 2002 election were unconstitutional.[82]

In accordance with the 2000 Arizona constitutional mandate, after the 2010 census, the IRC took another stab at crafting districts in accordance with the Arizona and U.S. Constitutions. But the final approved map again provoked a challenge in federal court as a violation of the Equal Protection Clause of the Fourteenth Amendment, arguing that partisan political motivations predominated over legitimate criteria.[83] In particular, plaintiffs argued the IRC overpopulated Republican-leaning districts and underpopulated districts that leaned Democratic all in violation of the one-person, one-vote principle.[84] This time the lawsuit was filed by a group of individual Arizona registered voters.[85]

Again, the issues required the convening of a three-judge panel, and again, I was randomly drawn as the presiding judge. At that time the Ninth Circuit Chief Judge was Alex Kozinski,[86] who understood the underlying exigencies and immediately appointed Ninth Circuit Judge Richard Clifton.[87] Judge Kozinski deferred to me on the appointment of a third district court judge. Judge Neil Wake, who had extensive involvement in redistricting litigation extending back to the 1990 Arizona redistricting challenge in federal court, agreed to sit as a panel member.[88]

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82. Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 855 (Ariz. Ct. App. 2005) (per curiam). After the superior court's ruling, the IRC immediately developed a new plan for the elections to be held in 2004–2010. But before the 2004 elections, the plan was withdrawn by the IRC because the Arizona Court of Appeals granted a stay, allowing the 2004 elections to be held according to the 2002 plan. And the court of appeals reversed the superior court decision and remanded for the superior court to determine if the 2002 plan was "rationally related to a legitimate government purpose" and the Arizona Supreme Court denied review. *Id.* at 855. *See also* Kristina Betts, *Redistricting: Who Should Draw the Lines? The Arizona Independent Redistricting Commission as a Model for Change*, 48 ARIZ. L. REV. 171, 172–74 (2006) (discussing state court litigation and redistricting commissions). On remand, the superior court again found problems with the IRC's maps. Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 208 P.3d 676, 682 (Ariz. 2009). The Court of appeals reversed and the Arizona Supreme Court granted review. The Arizona Supreme Court held the IRC's 2002 maps were lawful. *Id.* at 689.

83. Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1046 (D. Ariz. 2014).

84. *Id.*

85. *Id.*

86. Now retired Judge Kozinski.

87. Now Senior Ninth Circuit Judge.

88. Judge Wake had represented parties in *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992) and *Navajo Nation v. Arizona Independent Redistricting Commission*, 230 F. Supp. 2d 998 (D. Ariz. 2002).

After resolution of preliminary matters, such as the dismissal of the Commissioners in their individual capacities, the matter proceeded with a five-day bench trial. The decision of the court was fractured. The majority, composed of Judges Clifton and me, denied the plaintiff's request for an injunction, concluding the population deviations were the result of good faith efforts to comply with the Voting Rights Act and to obtain preclearance from the DOJ on the first submission by the IRC. The majority also decided that the one-person, one-vote principle did not require state legislative districts to have precisely equal population, but allows for divergences based on rational state policies. Judge Wake in the dissenting opinion would have ruled in favor of the plaintiffs because, though recognizing that compliance with the voting rights law was a legitimate objective in redistricting, he found the reason could not justify even minor variations in population among districts. Thus, the dissent would have permitted the IRC to consider preclearance only when drawing lines dividing districts of equal sizes. The majority also held that the Supreme Court opinion *Shelby County v. Holder*,[89] issued just prior to the court's ruling, holding that the Voting Rights Act requirement for preclearance was unconstitutional, was not retroactive such that it did not nullify the IRC's pursuit of preclearance as a justification for the population deviations.[90]

Though I concurred in the result in *Harris*, I differed in two substantive respects. First, I held the plaintiffs' burden of proof was to show partisanship was the sole reason for the population deviations. Second, I found that partisanship played no role in the drafting of the maps. I was particularly persuaded by my experience in the 2002 litigation where the Commission's plan was not precleared by the Attorney General appointed by President Bush, and that four of the Commission's members expressed that the critical objective of the Commission was to ensure DOJ approval on the first attempt. And I made note of the 2012 elections. The plaintiffs' claim was not realistic, because the Republicans won approximately 57% of the Senate seats and 60% of the House seats. Thus, Republicans, after the election, were over-represented in the legislature. Finally, I noted the constitutionality of partisan redistricting had not been squarely addressed by the Supreme Court.[91]

The Supreme Court on appeal affirmed the majority ruling and reaffirmed the holding that "those attacking a state-approved plan must show that it is

89. 570 U.S. 529 (2013).

90. *Harris*, 993 F. Supp. 2d at 1075–76.

91. *Id.* at 1085 (Silver, J., concurring). *See also* Gill v. Whitford, 138 S. Ct. 1916 (2018) (remanding for plaintiffs alleging partisan gerrymandering to prove they had been injured); Rucho v. Common Cause, 139 S. Ct. 2484 (2019) (finding partisan gerrymandering claim nonjusticiable).

more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than . . . 'legitimate considerations.'"[92] The Court, however, did not specifically decide whether partisan gerrymandering is unconstitutional.[93]

VI. REFLECTIONS

So, what to make of my two excursions into Arizona reapportionment litigation? They were not masterpiece trials. First, they were over-burdened with exigencies that required immediate attention. But of greater significance, the rule of law, which provides stability for judges to have confidence in the accuracy and fairness of rulings does not fit neatly into reapportionment litigation. For what was true yesterday probably will not be true tomorrow in reapportionment cases. Despite sixty years of reapportionment that produced a large and rich stream of law, there are relatively few well-established tools for the courts to use. And without such tools, it is difficult for judges to have confidence in their rulings.[94]

Also, I acquired a greater understanding of Justice Frankfurter's warning of judges wading too far into the "political thicket."[95] The Supreme Court later concluded malapportionment challenges were justiciable,[96] but my experience taught me it can be very difficult for a judge to discern the true motivations behind particular maps. If a particular mapping change reflects a legitimate state policy, but also promotes a partisan advantage, what guidance is there to resolve the conflict? Statistics and computer resources are often essential, but rife with abstractions. In the end, the decision may well be based primarily, and traditionally, on the credibility of witnesses.

Map drawing for elections in Arizona will continue to present difficulties, particularly because of persistent population growth. And public-spirited Arizonans, with aspirations to ensure that everyone's vote is meaningful, will doubtlessly find themselves embroiled in litigation again, both before and after elections.

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92. Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1307 (2019) (quoting Reynolds v. Sims, 337 U.S. 533, 579 (1964)).

93. *Id.* at 1310.

94. I did, however, gain appreciation for those lawyers who are able to muscle through pressured, time-consuming, and immensely complicated litigation.

95. Colegrove v. Green, 328 U.S. 549, 556 (1946).

96. Baker v. Carr, 369 U.S. 186, 237 (1962).