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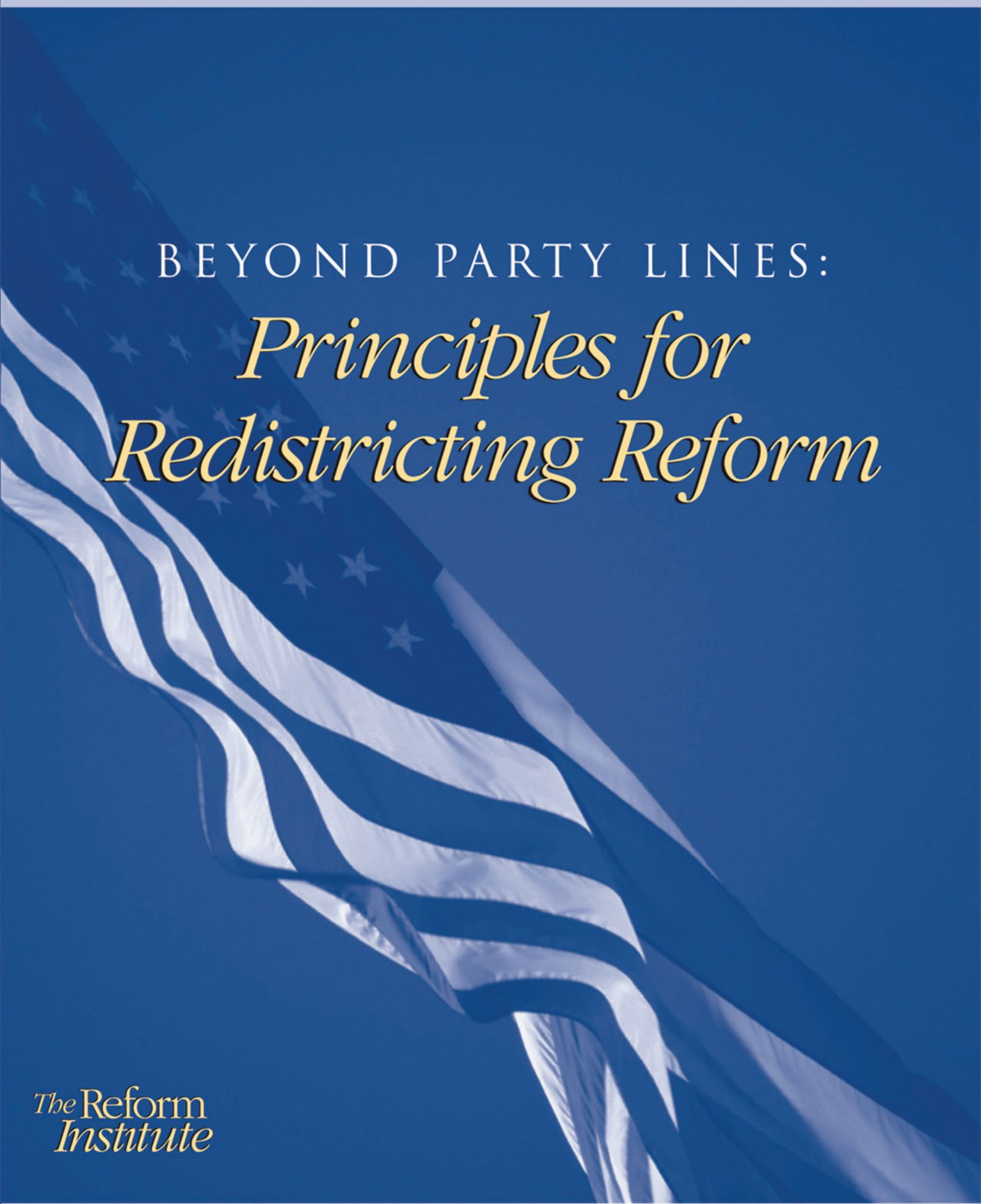

BEYOND PARTY LINES:
Principles for Redistricting Reform

The Reform Institute

BEYOND PARTY LINES: PRINCIPLES FOR REDISTRICTING REFORM

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INTRODUCTION

ADVANCING THE REFORM AGENDA

The Reform Institute has grown increasingly concerned with the continuous decline in competitiveness of federal elections in the United States. The high level of partisan and incumbent gerrymandering in the redistricting process at both the national and state levels is a driving force behind this problem. The Institute believes it is important for reform-minded organizations to focus public attention on increasing competitiveness, transparency and public participation in elections, and for these reasons, we believe we must take a critical look at the redistricting process.

The Institute has put together this important discussion guide on principles for redistricting reform, in the hopes that it will encourage an open dialogue on reforming the redistricting process and our democracy. Each general principle includes background, analysis, and discussion questions. This document should be read as part of a comprehensive approach to consensus-building. The debate over these redistricting principles is the foundation for a broader, long-term strategy for redistricting reform.

Gerrymandering and Incumbent Protection

The current redistricting practices have defeated much of our nation's framers' vision. Astonishing rates of incumbent reelection, declining competitiveness in congressional districts, and long periods of one-party control of the House have eroded the accountability and legitimacy of the people's chamber. The House of Representatives was established as the direct link between the people and their federal government. Unlike the Senate, the President, or the courts, according to the Federalists Papers, the House was to have "an immediate dependence on, and an intimate sympathy with, the people." Unfortunately, partisan gerrymandering weakens congressional responsiveness and accountability, and has reshaped the House of Representatives into a body that is largely unrepresentative of the people — both demographically and politically.

For example, competition in U.S. House elections has been declining since the 1950s, the 2002 and 2004 House elections were the least competitive in the postwar era. Among incumbents running for reelection in 2004 general elections, only five were defeated. In 2002, only four

challengers defeated House incumbents — the lowest number in modern American history.

In August 2003, in Vieth v. Jubelirer, a case challenging Pennsylvania's congressional redistricting, the Reform Institute filed a friend-of-the-court brief urging the U.S. Supreme Court to end gerrymandering and restore competitive elections. The outcome of that case was inconclusive, signaling that this issue will continue to be at the forefront of political debate as the courts struggle to define a consistent, balanced, and constitutional standard that applies to both the review and oversight of federal, state, and local redistricting plans.

Redistricting Reform

Because the next census is nearing, now is the opportune time for close scrutiny of the problems with the existing redistricting process and a thoughtful examination of the most promising solutions. The stakes in this debate are high, for competitive elections offer citizens meaningful options in choosing their representation and are among the greatest strengths of democratically elected leadership. The current redistricting process throughout this country works to the detriment of these core interests. This problem needs a thoughtful and workable public policy solution, in accord with constitutional values.

We hope that redistricting conferences, particularly the 2005 Airlie Redistricting Conference, serve as interactive, thought-provoking benchmarks in this important process. The following principles are meant as discussion-starters and we hope, will serve as a catalyst to creative thinking. They do not necessarily represent the views of any particular organization or the personal views of the project managers, Sam Hirsch and Daniel Ortiz. Please use the wide margins and note pages to take down your thoughts as you read through the principles.

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PRINCIPLE 1

ADHERE TO ALL CONSTITUTIONAL AND VOTING RIGHTS ACT REQUIREMENTS

Any redistricting — congressional, state legislative, or local — must satisfy all applicable requirements of federal law. One requirement, embodied in the "one person, one vote" rule, regulates how much districts in the same plan can differ in population. The other, embodied in the Voting Rights Act and the Equal Protection Clause, regulates how much representation particular minority groups should receive. Surprisingly to some, partisan gerrymandering currently escapes any direct federal control. Plaintiffs unhappy with gerrymandering, however, often try to attack a redistricting plan obliquely as violating one of these other, better-established requirements. What follows is a brief description of how these federal requirements apply to redistricting. Because the law is so complex, the description necessarily simplifies and leaves out many issues of practical importance to litigators.

One Person, One Vote

In the early 1960s, when many state legislative and congressional districts were grossly malapportioned, the Supreme Court imposed a rule of "one person, one vote" on nearly all districting. In general, it requires that equal or roughly equal numbers of people receive equal numbers of representatives. The rule applies differently, however, to federal congressional districting, and to state and local districting. To the first, it applies quite strictly. The Court asks first whether any population differences could have been avoided. The answer here is nearly always "yes," unless the differences are vanishingly small. Those redistricting could nearly always have readjusted boundaries slightly to make the districts' populations more equal and plaintiffs can easily show how this could have been done. A federal court, in fact, struck down Pennsylvania's post-2000 census congressional plan in which the largest district contained only nineteen more people than the smallest.

The federal court then asks whether the population disparities were necessary to achieve some legitimate goal. It will consider goals like compactness, respecting the boundaries of political subdivisions and precincts, preserving intact communities of interest, preserving the cores of

prior districts, and avoiding contests between incumbents. In each case, the Court will seek to relate specific discrepancies to specific goals and will weigh the size of the deviation, the importance of the asserted policies (both in general and to the particular jurisdiction), how consistently the plan reflects those policies, and how well the jurisdiction could carry them out without varying so much from perfect equality. Under this approach, courts have allowed only minor deviations in congressional plans. They have, for example, approved plans with population deviations of 0.82 and 0.73 percent but invalidated one with a variation only slightly higher: 0.94 per cent.[1]

The "one person, one vote" rule applies much less strictly to state and local redistricting plans. In general, total population deviations of 10 percent or less between the largest and smallest districts do not require justification. (This is not necessarily true, if such discrepancies reflect questionable aims, like maximizing partisan advantage.) Only when the deviation exceeds that threshold must the jurisdiction justify its plan, which it would justify in the same way it would justify a federal plan — by tying each discrepancy to a legitimate state policy. Although this approach allows for greater deviations in state and local plans, the courts still worry over their size. Because in an early case applying this approach the Supreme Court said that 16.4 percent "may well approach tolerable limits," many lower courts have viewed this figure as a presumptive upper-limit on how much population deviation a state or local redistricting plan may contain.

The Voting Rights Act

Congress enacted the Voting Rights Act in 1965 primarily to protect the voting rights of racial minorities and expanded it later to cover certain language minorities. Two sections are primarily relevant to redistricting: section 2 and section 5. Section 2 applies to all jurisdictions in the country. It bars any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen … to vote on account of race or color [or membership in a language minority group]." Such denial occurs when,

> based on the totality of the circumstances, it is shown that the political processes leading up to nomination or election … are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

The statute also provides that the extent to which members of a protected group have been elected to office in the relevant jurisdiction is relevant, but that there is no right to proportional representation.

Applying the "totality of circumstances" test can be difficult and uncertain. But the Supreme Court has provid-

[1] To calculate the percentage of total population deviations courts subtract the population of the smallest district from that of the largest and divide that number by the population of the ideal district. Thus, in a plan of ten single-member districts covering a jurisdiction of 1,000 people where the largest district contains 110 people and the smallest 85, the population deviation would be (110-85)/100, which equals 25 percent.

ed some specific guidance for redistricting. In determining whether a plan giving a particular minority group a voting majority in a certain number of districts abridges their right to representation, a court is to ask four questions. First, how many separate geographically compact single-member districts could be drawn in which the minority group constitutes an effective voting majority? If the answer is no more than the plan already contains, then the redistricting itself is likely not responsible for any minority vote dilution. The minority's geographical dispersion would be responsible instead. Second, is the minority group politically cohesive? If it is not, then the group has little potential to elect its own representatives and there is no Section 2 violation. Third, does the majority vote sufficiently as a bloc to enable it — in the absence of special circumstances — usually to defeat the minority's preferred candidate? If the majority does not vote sufficiently together, there is again no Section 2 violation because it is not the plan's particular combination of majority and minority populations that is responsible for thwarting the minority vote. Finally, would the minority receive at least its roughly proportional share of seats under the challenged plan? If it would, then Section 2 generally is satisfied because it does not require more than proportional representation.

Section 5 works very differently. For one thing, it does not apply nationwide but only to certain jurisdictions, which now include nine whole states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and political subdivisions in seven others (California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota). Section 5 requires any of these jurisdictions to obtain "preclearance" before they can implement a redistricting plan. A jurisdiction may meet this obligation in two ways. The most common means of compliance with Section 5 is to submit a proposed redistricting to the United States Attorney General, who has sixty days to object and thereby block the redistricting plan from taking effect. Alternatively, a state or political subdivision may institute a declaratory judgment action in the United States District Court for the District of Columbia. In either case, the jurisdiction bears the burden of demonstrating that the proposed redistricting does not have the purpose, and will not have the effect, of denying or abridging the right to vote of racial, ethnic, and certain language minorities. Unless renewed, Section 5 will expire in 2007.

Unlike Section 2, which creates a cause of action to challenge existing districting plans as discriminatory, Section 5's substantive standard is comparative — a standard of "nonretrogression." In other words, Section 5 forbids only changes that: (1) are intended to reduce minority participation in the electoral process or minority political power below that prevailing under the existing regime, or (2) have that effect. Under the nonretrogression principle, for example, a legislative districting plan will pass muster so long as it provides for no less minority representation than the existing plan does. A plan that reduces minority representation will not. In simple terms, any redistricting that improves or maintains protected minorities' existing level of representation should be approved pursuant to Section 5. How to measure the overall level of

representation, however, is somewhat unclear and jurisdictions are given some flexibility.

Even as Sections 2 and 5 require a jurisdiction to take race into account when redistricting, the Supreme Court has held that the Equal Protection Clause limits how much a jurisdiction may take it into account. Although the Court has never developed clean standards for constraining "racial gerrymandering," it has largely adopted Justice O'Connor's formulation:

> [S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy [e.g., as a proxy for party affiliation], States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny …. Only if traditional districting criteria are neglected and that neglect is predominantly due to the misuse of race [is the district presumptively unconstitutional].

The interaction of this constraint and the Voting Rights Act is one of the most confusing and hotly contested issues in redistricting, perhaps in election law generally. It puts jurisdictions in a difficult bind and frustrates many minority groups seeking representation. A plan can be invalidated either because it fails to take race sufficiently into account or because it takes race too much into account.

Discussion Questions

1. To what extent, if at all, do the legal requirements of the Voting Rights Act and the "one person, one vote" rule restrict partisan gerrymandering?

2. How can one unhappy with partisan gerrymandering seek to attack it indirectly under the Voting Rights Act and the "one person, one vote" rule?

3. How can redistricters working within these federal constraints best ensure full and fair representation for all racial and ethnic groups in an increasingly diverse society?

4. Should states create stricter population-equality rules for state and local redistricting or should they merely abide by the federal-constitutional "10 percent rule"?

PRINCIPLE 2

ENSURE TRANSPARENCY OF THE PROCESS AND A MEANINGFUL OPPORTUNITY FOR INTERESTED PARTIES AND FOR THE PUBLIC TO BE HEARD AND PARTICIPATE

The legitimacy of democratic institutions rests largely on transparency and participation. When citizens cannot see how their government operates and cannot affect its decision-making, popular control is lost and those governed come to mistrust those who govern in their name. Such loss of confidence is particularly dangerous in the design of basic electoral structures, like districts. Mistrust of those structures can taint all subsequent political outcomes.

Many feel that traditional redistricting processes ignore these two fundamental values. One of the common complaints about traditional redistricting is that it is largely conducted in secret without any meaningful opportunities for the public to participate. When redistricting is controlled by a single party, it often excludes even the minority party from participation. Often the only thing transparent in the process to the public is that they cannot participate. This leaves the public to see a process that, reflects the interests of a small (and often one-sidedly partisan) group of insiders. Although transparency and participation are important to any type of redistricting process, this principle will primarily discuss how an independent redistricting process might further them. Much of its discussion, however, could apply with appropriate modification to traditional redistricting processes in which a legislative body draws the lines.

The public and any interested parties should be allowed to participate in the redistricting process at two points. First, the redistricting body should allow participation up-front when it considers how to conduct the process. Early on, it should invite public input on such questions as what principles to follow (to the extent they are not clearly specified by law), how to operationalize those principles and balance them against one another, how to comply with applicable requirements of federal law, and what plan to use as a starting point. Not only does such participation allow everyone interested a say in framing the plan, which is likely to bolster the resulting plan's legitimacy, but it also can alert the redistricting body to potential legal and political pitfalls. In addition, early public input can produce much information necessary to

construct a plan. If a plan needs to respect communities of interest, for example, public participation can help the redistricting body identify those communities and where they lie.

The biggest substantive issue is whether participants should be able to propose plans or parts of plans. On the one hand, encouraging the public to submit actual plans may restrict the redistricting body's freedom and flexibility, particularly if it must explain why it did or did not accept them. On the other hand, accepting plans from the public can make the redistricting body's job much easier. Not only will it have more plans to choose among when it picks one to start from, but it will also be able to see how different groups believe a plan may respect their various interests. If nothing else, encouraging groups to submit concrete plans may discourage them from making requests that redistricting could not possibly fulfill. If they themselves cannot propose an actual plan that meets their goals, they are unlikely to press hard for those goals in the first place.

The redistricting body might possibly structure up-front public participation in a way to moderate different groups' demands. If the redistricters, for instance, announce that they will use as a starting point whichever submitted plan best meets all applicable legal requirements and policy goals, groups might well submit plans better fitting the public aims of the process than their own private interests. In this way, political parties would not likely submit plans that best advantaged them relative to others. Fearing that such plans would be easily trumped by others' submissions, they would instead submit plans that fit the public goals — even if the plans did edge in particular partisan directions.

The largest procedural issue is what form public participation should take. Should the redistricting body conduct public hearings and perhaps allow a right of oral response or should it limit participation to written submissions? Although oral hearings may promote legitimacy by allowing participants to feel that they had a full-dress opportunity to present and argue their points of view, it is likely to draw out the redistricting itself and may add little real value. Limiting participation to written submissions, is much more efficient, allowing a significant degree of public input and improving the overall quality of the comments.

The redistricting body could run the initial public comment period much as federal administrative agencies do. It could announce what it was thinking of doing and what particular questions it had in mind, provide a deadline for submissions, and make all comments publicly available — preferably in real time on a database easily accessible through the Internet. It also could specify that certain information should accompany certain types of comments to enable it and members of the public to better evaluate and respond to them. It could ask, for example, that groups requesting that the plan respect particular communities of interest provide data about those communities — how are they identifiably different from others, do they vote differently than others, and precisely where they are located? Such real-time electronic submissions would ease continuing comment. If one group submitted a plan, another could comment on it, and then the first group or still another could respond to that com-

ment in turn. Such a dynamic comment process would be largely transparent and would greatly promote public participation.

One large procedural issue turns on the nature of the process. If an independent non-partisan body is drawing the lines, the redistricting body should prohibit all other forms of substantive contact, especially informal ones like phone calls and conversations with members and staff. Should such contact occur, the body should require that its content and the identity of the person initiating it be docketed. That way the public would fear no secret, private submissions and political actors would keep their participation aboveboard and limited. If, on the other hand, the process is political, such contacts are more appropriate.

After this initial round of public participation, those redistricting will need to roll up their sleeves and get down to work. During this phase, public participation is inappropriate — at least if the process is non-partisan — but transparency of a kind can play an important role. To allow their work to proceed expeditiously, non-partisan redistricters will need to keep all their work and deliberations secret — at least until they propose a plan. The law could require them to keep copies of all drafts of plans, minutes of deliberations, and copies of internal correspondence, which they could make public — perhaps again electronically — when they released their proposed plan or later. Access to such records would facilitate review by both the public and the courts and encourage the redistricters to be honest from the beginning.

Once they have produced a redistricting plan, the redistricters should present it to the public for another round of comment. At this stage, any interested party should be able to submit legal arguments challenging the scheme and make policy arguments about why it should be modified. And the public could respond not only to the plan itself but also to others' comments on it. Again, if the process is non-partisan, all comments should be public and docketed; private *ex parte* contacts should be strictly prohibited. After this second round of comment, the body would go back to work and make appropriate changes to the plan in light of the public's input. This second round of decisionmaking, like the first, should be private, at least if it is non-partisan, but the law could again require disclosure later of all drafts of changes, minutes of deliberation, and records of internal correspondence when the body released its final plan.

Two important questions remain. First, what duty should the redistricting body have to respond to comments and proposals? Should it be required to explain, if only briefly, why it did not adopt proposed plans? Why it did not respect a particular community of interest? Why it divided one county and not another or why it divided one city twice while another not at all? Requiring explanation would highlight these concerns in the design process and would better enable the public to see how fully the body took public comment into account, but also it would significantly slow the process down. Having to explain choices, especially where there are so many of them, will greatly burden the redistricting body.

Second, how, if at all, should a court review a plan for adherence to these procedural requirements? Should it, for

example, invalidate a plan if it later appears that some people had private communications with those in charge? If so, under what standard? Only if the communication contained information that was central to the shaping of the final plan? Moreover, if a redistricting body must explain its choices, how deferentially, if at all, should a court review its explanations? Should it make sure that substantial evidence supports them? Should it require the redistricting body to have made the best choices or only acceptable ones?

Rigorous judicial review will cause those redistricting to take procedural requirements more seriously, but it will add another level of legal uncertainty to a plan's prospects and provide opportunities for those unhappy with a plan on other grounds to shoot it down. If the redistricting body is truly nonpartisan and independent, perhaps the burden of judicial review — or at least strict judicial review — of procedures is unnecessary, especially since judicial review will always be available for the plan's substance.

Discussion Questions

1. Should public participation in redistricting occur through written comments, as in most rulemaking proceedings, or should it occur in some part through more formal public hearings?

2. Should the law prohibit private communications between outsiders and the redistricting body and require that the content and source of any such communications that nevertheless occur be made public?

3. What, if any, materials of the redistricting body should remain secret after the process is completed? When during the process should other materials be made public?

4. What types of judicial review should be available? Courts will obviously need the right to review plans for their compliance with legal requirements, like "one person, one vote" and the Voting Rights Act. Should they also be able to review the process for compliance with procedural requirements? If the redistricting body is required to explain why it made certain choices, should the courts be able to review whether it adequately justified them?

PRINCIPLE 3

PROMOTE PARTISAN FAIRNESS AND COMPETITIVENESS

Partisan fairness and competitiveness are almost universally lauded goals of redistricting. But how to define, measure, operationalize, and interrelate these two concepts receives far too little attention from reformers and academics alike.

Partisan fairness — the roughly symmetrical treatment of the two major political parties — protects the fundamental principle of majority rule, as it ensures that the more popular of the two major political parties has at least an even chance of garnering a majority of legislative seats. Severely biased partisan gerrymanders stand democracy on its head by turning popular minorities into governing majorities.

Competitiveness, or responsiveness (as political scientists often refer to it), protects the fundamental principle of democratic accountability, as it ensures that shifts in popular opinion will be reflected in shifts in legislative membership. If all districts are gerrymandered to be lopsided and noncompetitive, political power shifts from the voters to the mapmakers. And if the voters can never "throw the bums out," eventually their legislatures may be filled with them.

Partisan fairness is just the flip side of partisan bias. Intuitively, the key feature of a fair, unbiased redistricting plan is that the political party whose candidates attract the most popular votes should generally be rewarded with the most seats in the legislature. More broadly, a fair plan treats the two major parties symmetrically. If the parties have equal support in the electorate, they should win a roughly equal number of seats in the legislature. A 50 percent vote share should translate into a roughly 50 percent seat share. If either party succeeds in attracting support from more than half the electorate, it should be rewarded with more than half the seats — and neither party should profit more from such success than would the other party, if the tables were turned. For example, if the Democrats would be rewarded with 60 percent of the seats for winning 55 percent of the popular vote, then an unbiased plan should likewise give Republicans 60 percent of the seats if their candidates win 55 percent of the vote.

Political scientists have developed various ways of measuring a redistricting plan's responsiveness — or, put differently, a way of summarizing the overall level of competitiveness in the plan's districts. As the plan's responsiveness to shifts in voting behavior increases, the electoral system begins to resemble a winner-take-all system, roughly akin to at-large (rather than districted) elections. With extremely high responsiveness and low bias, a bare 51 percent majority of votes will be magnified into a 100 percent supermajority of seats. A gubernatorial election is a good example of a winner-take-all election: The party whose candidate gets 51 percent of the vote wins "all" of the governorship. There is nothing proportional about that outcome; but at least the popular majority is rewarded. Analogously, if a politically competitive state is divided into ten districts, each of which is a perfect microcosm of the state as a whole, then a slight shift in the statewide electorate, from narrowly favoring one political party to narrowly favoring the other, will result in all ten seats "flipping" from the former party to the latter. Again, that is not at all proportional; but it is majoritarian.

One key point here is often overlooked: In a single-member districting system, where each district elects one and only one member to the legislative body (so the total number of districts is identical to the size of the body), redistricting plans that are both fair and responsive do not guarantee, and in most circumstances will not generate, proportional representation. For example, under an unbiased redistricting plan, it would not be unusual to see the following pattern: If either party attracts 51 percent of the vote, it would be expected to win roughly 52 percent of the seats; a party with 55 percent of the vote would expect roughly 60 percent of the seats; and a party with 60 percent of the vote would expect roughly 70 percent of the seats. As long as these expectations are the same for each party, the redistricting plan that generates them is unbiased. Thus, capping partisan bias is a far cry from demanding proportional representation.

One advantage of a single-member districting system over a proportional-representation system is that — absent gerrymandering — it tends to generate relatively high levels of responsiveness. In a districted system, a party that increases its popularity in the electorate should be well rewarded with additional seats in the legislature. But as has become clear in recent elections — especially the last two rounds of U.S. House elections — gerrymandering can undermine this desirable feature and create an unresponsive system. Unfortunately, that is where we find ourselves today, not only in Congress, but also in most state legislatures.

Less widely recognized is that the combination of better computers and political databases, more predictable voting patterns, and continued judicial insouciance has rendered partisan gerrymandering much more effective than it was 20 or 30 years ago. The confluence of high levels of partisan bias with low levels of responsiveness presents a unique danger to our democracy. Partisan bias makes the legislature unrepresentative of the people and the scarcity of competitive seats drains any potential for fixing that imbalance through the normal electoral process.

To see why, first imagine a nationwide congressional plan with low responsive-

ness and low bias. Assume the nation has 200 solidly Republican districts and 200 solidly Democratic districts. Although voters in 400 of the 435 districts might be deprived a meaningful choice in the general elections, partisan control of the House of Representatives would still be determined by voters (albeit in only thirty-five of the 435 districts) — not by mapmakers. Conversely, if a plan had a high degree of both responsiveness and bias — say, with 150 solidly Republican districts, only 100 solidly Democratic districts, and 185 truly competitive ones — the deck would be stacked against the Democrats, but they still potentially could take control of the House by running strong campaigns and winning at least 118 of the 185 competitive districts.

But in a system with high bias and low responsiveness, one party can develop what is effectively a "lock" on the legislature. Imagine a plan with 220 solidly Republican districts, 170 solidly Democratic districts, and only forty-five truly competitive districts. Even if Democrats ran the table in the competitive districts, capturing all forty-five and taking a solid majority of the nationwide vote in the process, they would remain the minority party in the House with only 215 seats. Under that scenario, control of the House would be determined by the mapmakers, not the voters — a fundamental affront to our democratic system of government.

While it is important to understand the linkages between partisan fairness and competitiveness, it is also important to recognize a key difference: From a public-policy perspective, there is no legitimate argument favoring partisan bias in districting. The ideal amount of partisan bias is zero. But there is plenty of room for disagreement about the ideal level of responsiveness, or the ideal number of competitive districts, as we can see from two hypotheticals. The hypothetical discussed above — where the level of responsiveness is very high because every district in a highly competitive state is a perfect microcosm of that state and thus is itself highly competitive — runs the risk of transforming a very slight partisan edge in the electorate into a one-party sweep of every district. That could leave a political party supported by nearly half the state's voters with absolutely no representatives, which may unfairly stifle minority voices. And at the congressional level, the repeated occurrence of such upheavals would place the state at a tremendous disadvantage, as its delegation would accumulate no seniority in the House.

At the other end of the spectrum, if one party or the other is likely to win at least 60 percent of the vote in every district, only an unprecedented political tidal wave would put any of the seats in play. Such a plan would lack responsiveness and undermine democratic accountability. It seems that the U.S. House of Representatives and most state legislatures today are closer to this latter hypothetical than to the former one; recent districted elections have been disturbingly uncompetitive. But we should not assume that the best antidote would be literally to maximize competitiveness. Put differently, it may not be a bad thing that some districts are overwhelmingly Republican and conservative and that other districts are overwhelmingly Democratic and liberal, so long as a significant number of districts are "in the middle" and truly up for grabs in com-

petitive general elections.

Fortunately, the first step toward at least modestly increasing competitiveness — reducing the number of lopsidedly noncompetitive districts — is also the first step toward reducing severe partisan bias. That is because the lynchpin to a successful partisan gerrymander is to over-concentrate, or "pack," the other party's voters into the fewest possible districts and thus effectively waste votes that otherwise might have had a meaningful impact in neighboring districts. If one party controls all the truly lopsided districts, the other party's supporters will be much more efficiently distributed across districts. That asymmetric distribution of Democrats and Republicans across districts is the essence of a partisan gerrymander.

The problem, however, is that eliminating "packed" districts is not always possible without severe costs to other redistricting principles (such as compactness or respect for county or municipal lines), severe costs to minority voting strength, or both. That is because partisan bias sometimes flows from residential patterns where one party's voters are much more geographically concentrated than the other's. The enormous concentration of Democratic voters in New York City is a perfect example of this phenomenon.

This "natural" form of partisan packing raises at least two difficult legal questions. First, if a state wishes to minimize partisan bias, should its redistricting rules require affirmative attempts to counteract this "natural" packing? If so, how much, if at all, should efforts to promote partisan fairness and competitiveness trump other redistricting principles such as compactness or respect for municipal or county lines? Second, if the concentrations of one party's voters are (as in New York and many other large American cities) heavily populated by African-Americans and/or Latinos, is it possible to "unpack" these partisan strongholds without diluting minority voting strength and perhaps violating the Voting Rights Act? Or will the unpacking of these heavily minority urban districts actually enhance minority citizens' political power and fully comport with the aims of the Voting Rights Act?

Finally, even if consensus can be reached about the proper levels of competitiveness and the acceptable tradeoffs that can be made to reduce partisan bias, a whole host of practical and technical issues must be resolved. How should we measure the partisanship of any given district? Should partisan registration matter (in those states where voters register by party)? Or should redistricters focus instead on actual voting patterns from recent elections? What contests should be considered, and how many years back should redistricters go when analyzing election returns? Should incumbency be "factored out" of election returns, to better reflect underlying partisanship? And when projecting future outcomes, should incumbency be "factored in"? How should the "pairing" of two or more incumbents in the same new district be treated? Should redistricters take affirmative steps to ensure that the burdens of being "paired" will not fall entirely on the incumbents from one political party? Most of these questions have become standard fare in Voting Rights Act litigation, but with surprisingly little consensus on how best to answer them. Without answers to these questions any attempt to operationalize

the relatively abstract principles of partisan fairness and competitiveness may fail.

Discussion Questions

1. Can "neutral" processes (e.g., bipartisan or nonpartisan commissions, or preventing redistricters from considering political data) or "neutral" criteria (e.g., maximizing compactness or minimizing county splits) create adequate levels of competitiveness and partisan fairness?

2. If — as most advocates of the Voting Rights Act would argue — "colorblind" redistricting cannot cure minority vote dilution, can "politics-blind" redistricting cure partisan vote dilution?

3. Can a state draft sufficiently specific and unambiguous laws to ensure adequate competitiveness and partisan fairness? How would they read?

PRINCIPLE 4

RESPECT EXISTING POLITICAL SUBDIVISIONS AND COMMUNITIES OF INTEREST

This principle requires redistricting plans to pay some respect to political boundaries and communities that exist independently of the plan itself. Thus, a plan drawing state legislative districts would have to keep one eye on city and county boundaries and try not to split up concentrations of certain cultural and socioeconomic groups. Like many of the other redistricting principles, this one plays both a constructive and preventive role, but in each case it is only partially successful.

On the constructive side, the principle serves three different values. First, it seeks to ensure that various political and social communities have some representation in the legislature. By avoiding splitting communities as much as possible, redistricters increase the chances that representatives find themselves responsive to a more unified set of interests. A representative whose district falls all within a city, for example, is likely to find herself more consistently taking an urban position on issues, to the extent such a position exists, than would a representative whose district encompasses both urban and rural areas. On the other hand, this principle sometimes can deny a city or community the advantages that flow from having representatives on both sides of the aisle in the legislature. This principle can, moreover, affect the character of the legislature in an important way. It increases to some degree the likelihood that the legislature will consist of representatives who will stand for a particular set of interests, rather than of representatives each of whom represents a compromise among different interests at the district level. This change promotes the representation of diverse views in the legislature, but may make compromise there more difficult.

Second, this principle may in some circumstances promote more informed discussion of political candidates. To the extent legislative districts correspond to other political and social boundaries, they may make it easier for voters to engage the candidates and issues. If everyone in a city falls in the same congressional district, for example, everyone will be interested in the same contest and will discuss the same candidates, and local media cov-

erage will likely be more focused. In the case of communities of interest, political discussion may be especially keen since many of these communities rest on vibrant social networks.

Third, this principle helps facilitate an important feature of some states' political process: local legislation. Where needs vary greatly from locality to locality, having representatives closely identified with particular political subdivisions may increase the responsiveness of state politics to local needs. Especially in those states that grant political subdivisions relatively little power and autonomy, many local needs must be addressed at the state level. Town and city councils simply lack the power to manage them. A county that needs state approval for a particular bond, tax, or land-use policy, for example, might more easily find a legislator to champion its interests if it is not split among several legislative districts.

This principle also plays an important preventive role. Even if it failed to promote any of the three above interests, it would confine the redistricters' freedom to gerrymander. To the extent a redistricting body must pursue one goal, it will be more difficult for it to pursue others like partisan advantage. The only question is how much more difficult it will be. Does this principle make gerrymandering only a little or much more difficult? Like some other traditional redistricting principles, this one constrains gerrymandering but not as much as many people believe and hope. First, given the demanding "one person, one vote" rule, cutting across the boundaries of political subdivisions and communities of interest is inevitable to some degree and those in control of redistricting can exercise their discretion to favor one political party or the other. Different ways of cutting across political and community lines are likely to have different political impacts. A redistricting body, for example, might have to choose between splitting a largely Democratic city or Republican county. The effects would be quite different and would depend, in part, upon the political complexion of the other areas each area is combined with.

Second, given that the many goals of redistricting often conflict, compromise among them is often necessary. This leaves much discretion to those who redistrict. If they are so inclined, they may be able to justify in the name of "compromise" splitting political subdivisions and communities of interest in ways that advantage one party or the other.

Third, this principle itself sometimes inevitably entails partisan advantage. Consider a 70 percent Democratic county, half the population of which lives in a single nearly 100 percent Democratic city. If the county is entitled to ten districts, respecting the city boundaries means that all five of the city districts will go Democratic by very large margins, while all five suburban districts might go Republican by much slimmer margins. Ironically, this is exactly what a Republican gerrymander would seek to do: to pack the Democrats into as few districts as possible in order to waste much of the Democratic vote.

Respecting communities of interest can work similarly. To the extent that some communities vote disproportionately for one party, respecting them by packing their voters into fewer districts may dampen the prospects of the party they support and lessen the community's overall influence in the legislature.

A community may, for example, prefer to have its members split over two districts rather than concentrated in a single one if that means twice as many representatives will respond to its interests. This debate, in fact, has led to much recent litigation under the Voting Rights Act.

Practical issues further lessen this principle's constraining force. To implement the principle, one must decide a whole host of questions, the answers to which may favor a particular party. Is it, for example, better to split one county three ways and preserve two counties intact or instead to split two counties two ways and leave one intact? Should respect for political subdivisions and communities of interest be measured from the subdivisions' and communities' perspective or from the perspective of the district? That is, should we care more about how often political subdivisions and communities are split or about how often districts are split across political subdivisions and communities? Furthermore, should all political subdivisions matter equally and how much should we care about different communities of interest? Showing great respect to all of them would make redistricting practically impossible. Should we respect rural communities as much as ethnic ones? Should all ethnic and racial communities count the same? If not, how much more should we count some than others?

Perhaps the hardest and most important question is the most basic. The courts have never really defined the concept of "community of interest." It could encompass not only racial, ethnic, religious, social, economic, and various cultural groups, but, especially on the local level, groups like university communities and retirement areas. How far should the notion extend before it becomes unhelpful? Should different kinds of communities count only for certain kinds of plans — *e.g.*, should we respect a university community in drawing city council, but not state legislative districts?

Because we can operationalize this principle in many different ways and because it is difficult to make all these choices in advance of redistricting, this principle will necessarily leave some room for partisan politics to play. This possibility does not mean, of course, that this principle makes gerrymandering worse, but just that it fails to constrain gerrymandering as much as many people hope and that this principle can sometimes systematically advantage one party over another. The Voting Rights Act may also conflict with this principle in some cases.

Discussion Questions

1. To what extent does this principle achieve the constructive goals claimed for it and how important are those goals today?

2. How effectively does this principle control partisan gerrymandering?

3. Can this principle be framed in a way that minimizes its potential for misuse to justify partisan redistricting?

4. How should we define "communities of interest"?

5. How should this principle be operationalized — *e.g.*, how much respect should different types of political subdivisions and communities of interest receive, how much should different

kinds of splitting matter, and how should we measure "respect" as a practical matter?

6. To what extent should choices among ways of operationalizing this principle be made by those who actually redistrict and when should those choices be made — in the redistricting process or in advance?

7. How, if at all, should redistricters use modern technology, like sophisticated consumer profiling, to identify "communities of interest"?

PRINCIPLE 5

ENCOURAGE GEOGRAPHICAL COMPACTNESS AND RESPECT FOR NATURAL GEOGRAPHICAL FEATURES AND BARRIERS

Like Principle 4, this principle serves both constructive and preventive purposes. On the one hand, it can further several important representational goals. In earlier times when travel was hard, compactness and, contiguity generally made it easier for candidates to meet and engage their constituents and to represent them once in office. Campaigning and keeping in touch once elected were much easier the less one had to travel within a district. Similarly, when most media were locally based and personal communication was largely by word of mouth, which required face-to-face interaction, compactness would have made it easier for voters to inform themselves of both candidates and issues and to vigorously discuss them. In addition, since communities of interest were often geographically based and often followed natural geographical features — think of low-country plantation culture versus mountain culture in colonial Virginia and South Carolina or of farming versus mining cultures in early Colorado — respecting compactness and natural geographical features could further, indirectly, the interests more directly promoted by Principle 4.

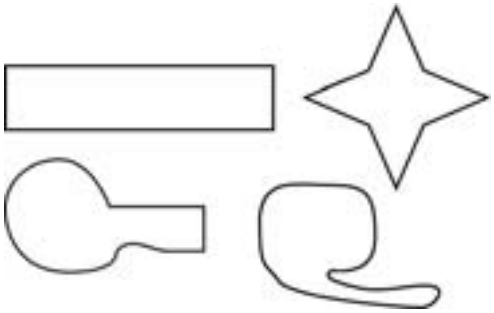
Today these justifications carry somewhat less weight. Modern ease of travel allows candidates both to campaign over much wider areas and across natural barriers without great difficulty and to more easily keep in touch with their constituents once elected. And since modern media operates on a broader geographical scale, voters obtain more of their information from non-local sources. A voter trying to decide which congressional candidate to vote for may, for example, consult a blog written by someone in a different state and hosted on a server located across the nation. The modern economy and transportation, moreover, have greatly increased citizen mobility, thereby lessening the tie of communities of interest to particular geographical areas. Today a river may more likely be seen as real estate perk than as an obstacle to transportation or communication and the people on one bank may have more in common with those on the other than either group has with people further inland.

Even if compactness and respect for natural geographical features promote

these particular goals less effectively than before, they still do so to some degree and they also serve an important preventive function. They constrain those who redistrict from pursuing less legitimate objectives, like partisan advantage. Most academics and political commentators, however, believe their constraining effect is somewhat overstated. Although these concerns may foreclose the most egregious gerrymanders, they leave much room for partisan politics to operate. This is especially true when they can be traded off opportunistically against other traditional redistricting principles and when redistricters have reliable information down to the precinct level, as they typically now do, about how people vote.

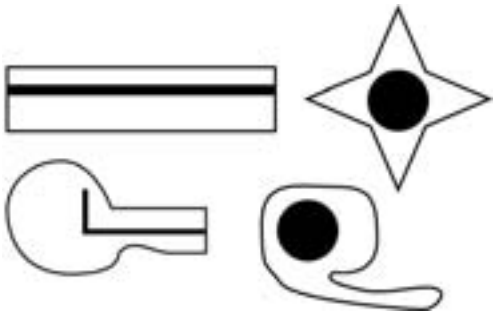
Compactness, moreover, is not really a politically neutral criterion. All other things being equal, it advantages interests that are more widely and evenly dispersed over the whole geographic jurisdiction. Geographically concentrated interests will tend to find themselves packed into a few individual districts. Consider the example of two political parties who have roughly the same number of supporters in a jurisdiction with ten districts. If 70 percent of one party's members live in a single, dense geographic enclave with the rest evenly dispersed over the remaining territory while the other party is more evenly dispersed across the jurisdiction as a whole, the other party will usually win more districts if they are reasonably compact. That is so because the first party's members would be disproportionally packed into fewer districts. Many believe, that for this reason, compactness can harm political parties whose supporters reside disproportionately in cities.

Compactness and respecting natural geographical features also raise many thorny practical issues. People have proposed many different formal measures of geographical compactness. Which one should be used? Although nearly everyone agrees that a circle is perfectly compact, one cannot create a plan of only circular, single-member districts. But once one moves away from circular districts, agreement as to what counts as compact ends. Should one care more about how broad a district is compared to its height, about how many tentacles it has, about how far those tentacles extend away from it, or about how much they curve around once they extend out? Should one worry about how often a straight line drawn from one arbitrary point in the district to another would cross outside it? Should the aesthetic ungainliness of a district matter if nearly all the population actually lives in a single relatively compact core within it? To understand these issues visually, consider how relatively compact the following districts are:



To make things even harder, then consider whether that judgment is justified without actually knowing where people live within those districts. If 90 percent

of the populations were evenly dispersed in the shaded areas of each district below, would your instincts change?



Compactness, moreover, is usually thought of narrowly as only geometric compactness — that is, how nice the district looks on a map. Should geometric compactness represent the only viable form? What if a district lacks geometric compactness but is "functionally" compact — that is, despite its visual ungainliness it ties together people of similar interests? Should such a form of compactness count? If so, how should we measure it?

Similar practical questions arise with respect to natural geographical features. Should all rivers be equally respected? Should a broad river matter as much as a tall mountain? As much as a swamp? Should natural barriers matter if many highways cross them, if people on either side of them look the same, or if media markets disregard them?

Since these questions all have many possible answers, compactness and respecting natural features will leave much room for other concerns, including politics, to play out. At worst, these two criteria can be manipulated to justify results reflecting less principled aims and in some cases they can conflict with the Voting Rights Act. It may sometimes, for example, only be possible to construct a plan satisfying the Voting Rights Act if one stretches the notion of compactness somewhat. None of this is to say, of course, that this principle should play only a small role — or no role — in redistricting but rather to caution that geography may matter less now than it used to and that it can sometimes be used opportunisticly to legitimate what its proponents fear: partisan gerrymandering.

Discussion Questions

1. In an age where travel and communication are easy, how much should physical proximity and natural boundaries matter?

2. How can this principle be framed so as to minimize the possibility that some may misuse it to justify partisan redistricting?

3. How should this principle be operationalized — for example, how should compactness be measured and how much should different kinds of natural boundaries matter? Should we focus on each plan's average district or on each plan's least compact district?

4. Who should make these choices and when should they make them — while redistricting or before?

5. Should we broaden the notion of compactness beyond simply geometry?

PRINCIPLE 6

EXCLUDE CONSIDERATION OF THE RESIDENCE OF INCUMBENTS AND CANDIDATES

At first glance, this principle seems relatively uncontroversial. Taking into account where incumbents and likely candidates live allows the redistricting body to play favorites among both candidates and parties. The redistricters could, for example, carve away an incumbent's residence from the core of her existing district and place her in a less hospitable one, thereby lessening her chances of reelection. Similarly, if one party controls the redistricting process, it can redraw district lines so that powerful incumbents of the other party have to run against each other while its own incumbents face less well-known challengers. This strategy both advantages the controlling party's own established candidates and diminishes the number of senior representatives on the other side.

Should those who redistrict remain neutral among individual candidates? In particular, should they not avoid deliberately giving additional electoral advantage to incumbents, who often already enjoy advantages in name recognition, fundraising, subsidized communications to constituents, and ability to draw media coverage? Likewise, should not the redistricting process remain neutral as among political parties? If not, partisan fairness, electoral competition, and political responsiveness all suffer. Closer analysis reveals, however, that this principle, just like several of the others, is somewhat more complicated and may involve policy tradeoffs. This is not to say that it should not guide redistricting, just that its place in the process needs to be well understood.

Some believe that taking incumbency into account can promote legitimate political values. For one thing, in a system where seniority rules the legislature, a jurisdiction may want to protect incumbents in order to increase the collective power of its representatives in a larger assembly. Thus, a state eager for more money for highway construction, mass transit, or agricultural subsidies might rationally want to send a slate of relatively senior members to the U.S. House of Representatives. In that way it could increase their power relative to other states' representatives on the relevant committees. The same holds true for poli-

cies other than appropriations that may affect the state's interests.

Seniority, however, is a zero-sum game — that is, one representative's seniority always comes at the expense of another's. Promoting seniority, thus, only makes sense when the jurisdiction performing the redistricting is redrawing districts for a body in which it competes against other jurisdictions. Enhancing the seniority of its congressional delegation, for example, may increase one state's influence and power in the House of Representatives. But enhancing the seniority of some members of its own state legislature would be fruitless. Their added seniority would come at the expense of others in the same body, who also represent people who live within the state. In this situation, the state would simply be playing favorites among its own, not increasing its power and influence in a body where it competes with other states. Whether one believes that promoting incumbency for this reason is legitimate or not, the rationale applies at most to congressional races.

In addition, protecting incumbents can increase the level of know-how in representative bodies. In a term-limited body, for example, some might want to respect incumbency at least a little in order to increase experience within the representative body. Not only would such experience help the body function better but it would also empower it relative to other branches of government and to outside interests. Rapid turnover in a term-limited legislature, some feel, weakens the body of government closest to the people, leads to a more powerful executive and perhaps judiciary, and places representatives more at the mercy of lobbyists and powerful private interests. This justification is obviously controversial. To some, it smacks of incumbent self-interest and many believe that the voters in individual races, not those who redistrict, should decide how much, if at all, to weigh this particular factor.

One concern in ignoring where incumbents and other candidates live is that it might not be possible. Under some circumstances, the Voting Rights Act might require redistricters to take into account where particular incumbents live. And, even if it does not, those who redistrict may already know or can easily find out where candidates, especially incumbents, live. Officially denying them knowledge which they can easily obtain on their own may only serve to empower those within the process who are willing to cheat. Thus, this "principle" may sometimes unfortunately serve as an invitation to corruption.

One might also criticize this principle in quite a different way — for not going far enough. Incumbents care even more about where their supporters live than where they themselves do. An incumbent pitted against another can always move to another district, especially if she has some name-recognition and support there. An incumbent whose supporters are broken up among other districts, however, has nowhere to go. For this reason, one might consider expanding the principle to exclude consideration not only of the residence of incumbents and of other candidates, but also of where their support lies. Of course, such an expanded principle, just like the more narrow one, would sometimes have to bend to the requirements of the Voting Rights Act.

Discussion Questions

1. Are the better values that some claim for maintaining incumbency truly legitimate or just smokescreens for incumbent self-interest?

2. If these values are legitimate, do they outweigh the potential for incumbent protection and partisan favoritism that considering where incumbents and candidates live creates?

3. If considering residence generally creates too much risk of mischief, are there some situations where it makes sense to allow jurisdictions to take residency into account — e.g., in congressional redistricting and in redistricting term-limited bodies?

4. Does the ability of redistricters to easily find out where incumbents and other candidates live mean that cheaters will be advantaged if this information is officially excluded from the process?

5. Should the principle extend to exclude consideration of where candidates' electoral support is based?

PRINCIPLE 7

MINIMIZE PARTISAN POLITICAL CONTROL BY ASSIGNING THE REDISTRICTING POWER TO AN INDEPENDENT COMMISSION

Advocates of "independent" redistricting commissions often elide the distinction between two very different models. The first model, which equates "independence" with nonpartisanship, suggests that redistricting should be made apolitical: Self-interested political actors should be replaced with neutral redistricters, who then must be shielded from the kinds of influences and data that might "re-politicize" the process. The second model, which equates "independence" with bipartisanship (at least in a two-party system such as ours), suggests that redistricting is inherently, indeed inescapably, political, but seeks to minimize unfairness by transferring the redistricting power from legislative bodies — which at any given time may be dominated by one political party — to balanced, bipartisan commissions, where both major parties are ensured an equal number of seats at the bargaining table.

The choice between these two models will drive many other considerations when crafting state constitutional amendments or statutes creating independent redistricting commissions. If the goal is to make the process nonpartisan and apolitical, then elected officials, party officers, and those who work closely with them cannot serve as commissioners. And commissioners furthermore must be "sealed off" from certain types of information, including most electoral data. For example, Principle No. 6 discusses the pros and cons of prohibiting redistricters (or attempting to prohibit them) from learning the locations of incumbents' and other candidates' residences. As the discussion there explains, any such efforts to deny decision-makers relevant information raise the risk of corruption — as cheaters who break the rules and obtain the prohibited data will gain a systematic edge over commissioners who follow the rules. Iowa's redistricting (which does not actually involve a "commission" but instead is done largely by legislative staff) suggests that, under certain circumstances, the nonpartisan model may be feasible. But the Iowa example cannot easily be transferred to other states that have more combative political cultures, less tradition of professional nonpartisan legislative staffing, more convoluted political-subdivi-

sion lines, and more Voting Rights Act issues.

On the other hand, if the goal of creating an independent redistricting commission is conceived more narrowly, so as to focus on preventing extreme partisan gerrymanders, then there is considerably greater flexibility regarding the composition of the commission, the criteria it may apply, and the data it may consider when seeking to satisfy those criteria. Elected officials, party officers, and even political consultants can serve as highly knowledgeable commissioners, so long as both major political parties have the same opportunity to appoint them, in equal numbers. Redistricting criteria can be overtly, and transparently, political — for example, taking into account the massive electoral advantages held by incumbents, rather than pretending that they do not exist. And all manner of relevant data — including detailed, precinct-level returns from recent elections — are fair game. This model reduces the need to police the commissioners as it eliminates censorship of sensitive political information.

In terms of membership, this bipartisan model only demands an equal number of seats for the two major parties. How many commissioners each party gets to appoint, and whether the state party chairs, the legislative leaders, or statewide elected officials (Governor, Attorney General, etc.) have the power to appoint are important questions.

But usually, the most important membership question is who, if anyone, will serve as the "odd" member of the commission — that is, as the tiebreaker. Absent a tiebreaker, there is too great a risk of partisan gridlock, which will simply result in court-ordered redistricting, hardly a satisfying reform. Sometimes the two party delegations to the commission can attempt to agree upon a tiebreaker. But barring such an agreement, who should appoint the tiebreaker? Options include the state supreme court, the state's chief justice, or a panel of retired judges. And who should be appointed — a political scientist, a geographer, a well-respected civic leader, or some other type of person?

Simply placing an equal number of Democrats and Republicans on the commission and then adding a tiebreaker does not necessarily generate good results, even if the tiebreaker is sophisticated and well intentioned. If the two parties' delegations decide that a bipartisan, sweetheart, pro-incumbent gerrymander is in their mutual best interests, then any effort by the tiebreaker to demand the creation of competitive districts will be futile, as he simply will be outvoted by the two sets of partisans. This risk is at its zenith in congressional redistricting, where a state's less popular party may be satisfied to strengthen its grip on a minority of seats while allowing the more popular party to strengthen its grip on the majority of seats. By contrast, at the state-legislative level, each party must compete for a majority of seats unless it is willing to surrender any hope of winning control of the chamber. That dynamic may thwart bipartisan action by the redistricting commission and thus prevent the tiebreaker from becoming powerless.

One way to ensure the tiebreaker a central role is to give him more votes than the two party delegations combined — effectively, to turn him into the sole ultimate decision-maker, and thus to transform the two partisan delegations into "inside lobbyists" whose job is to win the tiebreaker's support. But

placing that much discretionary power in the hands of one person (or even in a committee of three tiebreakers) may be too dangerous, unless the tiebreakers' discretion can be meaningfully constrained through clear, judicially enforceable state-law rules.

Because it is much easier to design bright-line rules for evaluating, or ranking, redistricting plans than for drawing them, and because the partisan delegations will likely have more plan-drawing resources at their disposal than will the tiebreaker, it may make sense to treat the commission's work as a competition, where the two partisan delegations take turns competing to see which one can best satisfy a discrete list of specific redistricting criteria, as judged by the tiebreaker. Each delegation would be required, in turn, to present a map that at least matches the other delegation's last map on all criteria and that also beats it on at least one criterion. For example, if state law established that the commission's only relevant criteria were minimizing the number of county splits and minimizing some specific measure of partisan bias, then the tiebreaker would be authorized to accept the most recent plan submitted to him unless the other side timely submitted a plan with the same level of partisan bias and fewer county splits or with the same number of county splits and less partisan bias. As the process continued with multiple iterations, plans alternately emanating from each partisan delegation would tend to converge toward the absolute minimum number of county splits. From then on, the two delegations would have no choice but to compete to minimize partisan bias. The tiebreaker's role would be tightly confined: "scoring" the most recent plan on both criteria, challenging the other partisan delegation to beat the most recent pair of scores, and deciding when to cut off the iterative process and adopt the last proposal.

An interesting wrinkle here would be to open this tournament to the public (see generally Principle No. 2). If the most recently submitted plan — along with the county-split and partisan-bias scores that the tiebreaker gave to it — were posted on the Internet, then members of the public could propose plans, too. If the two partisan delegations were not inclined to move quickly toward a good map, injecting a high-scoring plan drawn by a member of the public would force both sides to compromise and improve their proposals, to prevent the tiebreaker from simply choosing the public's high-scoring proposed plan.

One major problem with this format is that some valid redistricting criteria are not matters of degree, where the partisan delegations (or the partisan delegations plus members of the public) should be allowed to compete freely. For example, in most states, any plan containing a noncontiguous district should be rejected out of hand. Likewise, and more importantly, plans that violate the "one person, one vote" doctrine should be automatically ineligible for consideration, no matter who submits them and how well they score on other key criteria such as county splits and partisan bias. Satisfying "one person, one vote," however, is relatively simple: The state constitution or statute could simply demand a total population deviation of no more than one person or (in the case of non-congressional districts) a total population deviation of no more than 10 percent of the average dis-

trict population. Any plan violating that bright-line rule would be flatly rejected.

But satisfying the federal Voting Rights Act is not such a simple criterion. Reasonable minds can differ about whether a plan does or does not comply with the Act; and no simple, mathematical "rule of thumb" can replace a thorough, nuanced evaluation of minority electoral opportunities under the totality of circumstances. So when a partisan delegation or a member of the public submits a proposed plan, the tiebreaker's determination of whether the plan does or does not comply with the Voting Rights Act may be hotly contested and may ultimately have to be resolved in court.

Questions of compliance with federal law, of course, can be resolved by federal or state courts. But the tiebreaker's compliance with state redistricting rules such as those described here can be resolved only by state courts, as the Eleventh Amendment bars federal courts from enjoining state officials for violating state law. So the application of criteria such as minimizing county splits or minimizing partisan bias, the "scoring" of plans proposed by partisan commissioners or members of the public, and the number of iterations that the competition is allowed to consume before the tiebreaker cuts off the process and adopts the last map are all issues that ultimately may be tested in state court by any aggrieved citizen. A thorough reform proposal should also address the issue of which state court will have jurisdiction to review the commission's decisions. Perhaps the best option is the state supreme court, although that may raise some issues if the court will in effect be reviewing acts taken by the tiebreaker who it appointed. Another possibility is to allow any state trial court of general jurisdiction to hear challenges, but that would promote judge shopping and "races to the courthouse." Another solution, then, would be to grant exclusive jurisdiction to the state trial court located in the state's capital, with an automatic right of expedited appeal.

Given that, in many states, judges themselves are elected officials, and sometimes are elected on a partisan ballot, it is important that the state's redistricting rules be unambiguous and straightforward. Sacrificing equity for certainty may be wise, in order to minimize the judiciary's entanglement in the partisan politics that redistricting inevitably entails.

Discussion Questions

1. Is it correct to assume that partisan politics can be constrained, but can never be fully removed from the redistricting process?

2. Should the same commission take responsibility for congressional, state senate, and state house redistricting, or are these tasks best divided among two or three separate commissions? Would combining them in one commission encourage the tiebreaker to adopt one party's congressional plan and the other party's state-legislative plans, or one party's senate plan and the other party's house plan? If so, is that good or bad?

3. What criteria are sufficiently clear to constrain both the tiebreaker and the state court that ultimately will review his handiwork? Will this proposal work if state law mandates five or ten criteria, rather than just two or three?

4. Would a state court be allowed to replace the commission's plan with one that was equal or better on all state-law criteria? What if the superior plan had never been presented to the commission?

5. Should the commission's plan be subject to a vote of ratification in the legislature? If so, should the legislature be allowed to consider amendments?

6. Is this "bipartisan" commission proposal unfair to third parties? Is it any worse for third parties than the system it would replace?

PRINCIPLE 8

LIMITING REDISTRICTING TO ONCE FOLLOWING EACH DECENNIAL CENSUS

This principle aims to restrict opportunities for partisan redistricting. Under the "one person, one vote" requirement of the United States Constitution, any jurisdiction electing district-based representatives effectively must redistrict after each decennial census. If it does not, a court will do so in order to equalize the districts' populations. The "one person, one vote" rule, however, does not restrict redistricting from occurring more frequently. Unless state law provides otherwise, a jurisdiction could redistrict itself every two years — or even more often — if it wanted.

This possibility leaves much room for partisan opportunism. If a single party controls the redistricting process, it can redraw district lines before a particular election to maximize its chances of maintaining control. Indeed, it could do so before every election. The most notorious example of this type of opportunism is the Texas congressional redistricting of 2003. After the 2000 census, Texas had to redraw its congressional districts. Because the Texas legislature failed to agree upon a plan, a three-judge federal district court redrew them. According to the court's opinion, the court began by drawing those districts necessary to satisfy the Voting Rights Act and then located Texas's two new seats where the population had grown most. It then adjusted the districts to make them more compact, to ensure they were contiguous, to follow the prior boundaries of the congressional districts as much as possible, and to respect local political subdivisions. It then considered the effect of the plan on incumbents who held major leadership positions and its overall partisan implications. It found that the plan was likely to produce a congressional delegation roughly proportional to each major party's share of the statewide vote. The next election produced a congressional delegation of seventeen Democrats and fifteen Republicans.

In that same election, Republicans gained control of both the Texas House and Senate. At the urging of U.S. House Majority Leader Tom DeLay, the Republican-controlled legislature decided to redistrict to gain more Republican seats. The attempt caused such bitterness

that Democratic state representatives repeatedly decamped the state to deprive one house or the other of the state legislature of the two-thirds quorum necessary to pass a new plan. After much wrangling, including attempts to fine the absent Democrats and punish their staffs, enough Democrats returned to create a quorum and a new plan was passed and signed by the Republican governor. In the 2004 elections, this new plan produced a congressional delegation of eleven Democrats and twenty-one Republicans, thereby switching six seats. Significantly, Republicans now control the House of Representatives with a margin of only fifteen seats.

Limiting redistricting to once immediately after each decennial census accomplishes two goals. First, it removes any possibility of partisan opportunism after the post-census redistricting unless a court finds that the post-census plan is itself invalid. Even if a single party later came to control all the arms of the redistricting process, it simply could not redistrict to its advantage. It would have to live with the existing plan until after the next census. Second, redistricting only once after each census injects some healthy uncertainty into the redistricting process. Gerrymandering works only to the extent that those in control of redistricting can accurately predict voting behavior. The strategy depends on one party being able to spread out its own support so as to create relatively slim majorities in many districts while packing the other party's support into as few districts as possible, each with a very large majority. That strategy can backfire if the controlling party cuts its own margin of support too thin. When that happens, a slight shift in voter sentiment to the other party will give it majorities in many districts leaving some to argue that gerrymandering is inherently self-limiting. In their view, parties will overreach and their misjudgments will come back to bite them. That is true, however, only if parties cannot well predict future voting behavior. If they must predict it up to ten years out, there is much uncertainty, which may discourage them from gerrymandering as aggressively as they would otherwise. If they can fine-tune district boundaries every two years, however, there is much less uncertainty and they are apt to press much further.

Limiting redistricting to once after every decennial census thus makes some sense when partisan opportunism is a threat. When it is not present, however, as when an independent, non-partisan commission controls the redistricting process, it makes less sense. In fact, when partisanship or incumbent self-dealing is not a concern, more frequent redistricting might serve wholesome political goals. For example, state and especially local governments might legitimately want to redistrict more than once every ten years when they have reliable data that varying population growth across the jurisdiction as a whole has led once equipopulous districts to contain very different numbers of people. Such a jurisdiction could minimize opportunities for partisan advantage-taking by setting an objective trigger in advance — e.g., requiring or allowing redistricting only when the population of the largest district exceeded that of the smallest by a set percentage. Practically speaking, however, few jurisdictions are likely to have sufficiently reliable data on population growth between federal decennial censuses to

justify this type of redistricting.

More innovatively, a jurisdiction in which the redistricting process is controlled by political actors might actually try to use more frequent redistricting to combat partisan gerrymandering. If its law required redistricting whenever some previously stated criterion of partisan fairness was violated, the jurisdiction would force redistricting whenever one party had substantially more seats than its support warranted. If the subsequent redistricting were not controlled by players all of the same party, a compromise, not a partisan plan would presumably result. And even if the same players as before controlled the process, the situation would presumably be no worse. Or, if the jurisdiction wanted, it could kick the redistricting to a different type of body, like an independent commission. In fact, the prospect that a very partisan plan would automatically trigger a redistricting, control of which would be uncertain, would likely discourage partisan actors from reaching for too much in the first place. If nothing else, the thought of perhaps losing control of the process the second time around would force them to balance their own private incumbency concerns against partisan advantage. Of course, agreeing on a measure of partisan fairness would not be easy. Many different approaches exist and they might all have different political implications within the jurisdiction.

In short, limiting redistricting to once following every decennial census could help constrain partisan opportunism in cases where political actors redistrict. It adds little, on the other hand, when an independent commission does so. And even in the case where political actors control the process, more frequent redistricting might be structured innovatively to discourage excessive partisan behavior and to pursue more legitimate objectives.

Discussion Questions

1. Can the reasons one might want to redistrict out-of-cycle ever be legitimate?

2. If they can be, are they important enough to justify the risk of partisan advantage-taking that redistricting controlled by political actors can present?

3. Can out-of-cycle redistricting be structured in such a way as to minimize the dangers of partisan gerrymandering or even to control it?

PRINCIPLE 9

RECOGNIZE THE LIMITED PRECISION AND TRANSITORY NATURE OF DECENNIAL CENSUS DATA TO JUSTIFY APPROPRIATE FLEXIBILITY ON POPULATION VARIANCE

Redistricting depends upon numbers and census taking is necessarily an inexact project. Every ten years the federal government mounts an increasingly thorough effort to count the American population and every ten years it misses the mark. Some people never get their forms; others get them but never return them; others get them, return them, but fill them out incorrectly; and the government's follow-up never catches up with some of these people or introduces inaccuracies of its own. Still, other people receive duplicate forms and fill out both. The Census Bureau now estimates that the 2000 census overcounted nationwide by 0.48 percent. That overall figure may seem low but it constitutes roughly 1,350,825 people. More importantly, it masks some very large differences among social subgroups. The estimated undercount of African-Americans males aged 30-49 was 8.29 percent; of all African-American males, 4.19 percent; of Asian and Pacific Islanders, 2.12 percent; and of non-homeowners, 1.14 percent. On the other hand, the estimated overcount of women aged 50 and above was 2.53 percent; of adolescents aged 10-17, 1.32 percent; of non-Hispanic whites, 1.13 percent; and of homeowners, 1.25 percent.

Time only compounds these initial inaccuracies. The census is supposed to enumerate the population as of April 1st of each year ending with a zero. The Census Bureau, however, does not publish even its earliest figures until the end of that year. By the time a redistricting body can get seriously down to work, the figures are already nearly a year out-of-date. In that time, some people have died, some people have been born, some people have moved out, and others have moved in — all at different rates across different geographic areas. In other words, the day it is published the census is not only "off" but is differentially "off" in different places and for different demographic groups.

Given the census's unavoidable imprecision, many have suggested that the "one person, one vote" rule should be flexible in application. So-called de minimis population deviations, they believe, should not cause constitutional problems. After all, why should the Constitution require

more precision than the census itself can give, especially if a jurisdiction could perhaps use the added flexibility to boost the representation of those groups that the census itself disproportionately overlooks? In particular, why should the Constitution require more exact equality than the estimated imprecision of the census? To many, requiring more exact equality than that appears arbitrary.

The Supreme Court has heard versions of this argument several times and each time has firmly rejected it, most recently in 1983. In that case, New Jersey argued that the "one person, one vote" rule should overlook de minimis deviations from equality. Relying on the "inevitable statistical imprecision of the census," New Jersey argued that "[w]here, as here, the deviation from the ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero." In response, the Supreme Court characterized the particular *de minimis* line New Jersey proposed as one giving only "the illusion of rationality and predictability." The Court found two problems with the approach:

> First, [New Jersey] concentrate[s] on the extent to which the census systematically undercounts actual population—a figure which is not known precisely and which, even if it were known, would not be relevant to this case. Second, the mere existence of statistical imprecision does not make small deviations among districts the functional equivalent of equality.

The census's general imprecision, the Court found, was irrelevant because little was known about its distribution. If the undercount, which it reflected, were evenly distributed across districts, it would make no difference to population deviations among districts. As the Court explained it,

> The undercount in the census affects the accuracy of the *deviations* between districts only to the extent that the undercount varies from district to district. For a one-percent undercount to explain a one-percent deviation between the census populations of two districts, the undercount in the smaller district would have to be approximately three times as large as the undercount in the larger district.

In other words, for the imprecision to explain away a particular *de minimis* inequality between two districts, certain unlikely assumptions would have to be true.

The Supreme Court rejected deviations within the range of the estimated undercount as the "functional equivalent of equality" for a different reason. It admitted the imprecision, but then firmly rejected its claimed significance:

> The census may systematically undercount population, and the rate of undercounting may vary from place to place. Those facts, however, do not render meaningless the differences in population between congressional districts, as determined by uncorrected census counts. To the contrary, the census data provide the only reliable — albeit less than perfect — indication of the districts' "real" relative population levels. Even if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one can say with

> certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size. That certainty is sufficient for decisionmaking. Furthermore, because the census count represents the "best population data available," it is the only basis for good-faith attempts to achieve population equality. Attempts to explain population deviations on the basis of flaws in census data must be supported with a precision not achieved here.

The Court has offered two other arguments why it should not accept de minimis population variances. First, if that were the standard, redistricters would strive to achieve it rather than more exact equality. To some, of course, that would not be a bad idea because it would give redistricters more flexibility to consider other worthy redistricting goals. Second, whatever *de minimis* level the Court accepted would be arbitrary. If 0.7 percent were acceptable, why not 0.8 percent? Why not 1.0 or 1.2 percent? There would be no non-arbitrary place to draw the line. While this is true, some have asked why exact equality based on admittedly imprecise census numbers is not just as arbitrary. In the end, the Court acknowledged the argument and fell back upon somewhat vague constitutional "aspirations":

> Any standard, including absolute equality, involves a certain artificiality. As appellants point out, even the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed. Yet problems with the data at hand apply equally to any population-based standard we could choose. As between two standards — equality or something less than equality — only the former reflects the aspirations of [the Constitution].

Whatever one thinks of the Court's rejection of flexibility here — and many have criticized it — it really only matters in congressional redistricting. In state legislative and local redistricting, the Supreme Court has already relaxed application of the "one person, one vote" rule so that total deviations of 10 percent or less are presumptively legitimate and usually require no justification (see Principle 1). So long as those redistricting state and local bodies stay within this tolerance, they have great freedom to be flexible and to promote legitimate redistricting objectives other than equality of population. Only when they draw lines for congressional districts will redistricters be severely pinched by the "one person, one vote" rule.

Discussion Questions

1. To what extent does the "one person, one vote" rule's largely inflexible application to congressional redistricting impede pursuit of other legitimate aims?

2. Do states and localities employ the extra flexibility they have in designing state legislative and local districts to actually pursue more fully the aims they assert they would in congressional districting or do they use the added flexibility to engage in partisan gerrymandering?

3. How valid, if at all, are the Supreme Court's reasons for not allowing *de minimis* population variations in congressional redistricting?

4. Should the Supreme Court apply a uniform population variance standard to all redistricting or continue to apply a stricter standard to congressional districts and a more flexible standard to state legislative and local districts?

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THE REFORM INSTITUTE'S UNIQUE, INDEPENDENT VOICE

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BRENNAN
CENTER
FOR JUSTICE

A CITIZEN'S GUIDE TO REDISTRICTING

JUSTIN LEVITT
WITH BETHANY FOSTER

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE BRENNAN CENTER'S REDISTRICTING PROJECT

The Brennan Center is a leader in the fight for just and equitable redistricting procedures across the country. We are currently counseling advocates in the Midwest on how best to maximize their goals of diversity, accountability, and fairness through redistricting reform. Building on our analyses of successful and unsuccessful reform initiatives in states like Arizona, California, and Ohio, and our extensive study of redistricting practices nationwide, we have submitted testimony and helped draft legislation to shape and advance the reform agenda. We have also filed friend-of-the-court briefs in many of the major cases addressing the use of redistricting for undue partisan gain or at the expense of minority voters.

The Center offers top-flight legal and policy expertise to advocates and officials on the national and state level seeking to develop effective redistricting bills and initiatives. We facilitate consensus on policy goals and then translate those goals into language appropriate for legislation or ballot measures. The Center reviews and analyzes text drafted by others for potential constitutional and other legal problems. Once legislation is introduced, Brennan Center attorneys accept invitations to deliver written and oral expert testimony.

Finally, the Center's publications and public advocacy have amplified the values of redistricting reform: counting the population and redrawing the district lines in a way that is equitable, fair, and sensitive to diversity. In anticipation of the round of redistricting following the 2000 Census, the Brennan Center offered *The Real Y2K Problem*, an accessible analysis of the technical and legal issues facing legislators and reform advocates in redrawing the nation's legislative and congressional districts. Our publication *Beyond the Color Line?* focuses on the ramifications of redistricting, and the litigation that often results, for race and representation. Brennan Center attorneys have also authored numerous law review articles, magazine pieces, and opinion pieces detailing the promises and challenges of redistricting in the public interest.

ABOUT THE AUTHOR

Justin Levitt is counsel at the Brennan Center for Justice, focusing on redistricting, election administration, and other voting rights concerns. His work has included thorough research into the most pressing issues of election law and practice; publication of extensive studies and reports; assistance to federal and state administrative and legislative bodies with responsibility over elections; participation as *amicus curiae* in significant cases around the country; and litigation, when necessary, as counsel for parties seeking to compel states to comply with their obligations under federal law and the Constitution. He is the author or co-author of articles in both law reviews and peer-reviewed publications, and has also written many shorter commentaries for a more public audience. His Brennan Center monographs, including *The Truth About Voter Fraud* (2007) and *Making the List* (2006), have been cited extensively in national and local media, and recently, by the U.S. Supreme Court. Before coming to the Brennan Center, Mr. Levitt worked for a number of different civil rights and nonprofit voter engagement organizations, including as in-house counsel to one of the nation's largest voter registration and mobilization efforts.

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TABLE OF CONTENTS

Members of Congress and state legislators are elected from districts; at least once per decade, the district lines are redrawn, block by block. In most states, these legislative district lines are drawn by the legislators themselves.

The way the lines are drawn can keep a community together or split it apart, leaving it without a representative who feels responsible for its concerns. The way the lines are drawn can change who wins an election. Ultimately, the way the lines are drawn can change who controls the legislature, and which laws get passed.

REDISTRICTING MATTERS.

INTRODUCTION

Our representatives in local, state, and federal government set the rules by which we live. In ways large and small, they affect the taxes we pay, the food we eat, the air we breathe, the ways in which we make each other safer and more secure. Periodically, we hold elections to make sure that these representatives continue to listen to us.

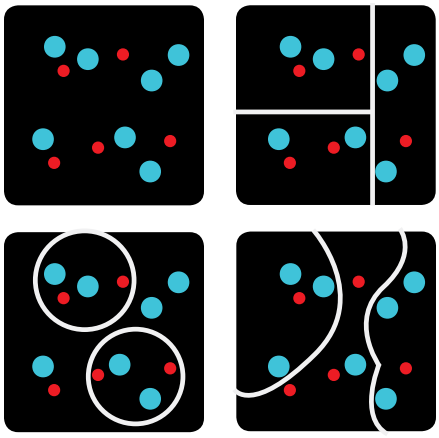
All of our legislators in state government, many of our legislators in local government, and most of our legislators in Congress are elected from districts, which divide a state and its voters into geographical territories. In most of these districts, all of the voters are ultimately represented by the candidate who wins the most votes in the district. The way that voters are grouped into districts therefore has an enormous influence on who our representatives are, and what policies they fight for. For example, a district composed mostly of farmers is likely to elect a representative who will fight for farmers' interests, but a district composed mostly of city dwellers may elect a representative with different priorities. Similarly, districts drawn with large populations of the same race, or ethnicity, or language, or political party are more likely to elect representatives with the same characteristics.

Every so often, a state's district lines – for both Congress and the state legislature – are redrawn, grouping different sets of voters together in new ways. Sometimes, the way that a particular district is redrawn directly affects who can win the next election. And together, the way that the districts are redrawn can affect the composition of the legislative delegation or legislature as a whole. Many believe that we would have different representatives, federal and state, if the district lines were drawn differently.

In addition to affecting large political trends, the way that district lines are drawn can have very specific consequences. For instance, in some cases, new lines may be redrawn to leave an incumbent's house out of the district she used to represent, making it difficult or impossible for her to run for re-election to represent most of her old constituents unless she moves. Other times, lines may be drawn to include the homes of two incumbents in the same party, forcing them to run against each other or retire, and in either case, knocking one of them out of the legislature. Often, sitting legislators from the party controlling the legislature are also in control of drawing new lines, leaving them free to target challengers, or legislators from an opposing party.

Occasionally, the process of redrawing district lines gets a lot of attention. In 2003, there was a big controversy in Texas; one party tried to redraw the district lines for Congress after a court had already redrawn the lines just a few years before, and legislators in the other party actually fled the state – twice – to try to stop the redrawing.

DIFFERENT REDISTRICTING PLANS



District lines group voters into districts, with each district electing a different representative. District lines can be drawn in many different ways.

More often, this "redistricting" gets much less attention in the press. But even when it does not make the front page, it is extremely important in determining which communities are represented and how vigorously – which is in turn extremely important to determining which laws get made.

There are many different ways to figure out which voters are grouped together to elect a representative. Whether the way that districts are currently drawn in any given state is good or bad depends on what you believe the goals of the process to be. Some stress objectivity; some independence; some transparency, or equality, or regularity, or other goals entirely. There is ample debate among scholars, activists, and practitioners about the role of political insiders, the nature of protection for minority rights, the degree of partisan competition or partisan inequity, and the ability to preserve established or burgeoning communities. But to date, this discussion has been inaccessible to most of the people directly affected.

This publication is intended to present the redistricting process for state and federal government, and for many local governments, in digestible parts. There are many moving components, complex issues that we attempt to describe in simple and straightforward fashion, piece by piece. This is a guide to the rules for drawing district lines – a description of how it works today, how it could work in the future, and what it all means. Consider it an owners' manual, for those who should own the process: we, the people.

RELATED TOPICS: Simulated Redistricting

After leafing through this **owners' manual,** feel like an entertaining and informative redistricting **test drive?**

At **www.redistrictinggame.org,** The Redistricting Game lets you draw and redraw the districts of a hypothetical state under several different scenarios, with instant feedback on the consequences. It's a good way to see for yourself how some of the parts of the redistricting process fit together.

WHAT IS REDISTRICTING?

I. WHAT IS REDISTRICTING?

We start with some definitions, to make sure that we are all talking about the same thing.

Even those who follow the issue may confuse three related terms: "reapportionment," "redistricting," and "gerrymandering." So what do they all mean?

Apportionment is the process of allocating seats in a legislature – two legislators here, three legislators there. On the federal level, the United States Constitution requires that seats in the House of Representatives be apportioned to states according to the population count in the federal census, conducted every ten years.[1] On the state level, most states maintain a fixed number of legislators, but some let the size of the legislature grow or shrink as the population grows or shrinks.[2] **Reapportionment**, then, is the process every ten years of deciding, based on population, how many representatives a state will receive.

Until the beginning of the twentieth century, the size of the House of Representatives grew as the United States population expanded and states entered the Union. For example, New York was assigned 6 federal Congressmembers in 1789, then 10 Congressmembers in 1790, and 17 Congressmembers in 1800 – and the House of Representatives grew accordingly.[3] However, in 1911 and 1929, Congress passed laws that ultimately fixed the number of House seats at 435.[4] Now, each state gets a portion of the 435 seats, depending on its population. After each census, states may therefore gain or lose House seats if their population grows more quickly or more slowly than the rest of the country.

For example, California grew substantially during the 1980s, and gained seven seats in the House after the 1990 census.[5] It gained an additional seat after 2000.[6] New York, on the other hand, lost population relative to other states; though it grew, it grew more slowly than the rest of the country. And the number of its Congressmembers dropped accordingly, falling from 34 to 31 after the 1990 census, and down to 29 after 2000.[7] The map to the right shows the seat shifts that resulted from the population shifts tallied by the 2000 census.[8]

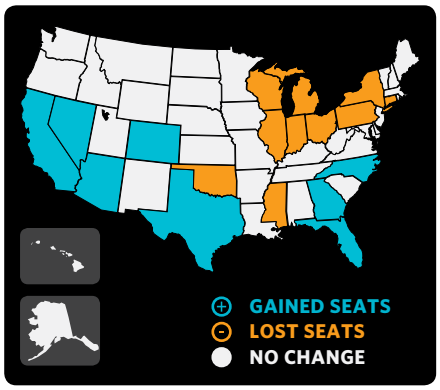
If reapportionment is the process of figuring out whether New York has 29 federal Congressmembers, rather than 28 or 30, **redistricting** is how we know which New York voters each of the 29 Congressmembers represents. Put differently, after the number of legislators has been set, redistricting is the process of redrawing the lines of each legislative district. Representatives at all levels – school board, city council, state legislature, and Congress – may be elected from districts, and all of these lines are redrawn from time to time. The lines may be redrawn to account for big population shifts – for example, when an area has gained or lost seats through reapportionment. But they can also be redrawn at other times, for other reasons – or in a few states, for no reason at all. And redrawing the lines can have a substantial impact on how different

Reapportionment *is the process of using a state's population to decide how many representatives it gets.*

Redistricting *is the process of redrawing legislative district lines.*

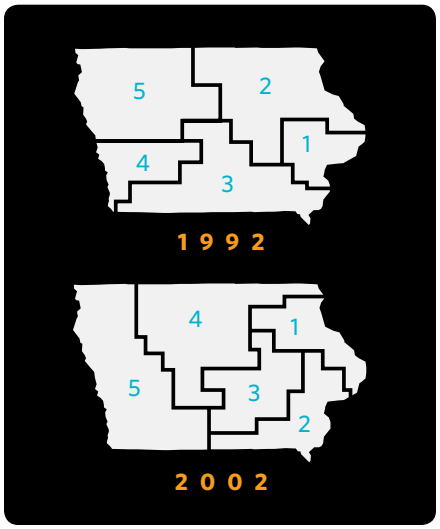
Gerrymandering *is the process of redrawing district lines to increase unduly a group's political power.*

SEATS IN THE HOUSE OF REPRESENTATIVES, 2000



ALABAMA	7		MONTANA	1	
ALASKA	1		NEBRASKA	3	
ARIZONA	8	+2	NEVADA	3	+1
ARKANSAS	4		NEW HAMPSHIRE	2	
CALIFORNIA	63	+1	NEW JERSEY	13	
COLORADO	7	+1	NEW MEXICO	3	
CONNECTICUT	6	+1	NEW YORK	29	+2
DELAWARE	1		NORTH CAROLINA	13	+1
FLORIDA	26	+2	NORTH DAKOTA	1	
GEORGIA	13	+2	OHIO	18	+1
HAWAII	2		OKLAHOMA	6	+1
IDAHO	2		OREGON	5	
ILLINOIS	19	+1	PENNSYLVANIA	19	+2
INDIANA	8	+1	RHODE ISLAND	2	
IOWA	6		SOUTH CAROLINA	6	
KANSAS	4		SOUTH DAKOTA	1	
KENTUCKY	8		TENNESSEE	9	
LOUISIANA	7		TEXAS	32	+2
MAINE	2		UTAH	3	
MARYLAND	8		VERMONT	1	
MASSACHUSETTS	10		VIRGINIA	11	
MICHIGAN	15	+1	WASHINGTON	9	
MINNESOTA	8		WEST VIRGINIA	3	
MISSISSIPPI	4	+1	WISCONSIN	8	+1
MISSOURI	9		WYOMING	1	

IOWA CONGRESSIONAL DISTRICTS



SOURCE: IOWA LEGISLATIVE SERVICE BUREAU

communities are grouped together. For example, the top map to the left shows Iowa's congressional districts drawn after the 1990 census, and the bottom shows the districts after the 2000 census; though the state kept the same number of districts, each district's borders changed substantially.

Gerrymandering refers to the manipulation of these district lines to affect political power. Every attempt to draw district lines has a political impact. But a gerrymander is a conscious and, according to opponents, undue attempt to draw district lines specifically to increase the likelihood of a particular political result. (Until a series of court decisions in the 1960s and 1970s, some insiders achieved similar results through **malapportionment** – assigning unequal numbers of people to districts, and making some votes worth less than others – instead of redrawing the district lines.) Some believe that most gerrymanders are a natural part of the political process; others believe that they represent a distortion from a more equitable norm.

Partisan gerrymandering occurs when the political party in control of the line drawing process draws districts to favor itself and limit opportunities for the opposition party. **Incumbent protection gerrymandering**, which is sometimes called "**bipartisan**" or "**sweetheart**" gerrymandering, occurs when those drawing the lines try to ensure that each party holds on to the districts it already controls, effectively divvying up the state to preserve the partisan status quo.

RELATED TOPICS: A Vote for DC

Washington, DC is apportioned one federal representative ... sort of. Rep. Eleanor Holmes Norton, Washington's at-large delegate in the House of Representatives, may sit on committees and participate in debate, but she is not allowed to vote.

Many Americans have joined the citizens of the District of Columbia – almost 600,000 people – in agitating for change, so that the District's residents will no longer suffer "taxation without representation."

Despite what some believe to be constitutional uncertainty, there is increasing support for a federal bill that would grant the District a vote in return for an additional representative for Utah.

Utah also believes that it has been denied adequate representation; the State claims that many of its citizens were not counted during the last Census because they were overseas at the time (for example, on missions on behalf of the Mormon church), and that the State's true population would merit an additional representative.

A BRIEF HISTORY OF REDISTRICTING

During the colonial period, long before the ratification of the Constitution in 1789, political insiders began to use malapportionment and other electoral structures for particular political gain. Redistricting is no exception. Patrick Henry, who opposed the new Constitution, tried to draw district lines to deny a seat in the first Congress to James Madison – the Constitution's primary author. Henry made sure that Madison's district was drawn to include counties that were more likely to oppose him.[9] The attempt failed, and Madison was elected – but the American gerrymander had begun.

*In the 1780s, **Patrick Henry** tried to draw congressional district lines to keep **James Madison** out of office.*

It is ironic that the man who inspired the term "gerrymander" actually served under Madison, the practice's first American target. Just a few months before Elbridge Gerry became Madison's vice president, as the Democratic-Republican governor of Massachusetts, Gerry signed a redistricting plan that was thought to ensure his party's domination of the Massachusetts state senate. An artist added wings, claws, and the head of a particularly fierce-looking salamander creature to the outline of one particularly notable district; the beast was dubbed the "Gerry-mander" in the press, and the practice of changing the district lines to affect political power has kept the name ever since.[10]

THE 1812 "GERRYMANDER"

In most states, the gerrymander is alive and well, and politicians still carve states into districts for political gain, usually along partisan lines. The particular rules have changed in some ways since the eighteenth century, but Elbridge Gerry and Patrick Henry would find many familiar elements in redistricting today.

WHY DOES REDISTRICTING MATTER?

II. WHY DOES REDISTRICTING MATTER?

The way that district lines are drawn puts voters together in groups – some voters are kept together in one district and others are separated and placed into other districts. The lines can keep people with common interests together or split them apart. Depending on which voters are bundled together in a district, the district lines can make it much easier or much harder to elect any given representative, or to elect a representative responsive to any given community. And together, the district lines have the potential to change the composition of the legislative delegation as a whole.

We discuss below options for drawing the district lines, and the effects they may generally have. To keep the discussion concrete, however, we first offer a few anecdotes from the last few rounds of redistricting, showing the substantial impact that these redistricting decisions can have on our elections.

LETTING POLITICIANS CHOOSE THEIR VOTERS

After the 2000 census, when it came time to redraw district lines in California, state Democrats controlled the state legislature and the Governor's mansion. Under California's rules, this let the party, and particularly the sitting Democratic legislators, control the redistricting process for both the state legislature and for California's Congressional delegation. However, Republicans threatened to put an initiative on the ballot, leaving the redistricting process to an uncertain public vote, if the Democrats got too greedy. Democrats also faced a threat that litigation over a redistricting plan would drive the process to the courts, potentially allowing the state supreme court – with six Republican appointees and only one Democratic appointee – to draw the lines. Ultimately, the two parties effectively decided to call a truce, and to keep the incumbents – of both parties – as safe from effective challenge as they could.[11]

Democrats paid Michael Berman, a redistricting consultant, more than $1.3 million to create the resulting redistricting plan. In addition, thirty of California's 32 Democratic members of Congress each gave Berman $20,000 in order to custom-design their individual districts for safety. As Rep. Loretta Sanchez explained: "Twenty thousand is nothing to keep your seat. I spend $2 million (campaigning) every year. If my colleagues are smart, they'll pay their $20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them."[12]

ELIMINATING INCUMBENTS

After the 2000 elections, just as Democrats controlled the redistricting process in California, Republicans controlled the redistricting process in Virginia. The Virginia Republicans used the redistricting pen to target Democratic Minority Leader Richard Cranwell, a 29-year veteran of the state legislature. They surgically carved his house, and 20 neighboring homes along the same street, out of the district he had represented, and placed them into the district of his 22-year colleague, Democrat Chip Woodrum. The resulting district crossed both county and town lines, and with what fittingly looked like a tiny grasping hand, reached out to grab Cranwell's residence.[13] Rather than run against Woodrum in what was essentially Woodrum's home district, Cranwell decided not to run for re-election in 2001.

ELIMINATING CHALLENGERS

In the 2000 Democratic primary for a Brooklyn, NY, state legislative seat, newcomer Hakeem Jeffries challenged long-time incumbent Roger Green, and won more than 40% of the vote.[14] Jeffries' strong showing set the stage for a potential rematch.

In the meantime, however, New York redrew its state legislative districts, in a process controlled by sitting legislators – including Roger Green. The redistricting process took the block where Jeffries' house was located and carved it out of Green's district.[15] With Jeffries out of the picture, no candidate ran against Green in the 2004 primary, and he won the general election in November with 95% of the vote. Two years later, Hakeem Jeffries was able to move to a house within the redrawn district in order to run for the seat; he won the district's primary election with 65% of the vote, and as the Democratic nominee in an overwhelmingly Democratic district, won the general election with 97% of the vote.[16]

NEW YORK ASSEMBLY 57

SOURCE: NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT

PACKING PARTISANS

Just like they can be drawn around particular politicians, districts can be drawn around particular voters. There are many tools available to try to predict which voters will support a favored candidate, and those who draw the lines may try to put as many of those voters as possible within a given district, to protect incumbent legislators or give challengers a better chance, or to drain support for the opposition from neighboring districts. In so doing, the districts may split communities or stretch across vast swaths of a state.

In 1991, for example, Texas's 6th Congressional District was designed to include as many loyal Republicans as possible, in part so that Democrats could control adjacent districts. As Supreme Court Justice John Paul Stevens described the district lines:

> To the extent that it "begins" anywhere, it is probably near the home of incumbent Rep. Barton in Ennis, located almost 40 miles southwest of downtown Dallas. . . . It skips across two arms of Joe Pool Lake, noses its way into Dallas County, and then travels through predominantly Republican suburbs of Fort Worth. Nearing the central city, the borders dart into the downtown area, then retreat to curl around the city's northern edge, picking up the airport and growing suburbs north of town. Worn from its travels into the far northwestern corner of the county (almost 70 miles, as the crow flies, from Ennis), the district lines plunge south into Eagle Mountain Lake, traveling along the waterline for miles, with occasional detours to collect voters that have built homes along its shores. Refreshed, the district rediscovers its roots in rural Parker County, then flows back toward Fort Worth from the southwest for another bite at Republican voters near the heart of that city. As it does so, the district narrows in places to not much more than a football field in width. Finally, it heads back into the rural regions of its fifth county – Johnson – where it finally exhausts itself only 50 miles from its origin, but hundreds of "miles apart in distance and worlds apart in culture."[17]

TEXAS CONGRESSIONAL 6

DILUTING MINORITY VOTES

When the Texas legislature next drew district lines, in 2003, there were further shenanigans. The redistricting battles were so bitterly fought that Democratic state legislators, then in the minority, fled to Oklahoma and New Mexico to prevent the state legislature from meeting; federal House Majority Leader Tom DeLay drew a formal ethics rebuke for using the FAA to try to track their plane.[18]

Among other things, the Congressional redistricting plan that emerged moved about 100,000 Latino voters from one district (District 23) into an adjacent district (District 25) in order to protect a particular incumbent.[19] The incumbent had lost support among Latinos in every election since 1996, and just before the lines were redrawn, Latinos had grown to a majority of the voting-age citizens in the district. Then the lines were redrawn, splitting off a sizable portion of the Latino community and replacing them in the district with voters more inclined to favor the incumbent.[20] The plan ended up at the Supreme Court, which recognized that, "[i]n essence, the State took away the Latinos' opportunity because Latinos were about to exercise it."[21] The Court forced Texas to redraw District 23, and the following year, the candidate of choice for the Latino community was elected.[22]

SPLITTING COMMUNITIES

In 1992, race riots in Los Angeles took a heavy toll on many neighborhoods, including the area known as Koreatown. It is estimated that the city suffered damages of more than $1 billion, much of it concentrated on businesses operated by Koreans and other Asian immigrants.[23]

When residents of these neighborhoods appealed to their local officials for assistance with the cleanup and recovery effort, however, each of their purported representatives – members of the City Council and the state Assembly – passed the buck, claiming that the area was a part of another official's district. The redistricting map, it turned out, fractured Koreatown. The area, barely over one mile square, was split into four City Council districts and five state Assembly districts, with no legislator feeling primarily responsible to the Asian-American community.[24]

WHEN ARE THE LINES REDRAWN?

III. WHEN ARE THE LINES REDRAWN?

Each state is responsible for drawing district lines both for its congressional delegation and for its state legislators.

This redistricting process usually starts with the federal Census, which takes place every ten years. In March of years ending in "0" (1980, 1990, 2000, etc.), the Census Bureau sends out questionnaires and census workers to count the population, and compiles basic demographic data like gender, age, and race.[25]

The Census Bureau spends the next few months adding up the data. By December 31st of years ending in "0," it sends population counts to the President.[26] The President, in turn, passes the population figures along to Congress, along with a calculation of how many federal Congressmembers are **apportioned** to each state, using a formula set by federal statute.[27]

Within one year of the federal Census, the Census Bureau also sends population data to the states.[28] This information includes population counts by age and race, down to individual blocks.[29]

As discussed below, in the 1960s, the Supreme Court ruled that legislative districts had to have approximately the same population, using figures that are reasonably up to date. For practical purposes, this means that district lines have to be redrawn at least once after every census, to account for population shifts.

Though the lines have to be redrawn after each census, in some states, district lines *may* be redrawn at any time – in the middle of a decade, even over and over. Other states have rules saying that district lines may not be redrawn before the next census, or that they may be redrawn only under certain circumstances – for example, if existing lines are struck down by a court. Moreover, most states have *different* rules for drawing congressional districts and for drawing state legislative districts. And some have no rules at all for when the district lines may be redrawn.[30]

*The next Census will take place in 2010. The **2012 elections** will be the first ones conducted using the newly drawn districts.*

RELATED TOPICS: Census Count

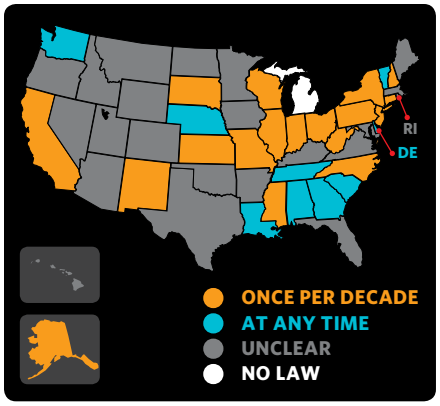
The official Census count determines how many federal representatives each state gets, and is usually essential for allocating state representatives to different parts of the state. There is evidence, however, that minorities, children, low-income individuals, and renters are systematically undercounted, resulting in underrepresentation in the legislature.

Moreover, incarcerated people – who are disproportionately minorities and poor – are generally counted where they are imprisoned, inflating representation of prison districts and diluting the voting power of the prisoners' home communities.

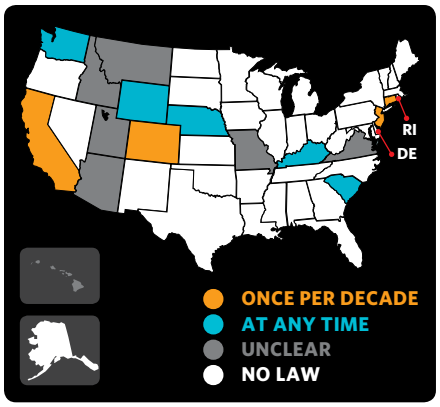
RELATED TOPICS:
Re-redistricting – Litigation & Legislation

In 2003, just two years after a court redrew Texas' congressional district lines, the Texas legislature redrew the lines again. A challenge made its way to the Supreme Court, but the Court refused to strike down the re-redistricting as unconstitutional. In the wake of the decision, three federal bills were introduced to prohibit states from redrawing congressional districts more than once per decade. Versions of these bills are once again pending in the 110th Congress.

REDRAWING STATE LEGISLATIVE DISTRICTS



REDRAWING CONGRESSIONAL DISTRICTS



There are upsides and downsides to redrawing district lines frequently. On the one hand, especially when the population is mobile, frequent redrawing makes it easier to tailor district lines as communities change shape. This may, in turn, make it easier for legislators to stay connected to the communities they represent. And if new population estimates are used when the lines are redrawn, it will also be easier to keep districts roughly the same size.

On the other hand, the ability to redraw districts as the population shifts will exaggerate the impact of drawing the lines. If districts are generally drawn to benefit a particular set of legislators or a particular political party, frequent redrawing lets the people with the pen tweak the lines repeatedly to address threats or opportunities in an upcoming election, and lock in their advantage. Frequent redrawing also means that constituents may be shuffled in and out of districts without the chance to hold their legislators accountable from one election to the next.

WHO REDRAWS THE LINES?

IV. WHO REDRAWS THE LINES?

Each state decides for itself – usually in the state constitution – who will draw district lines for its Congressmembers and for its state legislators.[31] And states have chosen many different ways to draw these lines. Though Congress is given the constitutional power to pass a federal law regulating the process in a uniform fashion nationwide for congressional district lines (and though several bills have been proposed), it has not yet done so.[32]

Most states put the power to draw district lines solely in the hands of the **state legislature**. This means that state legislators pass laws to create the boundaries for their own districts and for the state's Congressmembers. These laws are usually just like any other law, but sometimes involve a few special procedures. And usually, the governor can veto these laws – subject to an override by the legislature – just like any other law.[33]

In 22 states, entities other than the legislature, often called "commissions," may take part in the redistricting process. These commissions vary substantially from state to state, but even here, in nearly all instances, legislators have a say at some point in how their districts will be drawn.

Four states have **advisory commissions** to help draw lines for the state legislative districts.[34] (Ohio uses an advisory commission for its congressional lines.)[35] Advisory commissions recommend district plans to the legislature, but the legislature has the final say. The commissions vary widely. For example:

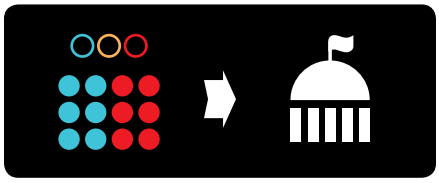
- New York's advisory commission has 6 members chosen by the majority and minority leaders of the legislature; some commissioners will also be legislators themselves. The way the commission is structured, there might be 4 Democrats and 2 Republicans, or 2 Democrats and 4 Republicans, or 3 of each, depending on partisan control of the legislature.[36]
- Maine's advisory commission has 15 members, with the legislative leadership and party chairs choosing some commission members, and those members choosing other members from the public. The structure is set up so that there will most always be an equal number from each major party, with one tiebreaker acceptable to both parties.[37]
- Iowa's advisory commission has a nonpartisan professional staff, advised by a five-member group appointed by the legislative leadership. There is an especially strong tradition of abiding by the commission's recommendations in Iowa; in fact, the legislature has to vote down two different plans proposed by the advisory commission before it can implement a plan of its own.[38]

*The **legislature** draws district lines in most states. Some states have an **advisory commission** to suggest lines to the legislature; others use a **backup commission** in case the legislature can't come to an agreement. Still others give all power to a commission – either a **politician commission** that can include legislators, or an **independent commission** where legislators don't have a vote.*

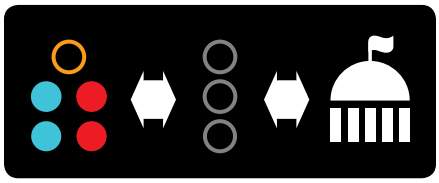
In the figures below, blue and red represent partisan commissioners; orange represents commissioners chosen by members of both parties. Outline circles will not be current legislators; solid circles may be anyone.

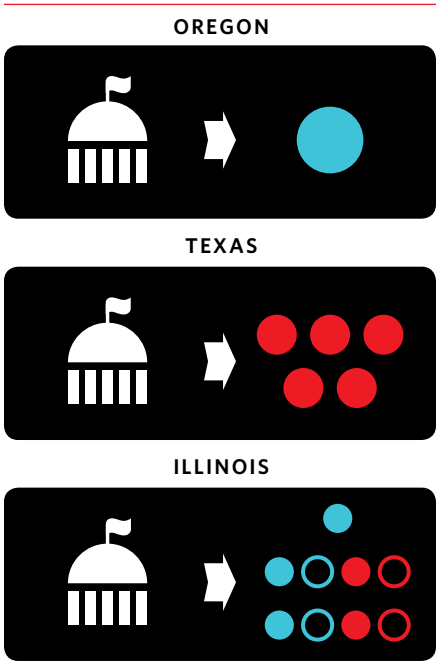
NEW YORK

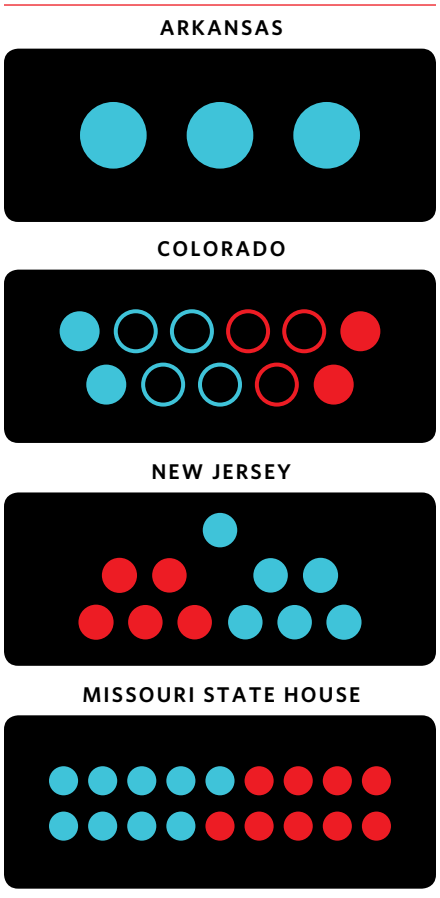
MAINE



IOWA







Five states instead use a **backup commission** for their state legislative districts (Connecticut uses a backup commission for congressional districts as well, and Indiana uses a backup commission only for its congressional districts).[39] These backup commissions will step in to draw plans, but only if the legislature cannot agree on a districting plan in a timely fashion. Connecticut increases the chance that this backup commission will be called into action, by barring plans from the legislature without 2/3 support in each chamber.[40] Other states with backup commissions vary in other respects. For example:

- In Oregon, for example, the backup "commission" is really just the state's Secretary of State, who will draw the legislative districts if the legislature cannot come to an agreement.[41]
- Texas's backup commission is made up of the Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts, and the Commissioner of the General Land Office – all of which are elected partisan posts.[42]
- In Illinois, the backup commission has 8 members chosen by the legislative leadership (half will be legislators, half not). If necessary, one tiebreaker is chosen at random from two names submitted by the Supreme Court, each nominee from a different political party.[43]

Still other states have commissions that do almost all of the work. Here too, the commissions look very different in different states.

At least for state legislative districts, seven states use what we'll call "**politician commissions**": either legislators or other elected officials can sit on the commission, but the legislature as a whole isn't involved.[44] Just as with the other structures above, each state is slightly different:

- In Arkansas, the commission is made up of the Governor, the Secretary of State, and the Attorney General.[45]
- In Colorado, the commission has 4 members picked by the legislative leaders, 3 picked by the Governor, and 4 picked by the Chief Justice of the Colorado Supreme Court. No more than six commissioners can be members of the same party, and no more than four can be legislators.[46]
- In New Jersey, each major party's state chair selects five commissioners. If these ten commissioners cannot agree on a plan by a set deadline, the Chief Justice of the New Jersey Supreme Court appoints a tiebreaker.[47]
- In Missouri, the lines for each house of the legislature are drawn by a separate commission. The commission drawing lines for the Missouri state house has 18 members; the parties each nominate two members from each congressional district, and the Governor picks one from each party for each district. The commission drawing lines for the Missouri state senate has 10 members; each party nominates ten members, and the Governor picks five from each party. Redistricting plans pass only if they have support from 70% of the commissioners.[48]

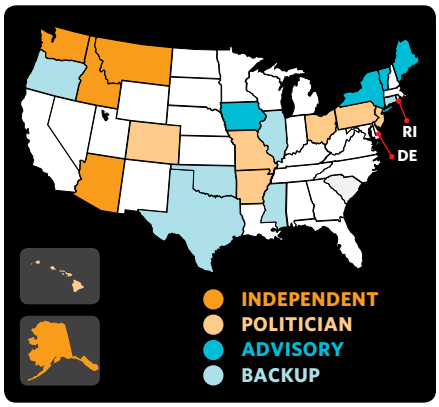
Finally, four states draw their congressional districts using **independent commissions** of five or six members of the public, largely chosen by the legislative leadership, but who are not themselves legislators or other public officials.[49] (Alaska has the same system for its state legislative districts, but has only one congressional district, and has no set rules for drawing congressional district lines.) This means that for the most part, legislators may have a role in picking the commissioners, but will not be able to pick the district lines themselves. As with the other examples above, there are several different models of independent commission. In Arizona, for example, four commissioners are selected by the legislative leadership, but they may only be chosen from a pool of nominees selected by the state's commission on appellate court appointments; those four commissioners then select a fifth tiebreaker of a different party or no party at all, by majority vote.[50] Washington has an independent commission chosen by the legislative leadership, but also lets the legislature tweak lines at the end of the process; once the commission has drawn a plan, if the legislature gets a 2/3 vote in each house, it can change the commission's plan on the margins – but only 2% of the population in any given district may be affected by such a legislative change.[51]

The summary above describes who currently draws the lines in each state. But as varied as these models are, there are still more possibilities. Some involve variants of the processes above. For example, one recent proposal would have established a commission of retired judges, chosen randomly from a pool nominated by legislative leaders (judges now draw the lines in many circumstances when other bodies fail to do so properly).[52] Another proposal would ask established non-legislative state bodies to nominate potential commissioners, and give legislative leaders a veto before choosing the commissioners themselves at random.

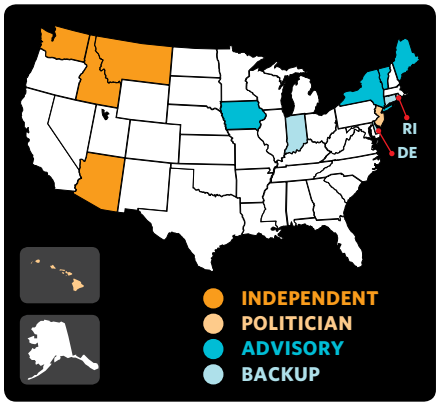
Other proposals are more radical departures from the status quo. Some have suggested letting **computers** draw the lines using automated algorithms. Some would allow members of the **public** to submit plans to be judged purely on quantitative criteria, like the plan that splits the fewest counties or the plan that creates the most competition (see below). Some have proposed **citizen commissions** selected by random lot.[53] Still others have put forth combinations of various pieces of the ideas above.

ARIZONA

COMMISSIONS FOR STATE LEGISLATIVE DISTRICTS



COMMISSIONS FOR CONGRESSIONAL DISTRICTS



CHOICES INFLUENCING WHO DRAWS THE LINES

*It is useful to consider the following **factors** in deciding who draws the lines:*

- *Role of the legislature*
- *Role of individual legislators*
- *Partisanship*
- *Voting rule*
- *Size*
- *Diversity*
- *Role of the courts*

Because the possibilities are virtually endless, it may help to think about the different ways of deciding who draws the lines by breaking the choices down into a few broad categories:

ROLE OF THE LEGISLATURE

Most states allow the legislature full control over the process of drawing lines from beginning to end. Some give the legislature first crack only. Some give others the first crack but allow the legislature the final word. Some (like Washington) let the legislature tinker only at the edges, changing districts set by others in minor ways. And some give no role to the legislature at all.

Giving the legislature a role has some pros and cons. Legislators, whose election depends on knowing their constituents, are particularly aware of where specific constituent communities are located in a geographic area; they may choose to use this knowledge to tailor districts so that those constituencies are adequately represented. Also, because legislators are elected, they are at least in theory directly accountable to the public in the event that district lines become controversial. (On the other hand, one of the ways in which legislators may use their redistricting power is to dilute the political voice of the groups most likely to oppose particular redistricting decisions.) Moreover, because there are always tradeoffs involved in drawing district lines, it may make sense to let the legislature – which has to confront tradeoffs constantly – handle the job, rather than creating a whole new institution to hammer out compromise.

Critics, however, point out that no other country allows self-interested legislators to draw the lines of the districts in which they run for office.[54] When the legislature is involved in drawing lines, the lines are more likely to overemphasize the interests of the party in control of the legislature, at least if the Governor is friendly or the legislature can override a veto. Moreover, when the legislature draws the lines, the lines are also more likely to emphasize the interests of some (or in some cases, all) incumbent legislators in getting re-elected. Because legislators who stay in office longer get more seniority, and are able to do more for their constituents, some people consider self-interested redistricting a good thing; because these same legislators may break up real communities in order to build districts more likely to re-elect them, many consider it a detriment.

ROLE OF INDIVIDUAL LEGISLATORS

By giving the legislature control of drawing the lines, most states necessarily involve legislators directly in the process. Some states move control to "politician commissions," where the legislature as a whole is not involved, but a few elected officials – usually legislative party leaders – become members of the commission. Arkansas gives control not to legislators, but to elected executive officials.

A few states have "independent commissions"; though elected public officials in these states are not themselves permitted to become commissioners, they are responsible for appointing commission members, and often select political insiders. Arizona limits this discretion by creating a nominee pool; though the legislative leadership chooses four of the five commissioners, they must make their selections from a pool of 25 nominees chosen by the state's bipartisan commission responsible for nominating appellate judges.[55]

The states with independent commissions also use other mechanisms to limit legislators' ties to those drawing the lines. All have some sort of forward-looking rule, preventing commissioners from running for office in the districts that they draw, at least for a few years after they draw the lines.[56] Idaho and Washington also look backward, preventing recent lobbyists from becoming commissioners.[57] Still other proposals would buttress the wall between legislators and those who draw the lines by declaring commissioner positions off-limits to relatives of legislators, or to recent staffers or consultants for legislators. A recent California proposal adds a further prohibition on those who have recently contributed more than a given amount to a candidate's campaign.[58]

Involving individual legislators – or allowing individual legislators to involve their staff or confidants, either as commissioners or as technical consultants for a commission – has many of the same effects as involving the legislature as a whole. Legislators may know their constituent communities especially well, and ensure that they are adequately represented. Individual legislators may also seek to preserve their own jobs, trying to draw the lines so that it is easier for them and harder for any promising challenger to win an election. When party leaders rather than individual legislators are involved, they may seek to serve the interests of their party's legislators, or they may try to boost party fortunes, even at the expense of individual members of the legislature.

PARTISANSHIP

In some states, the redistricting process may be set up to allow one political party to take control. For example, this may happen when the legislature draws the lines and one party controls the Governor's office and both houses of the legislature. Similarly, some commissions have an odd number of partisan members, putting one party effectively in charge. Illinois begins with an even number of members from each major party, but chooses a tiebreaker randomly, which lets one party ultimately take control.[59]

In other states, the process is designed to be bipartisan, as when an equal number of people from each major party sit on a commission; to get a majority, at least one commissioner from each party must vote for a particular plan.[60] In some cases, a commission consists of an equal number from each major party plus a tiebreaker either appointed by the judiciary,[61] or selected by the partisan commissioners themselves.[62] In Arizona, the tiebreaker must not be registered with any party already represented among commissioners chosen by the legislative leadership.[63]

There are also other ideas that are not yet in place in any state. Some of these proposals would create multipartisan commissions, with commissioners from third parties or who are not registered with any major party, in addition to Democrats and Republicans.[64] And some proposals would not let anyone registered with a political party draw the district lines.

Each of these models or proposals has its critics. Allowing one political party to control the process of drawing the lines can lead to a plan that tries to maximize that party's seats in the state legislature or in Congress, or make as many seats as possible "safe" for one party, at the expense of supporters of opposing parties. On the other hand, a process designed to be bipartisan or multipartisan may ratify bipartisan or incumbent protection gerrymanders, or allow the minority party or parties to draw lines that make it easier to win more seats than otherwise justified by their level of support. And critics are very skeptical of purported nonpartisans; they say that aiming for a nonpartisan process either involves people who don't know enough about political communities to make reasoned choices, or gives people with hidden partisan preferences – whether commissioners or the consultants or technicians who serve as staff to a commission – license to act under the radar.

VOTING RULE

In most states, a redistricting plan can pass if it wins a simple majority of the votes of the people drawing the lines. Some states, however, require a **super-majority**: more than just over half.[65] In Maine, a plan needs 2/3 of the votes to pass; in Missouri, it needs 70%.[66] In Connecticut, a backup commission will draw the lines if a plan does not get 2/3 of the votes in the legislature.[67] These sorts of supermajority requirements tend to produce broad compromise plans, because they give an effective veto to a small number of members. If legislators are themselves involved in drawing the district lines, this structure may lead to a compromise decision to just maintain the existing lines, or tweak the districts so that incumbent legislators have an easier chance to win their elections.

SIZE

Redistricting bodies range in size from 424 legislators in New Hampshire to just three executive officials in Arkansas. The more people who are involved, the more opportunity there is to make sure that those drawing the lines reflect the diversity of the state. However, involving more people also makes it harder to come to a consensus on where the lines should be drawn.

DIVERSITY

Because district lines make it more likely that certain interests will be represented and others ignored, many forms of diversity are relevant in deciding who draws the lines – including geographic, ethnic, racial, and partisan diversity. When the legislature is in charge of drawing the lines, those with the pen will at least be as diverse as the legislative majority. When commissions draw the lines, though, some states have extra rules to make sure that the commission is diverse. As discussed above, several states try to ensure that their commissions have a balance of partisan members. Other states may require that one or two commissioners be chosen from each of several geographic regions.[68] Still other proposals (not yet in place in any state) ask those who are picking the commissioners to make sure that the commissioners reflect the racial or ethnic diversity of the state.

In general, the more the body drawing the lines represents the diversity of the state itself, the more likely it is that the final district plan will fairly balance the various interests and communities in the state – though diversity on the redistricting body itself is no guarantee that the final plan will represent diverse interests.[69] On the other hand, the more diverse the membership, the harder it may be to come to a consensus on where the lines should be drawn.

ROLE OF THE COURTS

In a few states, a judicial official has some say in determining who draws the legislative lines. In Mississippi, the Chief Justice of the Supreme Court is him- or herself a member of the five-person backup commission that draws the lines if the legislature cannot agree on a plan.[70] In Alaska, the Chief Justice of the Supreme Court appoints one of the state's five commissioners; in Colorado, the Chief Justice appoints four of the eleven commissioners.[71] And in New Jersey, if the ten appointed bipartisan commissioners cannot agree on a plan, the Chief Justice will appoint a tiebreaker.[72]

Judges have little direct stake in the contours of particular legislative district lines, and may appoint individuals who similarly have little direct stake in the outcome of the redistricting process. Some judges, however, have more distinct loyalties. Particularly in states where judges are elected in partisan contests or have strong partisan ties, there may be pressure to use the redistricting or appointment power to further particular partisan ends.

Such inclinations may also be factors when the courts are called upon to draw district lines, when the regular process breaks down. Legislatures deadlock and can't come to an agreement. Commissions draw lines that are illegal and need to be revised in a hurry. Many times, those who feel they have "lost" in a redistricting plan will try to convince a court that the plan is illegal, and sometimes they are right. At that point, because of an upcoming election or because the primary line-drawers have proven incapable, the court may have to draw district lines itself.[73] Since 2000, courts have drawn district lines for at least one legislative chamber in at least eleven states.[74] As mentioned above, these may have partisan impact as well; studies have shown that judges who supervise the drawing of lines often adopt plans that favor the political party with which they identify.[75]

A few states provide for automatic review of any redistricting plan by the state's supreme court.[76] Such a rule generally speeds up the resolution of any conflict, though it is always possible that further litigation in federal court will follow. Moreover, these provisions also have their detractors: again, where judges have more pronounced partisan leanings, these loyalties may influence court decisions on a redistricting plan just as surely as they may influence the state legislature. And even if the courts do not actually draw the lines, the prospect of a judicial decision favoring one party may be used as a bargaining weapon by legislators or commission members from that party.

COMMISSIONS USED TO DRAW STATE LEGISLATIVE DISTRICTS[1]

	STRUCTURE	YEAR	SIZE	WHO SELECTS COMMISSIONERS	OTHER RESTRICTIONS ON COMMISSIONERS
AK	Independent Commission	1998	5	Governor selects 2 :: Legislative majority leaders select 1 each :: Chief Justice selects 1	1 commissioner from each of 4 judicial districts :: Cannot be public employee or official :: Cannot use party affiliation to select commissioner
AR	Politician Commission	1936	3	Governor, Secretary of State, Attorney General are the commissioners	
AZ	Independent Commission	2000	5	Commission on appellate court appointments nominates 25 (10 from each major party, 5 from neither major party) :: Legislative majority and minority leaders select 1 each :: Those 4 commissioners select 1 tiebreaker not registered with party of any of 4 commissioners	At most 2 commissioners from the same party :: At most 2 of first 4 commissioners from same county :: No public office for 3 years before appointment :: Cannot have switched party in last 3 years
CO	Politician Commission	1974	11	Legislative majority and minority leaders select 1 each :: Governor selects 3 :: Chief Justice selects 4	At most 6 commissioners from the same party :: At most 4 can be members of state assembly :: At least 1/at most 4 from each congressional district
CT	Backup Commission	1976	9	Legislative majority and minority leaders select 2 each :: Those 8 commissioners select 1 tiebreaker	Must be elector of state
HI	Politician Commission	1968	9	Legislative majority and minority leaders select 2 each :: 6 of those 8 commissioners agree on 1 tiebreaker	None
IA	Advisory Commission	1980	Bureau	Nonpartisan bureau draws lines for legislature to approve	
ID	Independent Commission	1994	6	Legislative majority and minority leaders select 1 each :: State party chairs of two major parties select 1 each	Must be registered voter in state :: Not lobbyist for 1 year before appointment :: Not official/candidate for 2 years before
IL	Backup Commission	1980	8 (9 if tie)	Legislative majority and minority leaders select 1 legislator and 1 non-legislator each :: Tiebreaker chosen if necessary by random draw from 2 names (1 of each party) submitted by Supreme Court	At most 4 commissioners from the same party
ME	Advisory Commission	1975	15	Senate majority and minority leaders select 2 each :: House majority and minority leaders select 3 each :: State party chairs of two major parties select 1 each :: Those 7 commissioners select 1 each from the public :: Those 7 "public" commissioners select 1 tiebreaker	None
MO	Politician Commission	1966	House: 18 Senate: 10	House: each major party nominates 2 per congressional district :: Governor chooses 1 per party per district (for 9 districts) Senate: each major party nominates 10 :: Governor chooses 5 per party	House: at most 1 nominee from each state legislative district within each congressional district Senate: none
MS	Backup Commission	1977	5	Chief Justice, Attorney General, Secretary of State, and the legislative majority leaders are the commissioners	

[1] *In the other states not represented in the chart, the legislature draws the district lines. If the legislature cannot agree on a plan, the Governor will draw the lines in Maryland; the Secretary of State will draw the lines in Oregon; and the process elsewhere is left to the courts.*

COMMISSIONS USED TO DRAW STATE LEGISLATIVE DISTRICTS (cont'd)[1]

	STRUCTURE	YEAR	SIZE	WHO SELECTS COMMISSIONERS	OTHER RESTRICTIONS ON COMMISSIONERS
MT	Independent Commission	1972	5	Legislative majority and minority leaders select 1 each :: Those 4 commissioners select 1 tiebreaker	2 commissioners from west counties, 2 from east :: Cannot be public official at the time
NJ	Politician Commission	1966	10 (11 if tie)	Each major party chooses 5 :: Tiebreaker chosen if necessary by Chief Justice	Selectors must "give due consideration" to representation of geographical areas of state
NY	Advisory Commission		6	Legislative majority leaders select 1 legislator, 1 non-legislator each :: Legislative minority leaders select 1 each	None
OH	Politician Commission	1967	5	Governor, State Auditor, Secretary of State are the commissioners :: Each major party's legislative leaders select 1 other commissioner	
OK	Backup Commission	1964	3	Attorney General, Superintendent of Public Instruction, State Treasurer are the commissioners	
PA	Politician Commission	1968	5	Legislative majority and minority leaders select 1 each :: Those 4 commissioners select 1 tiebreaker	Tiebreaker cannot be current public official
RI	Advisory Commission	2001	16	Legislative majority leaders select 3 legislators, 3 non-legislators each :: Legislative minority leaders select 2 legislators each	None
TX	Backup Commission	1948	5	Lt. Governor, Attorney General, Comptroller of Public Accounts, Commissioner of the General Land Office, and the House majority leader are the commissioners	
VT	Advisory Commission	1965	5	Chief Justice selects 1 :: Governor selects 1 from each major party :: Each major party selects 1	Gubernatorial and party appointees must be resident of state for last 5 years
WA	Independent Commission	1982	5	Legislative majority and minority leaders select 1 each :: Those 4 commissioners select 1 nonvoting chair	Must be registered voter :: Not lobbyist for 1 year or official/candidate for 2 years before appointment

[1] *In the other states not represented in the chart, the legislature draws the district lines. If the legislature cannot agree on a plan, the Governor will draw the lines in Maryland; the Secretary of State will draw the lines in Oregon; and the process elsewhere is left to the courts.*

STATE LEGISLATIVE DISTRICTS: WHO DRAWS THE LINES

	STRUCTURE FOR STATE LEGISLATIVE DISTRICTS	GOVERNOR CAN VETO PLAN?	2001 CYCLE PARTISAN CONTROL	STATE SUPREME COURT REVIEW
AK	Independent Commission	No	Democrat[2]	If citizen asks
AL	Legislature	Yes	Democrat	
AR	Politician Commission	No	Democrat	If citizen asks
AZ	Independent Commission	No	Bipartisan	
CA	Legislature	Yes	Democrat	
CO	Politician Commission	No	Democrat	Automatic
CT	Backup Commission	No	Republican Governor, Democratic Legislature :: no legislative agreement, bipartisan backup commission drew lines*	If registered voter asks
DE	Legislature	Yes	Democratic Governor, Democratic Senate, Republican House	
FL	Legislature	No	Republican	Automatic
GA	Legislature	Yes	Democrat	
HI	Politician Commission	No	Bipartisan	If registered voter asks
IA	Advisory Commission	Yes	Democratic Governor, Republican Legislature	If qualified elector asks
ID	Independent Commission	No	Bipartisan	
IL	Backup Commission	Yes	Republican Governor, Republican Senate, Democratic House :: no legislative agreement, Democratic backup commission drew lines*	
IN	Legislature	Yes	Democratic Governor, Republican Senate, Democratic House	
KS	Legislature	Yes	Republican	Automatic
KY	Legislature	Yes	Democratic Governor, Republican Senate, Democratic House	
LA	Legislature	Yes	Republican Governor, Democratic Legislature	

[2] *Control by one party or another does not guarantee a partisan result, and bipartisan control does not preclude a result biased in favor of one party or another. This table lists only the inputs into the process.*

* *In these states, the primary decision maker did not agree on district lines before the state's deadline. In some cases, a backup commission drew the lines; in other cases, a court took over.*

STATE LEGISLATIVE DISTRICTS: WHO DRAWS THE LINES (cont'd)

	STRUCTURE FOR STATE LEGISLATIVE DISTRICTS	GOVERNOR CAN VETO PLAN?	2001 CYCLE PARTISAN CONTROL	STATE SUPREME COURT REVIEW
MA	Legislature	Yes	Republican Governor, Democratic Legislature	If registered voter asks
MD	Legislature	No	Democrat	
ME	Advisory Commission	Yes	Independent Governor, split Senate, Democratic House :: no legislative agreement on Senate districts, court drew lines*	If citizen asks
MI	Legislature	Yes	Republican	If qualified elector asks
MN	Legislature	Yes	Independence Party Governor, Democratic Senate, Republican House :: no legislative agreement, court drew lines*	
MO	Politician Commission	No	Bipartisan :: no commission agreement, backup judicial commission drew lines*	
MS	Backup Commission	No	Democrat	
MT	Independent Commission	No	Bipartisan	
NC	Legislature	No	Democrat	
ND	Legislature	Yes	Republican	
NE	Legislature	Yes	Republican Governor, Nonpartisan Legislature	
NH	Legislature	Yes	Democratic Governor, Republican Legislature :: legislative plan vetoed, court drew lines*	
NJ	Politician Commission	No	Republican[3]	
NM	Legislature	Yes	Republican Governor, Democratic Legislature :: legislative plan for House districts vetoed, court drew lines*	
NV	Legislature	Yes	Republican Governor, Republican Senate, Democratic Assembly	
NY	Advisory Commission	Yes	Republican Governor, Republican Senate, Democratic Assembly	If citizen asks

[3] *Although the commission's tiebreaker, Professor Larry Bartels, was selected by the state supreme court's Republican Chief Justice, Professor Bartels was not affiliated with either major party, and announced that he would vote based on criteria designed to foster partisan balance. Sam Hirsch,* Unpacking *Page v. Bartels, 1* Election L.J. *7, 9-11 (2002).*

* *In these states, the primary decision maker did not agree on district lines before the state's deadline. In some cases, a backup commission drew the lines; in other cases, a court took over.*

STATE LEGISLATIVE DISTRICTS: WHO DRAWS THE LINES (cont'd)

	STRUCTURE FOR STATE LEGISLATIVE DISTRICTS	GOVERNOR CAN VETO PLAN?	2001 CYCLE PARTISAN CONTROL	STATE SUPREME COURT REVIEW
OH	Politician Commission	No	Republican	On request
OK	Backup Commission	Yes	Republican Governor, Democratic Legislature	If qualified elector asks
OR	Legislature	Yes	Democratic Governor, Republican Legislature :: legislative plan vetoed, Democratic Secretary of State drew lines*	If qualified elector asks
PA	Politician Commission	No	Bipartisan	If aggrieved person asks
RI	Advisory Commission[4]	Yes	Republican Governor, Democratic Legislature	
SC	Legislature	Yes	Democratic Governor, Republican Legislature :: legislative plan vetoed, court drew lines*	
SD	Legislature	Yes	Republican	
TN	Legislature	Yes	Republican Governor, Democratic Legislature	
TX	Backup Commission	Yes	Republican Governor, Republican Senate, Democratic House :: no legislative agreement, Republican backup commission drew lines*	
UT	Legislature	Yes	Republican	
VA	Legislature	Yes	Republican	
VT	Advisory Commission	Yes	Democratic Governor, Democratic Senate, Republican House	If 5 or more electors ask
WA	Independent Commission	No	Bipartisan	Automatic if plan is late, or if registered voter asks
WI	Legislature	Yes	Republican Governor, Democratic Senate, Republican Assembly :: no legislative agreement, court drew lines*	
WV	Legislature	Yes	Democrat	
WY	Legislature	Yes	Republican	

[4] *In 2001, Rhode Island created an advisory commission to assist with the particularly sensitive task of redistricting an assembly that had been "downsized" from 50 Senators and 100 Representatives to 38 Senators and 75 Representatives. It is not clear whether this advisory commission will be utilized again in the future. See* 2001 R.I. Pub. Laws ch. 315*; Parella v. Montalbano,* 899 A.2d 1226 (R.I. 2006).

* *In these states, the primary decision maker did not agree on district lines before the state's deadline. In some cases, a backup commission drew the lines; in other cases, a court took over.*

CONGRESSIONAL DISTRICTS: WHO DRAWS THE LINES

	STRUCTURE FOR STATE LEGISLATIVE DISTRICTS	STRUCTURE FOR CONGRESSIONAL DISTRICTS	GOVERNOR CAN VETO PLAN?	2001 CYCLE PARTISAN CONTROL FOR CONGRESSIONAL DISTRICTS
AK	Independent Commission	1 congressional district	n/a	n/a
AL	Legislature	Legislature	Yes	Democrat
AR	Politician Commission	Legislature	Yes	Republican Governor, Democratic Legislature
AZ	Independent Commission	Independent Commission	No	Bipartisan
CA	Legislature	Legislature	Yes	Democrat
CO	Politician Commission	Legislature	Yes	Republican Governor, Democratic Senate, Republican House :: no legislative agreement, court drew lines*
CT	Backup Commission	Backup Commission	No	Republican Governor, Democratic Legislature :: no legislative agreement, bipartisan backup commission drew lines*
DE	Legislature	1 congressional district	n/a	n/a
FL	Legislature	Legislature	Yes	Republican
GA	Legislature	Legislature	Yes	Democrat
HI	Politician Commission	Politician Commission	No	Bipartisan
IA	Advisory Commission	Advisory Commission	Yes	Democratic Governor, Republican Legislature
ID	Independent Commission	Independent Commission	No	Bipartisan
IL	Backup Commission	Legislature	Yes	Republican Governor, Republican Senate, Democratic House
IN	Legislature	Backup Commission	Yes	Democratic Governor, Republican Senate, Democratic House :: no legislative agreement, Democratic backup commission[5] drew lines*
KS	Legislature	Legislature	Yes	Republican

[5] *In Indiana, when the legislature cannot agree, congressional lines are drawn by a five-person backup commission composed of the majority leader and the chair of the apportionment committee in each legislative chamber, and a member of the assembly appointed by the Governor. In 2001, there were three Democrats and two Republicans on the commission. See* Ind. Code § 3-3-2-2*; Mary Beth Schneider,* Panel Adopts New Congressional Maps, Indianapolis Star*, May 11, 2001.*

* *In these states, the primary decision maker did not agree on district lines before the state's deadline. In some cases, a backup commission drew the lines; in other cases, a court took over.*

CONGRESSIONAL DISTRICTS: WHO DRAWS THE LINES (cont'd)

	STRUCTURE FOR STATE LEGISLATIVE DISTRICTS	STRUCTURE FOR CONGRESSIONAL DISTRICTS	GOVERNOR CAN VETO PLAN?	2001 CYCLE PARTISAN CONTROL FOR CONGRESSIONAL DISTRICTS
KY	Legislature	Legislature	Yes	Democratic Governor, Republican Senate, Democratic House
LA	Legislature	Legislature	Yes	Republican Governor, Democratic Legislature
MA	Legislature	Legislature	Yes	Republican Governor, Democratic Legislature (veto overridden)
MD	Legislature	Legislature	Yes	Democrat
ME	Advisory Commission	Advisory Commission	Yes	Independent Governor, split Senate, Democratic House :: no legislative agreement, court drew lines*
MI	Legislature	Legislature	Yes	Republican
MN	Legislature	Legislature	Yes	Independence Party Governor, Democratic Senate, Republican House :: no legislative agreement, court drew lines*
MO	Politician Commission	Legislature	Yes	Democratic Governor, Republican Senate, Democratic House
MS	Backup Commission	Legislature	Yes	Democrat :: no legislative agreement, court drew lines*
MT	Independent Commission	1 congressional district	n/a	n/a
NC	Legislature	Legislature	No	Democrat
ND	Legislature	1 congressional district	n/a	n/a
NE	Legislature	Legislature	Yes	Republican Governor, nonpartisan Legislature
NH	Legislature	Legislature	Yes	Democratic Governor, Republican Legislature
NJ	Politician Commission	Politician Commission[6]	No	Bipartisan
NM	Legislature	Legislature	Yes	Republican Governor, Democratic Legislature :: legislative plan vetoed, court drew lines*

[6] *New Jersey uses a different politician commission for its congressional districts: the majority and minority leaders and the major state party chairs select 2 commissioners each (none of whom may be a member or employee of Congress), and those 12 commissioners select a tiebreaker by majority vote.* N.J. Const. art. II, § 2, ¶ 1.

* *In these states, the primary decision maker did not agree on district lines before the state's deadline. In some cases, a backup commission drew the lines; in other cases, a court took over.*

CONGRESSIONAL DISTRICTS: WHO DRAWS THE LINES (cont'd)

	STRUCTURE FOR STATE LEGISLATIVE DISTRICTS	STRUCTURE FOR CONGRESSIONAL DISTRICTS	GOVERNOR CAN VETO PLAN?	2001 CYCLE PARTISAN CONTROL FOR CONGRESSIONAL DISTRICTS
NV	Legislature	Legislature	Yes	Republican Governor, Republican Senate, Democratic Assembly
NY	Advisory Commission	Advisory Commission	Yes	Republican Governor, Republican Senate, Democratic Assembly
OH	Politician Commission	Advisory Commission	Yes	Republican[7]
OK	Backup Commission	Legislature	Yes	Republican Governor, Democratic Legislature :: no legislative agreement, court drew lines*
OR	Legislature	Legislature	Yes	Democratic Governor, Republican Legislature :: legislative plan vetoed, court drew lines*
PA	Politician Commission	Legislature	Yes	Republican
RI	Advisory Commission[8]	Advisory Commission	Yes	Republican Governor, Democratic Legislature
SC	Legislature	Legislature	Yes	Democratic Governor, Republican Legislature :: legislative plan vetoed, court drew lines*
SD	Legislature	1 congressional district	n/a	n/a
TN	Legislature	Legislature	Yes	Republican Governor, Democratic Legislature
TX	Backup Commission	Legislature	Yes	Republican Governor, Republican Senate, Democratic House :: no legislative agreement, court drew lines*
UT	Legislature	Legislature	Yes	Republican
VA	Legislature	Legislature	Yes	Republican
VT	Advisory Commission	1 congressional district	n/a	n/a
WA	Independent Commission	Independent Commission	No	Bipartisan
WI	Legislature	Legislature	Yes	Republican Governor, Democratic Senate, Republican Assembly
WV	Legislature	Legislature	Yes	Democrat
WY	Legislature	1 congressional district	n/a	n/a

[7] *When Ohio's congressional redistricting took longer than expected, the legislature had to pull together a 2/3 majority to pass the plan as an emergency bill, which would take effect in time to avoid an expensive supplemental primary for congressional seats alone. See Lee Leonard,* Redistricting Compromise Reached, COLUMBUS DISPATCH, *Jan. 18, 2002.*

[8] *This advisory commission was created to assist with redistricting given a reduction in the overall size of the legislature. It is not clear whether this advisory commission will be utilized again in the future. See the description above in the table of state legislative redistricting structures.*

* *In these states, the primary decision maker did not agree on district lines before the state's deadline. In some cases, a backup commission drew the lines; in other cases, a court took over.*

HOW SHOULD THE LINES BE DRAWN?

V. HOW SHOULD THE LINES BE DRAWN?

Institutions that seem similar may draw lines using very different processes, and emerge with very different results.

STARTING POINT

A decision as simple as where to start drawing – from the southeastern corner of a state, for example, or from the northwest, or from the center – can substantially impact the final contours of the district lines. In most states, those drawing new lines start with the existing districts. Some, instead, start the map by drawing around minority communities, because of the priority of the federal Voting Rights Act (see below). Others start with a relatively regular box-like grid, and adjust as necessary.[77]

TIMING

The redistricting process always has one eye on the clock. The census distributes redistricting data to the states no later than April 1 of the first year of a decade: 1991, 2001, 2011, and so on.[78] In most states, districts must be redrawn for the next election; pragmatically, this means that district lines must be set, at the latest, by the filing deadline for the state's primary election, in the spring or summer of the decade's second year: 1992, 2002, 2012, etc.[79]

The vast majority of states actually set themselves deadlines far earlier than the candidate filing date. Most also set up interim time limits for different stages of the process: a proposed plan by *X* date, hearings by *Y* date, a final plan by *Z* date, usually anticipating the likelihood of litigation after a plan is passed. Some states with advisory bodies or commissions that draw the lines will get a head start by establishing those bodies, and picking commissioners, well before the census data arrives in April.[80]

If the clock runs out, a court or backup commission or elected official – depending on the state – will be charged with drawing district lines that reflect the new population counts. In order to ensure enough time to act, these institutions will usually begin the process of collecting data and reviewing potential plans well before the deadline for the primary decisionmaker.

The amount of time that each state devotes to each part of the redistricting process can affect the resulting district lines. For example, states that allow relatively little time for the primary redistricting body to negotiate over various proposals may be more prone to deadlock, leaving responsibility for the final district lines to the courts or other backup institutions. In states with more time, on the other hand, public hearings may reveal unintended consequences of a particular proposal, and allow the primary redistricting body to adjust the map accordingly.

TRANSPARENCY

In some states, only a few insiders have a meaningful chance to get involved with drawing the district lines. They may be on a committee within the legislature, or a technical advisory group, or one of the commissions discussed above. Decisions are made in secret, with little opportunity for those outside the room to have input into the district lines, or the communities that end up represented.

Other states open the process to the public. In 2002, at least 26 states made demographic or political data available and accessible, and at least 18 provided public access to computers or redistricting software that might otherwise cost thousands of dollars.[81] Many states hold public hearings.[82] They may accept potential maps from the public.[83] They may even publish proposed district lines and take specific feedback from the community.

Other proposals would go one step further, requiring that decisions be made entirely in the public eye. In these proposals, aside from conversations with their own staff or individual fellow commissioners, redistricting conversation would not be permitted behind closed doors.[84] All comments would have to be "on the record," for public distribution either at the time or after the maps are released.

Still other proposals take a different approach to transparency, allowing those drawing the lines to conduct business in secret, but forcing them to publicly justify the lines that they draw. They would have to produce a report at the end of the process, explaining why the districts were drawn as they were. That report would not only inform the public, but would also serve as contemporaneous evidence of the intent of the redistricting body in the event of a future court challenge.

Like the other variables, transparency has its tradeoffs. In the extreme, it can be hard to make politically unpalatable decisions if each step along the way is publicized in real-time. And though allowing the public to submit plans or forcing a body to justify its decisions in public need not interfere with the operation of a redistricting body, both require time that must be allocated in a busy redistricting season.

On the other hand, secrecy often breeds distrust, and may cause citizens to assume the worst about the motives of those drawing the lines. Moreover, members of the public are likely to know more about the effect of certain district configurations on local communities than legislators or commissioners who may be concentrating on the redistricting plan as a whole. Public comment is the best means to ensure that those who draw the lines get the best information on the impact of their choices.

RELATED TOPICS: The Role of Technology

Given more than a few competing objectives, it is difficult to program a computer to draw district lines on its own – but in the right hands, computers are still extremely useful redistricting tools.

Geographic Information Systems (GIS) software assigns political and demographic data to points or regions of maps, and will allow even less experienced users to draw district lines on-screen with instant feedback about the composition of the district.

Several packages are commercially available; some states will make data for these packages available over the Internet, so that private parties can plan districts just as the states do.

DISCRETION AND CONSTRAINT

Finally, a practical note on discretion and constraint. As discussed below, different states have different legal rules for where the lines can be drawn. The more constraints there are, and the less discretion the line-drawers have, the less important it may be to choose one set of line-drawers over another. Some people want to make the rules on where to draw the lines so tight that one plan is the clear mathematical "winner." Some even advocate for programming a computer to draw the lines, though there are serious practical difficulties in doing so while trying to reconcile multiple objectives.[85]

Those who find intuitive appeal in an automated approach often point to the fact that automation limits the likelihood that maps will be manipulated by a few actors at the expense of others. "Automated," however, does not mean "neutral." Voters' homes are not randomly located across the countryside. Many of the rules susceptible to automated application have predictable consequences for the sorts of legislators likely to be elected.[86] For example, in 1969, districts for the Hinds County Board of Supervisors in Mississippi were ostensibly drawn to equalize road and bridge mileage within each district; the resulting plan had the effect of splintering the African-American urban core of the county, in the state capitol, Jackson.[87]

Because discretion can be abused, some have suggested eliminating discretion. But such tight constraints are rarely "neutral," and often have predictable, and potentially undesirable, effects.

Moreover, many of the more familiar "mathematical" rules – like district shape and keeping counties intact and the like – are proxies for trying to keep together groups that people perceive as coherent communities. The tighter those rules are, the less flexibility there will be to adjust when a community doesn't stick to an ideal pattern.

Finally, even a computer has to be programmed, with rules deciding which constraints take priority over others. There is no way to avoid the hard work of balancing the tradeoffs involved in drawing district lines – the decision whether it is more important to draw districts that try to do X or that try to do Y. And that also means there is no way to avoid the hard work of deciding *who* should decide.

WHERE SHOULD THE LINES BE DRAWN?

VI. WHERE SHOULD THE LINES BE DRAWN?

The people who draw district lines cannot simply divide a state up however they wish. To some extent, the federal Constitution and federal statutes limit where the lines can be drawn. In most states, the state constitution also imposes certain limits. And even when there are few legal limits, those with the pen use certain principles to guide where the lines should be drawn, each of which has its own tradeoffs. We next discuss the criteria that states must and may consider when redrawing their districts.

*States consider some or all of the following **criteria** when deciding where the lines should be drawn:*

- *Equal population*
- *Voting Rights Act*
- *Contiguity*
- *Compactness*
- *Political boundaries*
- *Communities of interest*
- *Electoral outcomes*

EQUAL POPULATION

For much of the 18th, 19th, and even 20th centuries, most legislative districts were made up of whole towns or counties, or groups of counties.[88] As the population shifted, however, some counties grew much larger than others – and accordingly, some legislative districts grew much larger than others. By the 1960s, for example, the biggest district in California (Los Angeles County) had 422 times as many people as the smallest district.[89]

In some cases, each district – each county – would be assigned a different number of legislative representatives, depending roughly on its population. In other cases, each district elected only one legislator. The population disparities quickly became extreme – and in the bigger districts, each individual vote was worth less. In California's state senate, for example, each district elected one Senator. And as a result, the vote of each citizen in the smallest district was worth 422 times more than the vote of each citizen in Los Angeles County.

In a series of cases starting in 1962 known as the "**one person, one vote**" cases, the Supreme Court decided this sort of disparity violated the Constitution. Now, when districts are drawn, each district's population must be roughly equal.[90]

There are two different standards for "equal" population in congressional districts and state legislative districts. In 1964, the Supreme Court set the bar for congressional districts very high, requiring equal population "as nearly as is practicable."[91] In practice, this means that states must make a good-faith effort to have absolute mathematical equality for each district within the state, and any differences must be specifically justified.[92]

For state legislative districts, the Supreme Court has allowed a bit more flexibility. These districts have to show only "substantial equality of population."[93] The Supreme Court has never said exactly how much equality is "substantial" equality. Over a series of cases, however, it has become generally accepted that the population difference between the largest and smallest state legislative districts (the "**total deviation**") may not be more than 10% of the average district population.[94] This is not an absolutely hard line: in some cases, a state

RELATED TOPICS: Measure of Population

Each Congressional district's population is based on the total number of residents, including children, noncitizens, and others not eligible to vote.

For state legislative districts, however, the law is less settled: most states count the total population, but some have proposed using voting-age population ("VAP") or citizen voting-age population ("CVAP").

These latter measures tend to equalize the voting power of each ballot, but leave many taxpaying residents under-represented.

*Except for rare cases, **congressional districts** must have almost exactly the same population. In contrast, the biggest and smallest **state legislative districts** can generally have a population difference of up to 10%.*

may have a compelling reason for drawing districts with more than 10% population disparity,[95] and in some cases, a state's reasons may not be good enough to justify population disparities that are less than 10%.[96] But 10% seems to be a generally accepted federal constitutional benchmark.

A few states have gone beyond these federal limits. Some restrict the overall total disparity, to prevent particularly big or particularly small districts: Colorado, for example, says that there can be no more than a 5% difference between the biggest district and the smallest district,[97] and in Minnesota, the maximum deviation is 2%.[98] Iowa both limits the maximum deviation to 5% *and* says that the average deviation must be less than 1%, keeping all districts closer to the "ideal" population.[99]

Still other standards have been proposed but have not yet been put in place. For example, one standard would require groups of districts to reflect the appropriate proportion of the state population as a whole: 10% of the districts should have about 10% of the population, 20% of the districts should have about 20% of the population, and so on.[100] This measure allows flexibility for an individual district or two, while making sure that no substantial region of the state is systematically underpopulated or overpopulated.

Like all of the other criteria below, there are pros and cons to equal population rules more rigid than the constitutional requirements. Rigid equal population rules ensure that each person has the same representation as every other person. Because population is easy to measure, rigid equal population rules also limit the discretion of people who are drawing the lines in ways that are easily enforced by courts.

On the other hand, rigid equal population rules can force districts to cut up communities: if every district must be exactly the same size, a district may have to carve out part of a town or county or neighborhood. Rigid equal population rules can also cause districts to look strange, with lines drawn in irregular ways to exclude or include a particular number of people. Finally, rigid equal population rules can make it harder to draw districts that give minority citizens real opportunity to elect representatives of their choice; for example, in some cases, minority citizens may live in pockets that would make it possible for them to elect minority representatives in districts that are slightly smaller than average, but that would essentially make it impossible for them to do so in full-size districts.

CALCULATING EQUAL POPULATION

DISTRICT #	POPULATION	DEVIATION
1	1,010	**+1.0 %**
2	1,035	**+3.5 %**
3	980	**- 2.0 %**
4	940	**- 6.0 %**
5	1,005	**+0.5 %**
6	990	**- 1.0 %**
7	965	**- 3.5 %**
8	1,020	**+2.0 %**
9	1,050	**+5.0 %**
10	995	**- 0.5 %**

Total population:	**10,000**
Average ("ideal") population:	**1,000**
Average deviation:	**2.5 %**
Total deviation:	**11.0 %**

MINORITY REPRESENTATION

The extent to which redistricting can account for race is a particularly delicate legal balance: essentially, states must account for race in some ways, but may not do so "too much." The Supreme Court has interpreted the federal Constitution to require a particularly compelling reason before a state can make the race of citizens the "predominant" reason for drawing particular district lines.[101] And the Court has also repeatedly implied that one such compelling reason is the use of race to comply with the federal Voting Rights Act.[102]

The Voting Rights Act was passed by Congress and signed by President Lyndon Johnson in 1965. As federal law, the Voting Rights Act overrides inconsistent state laws or practices, just like the federal constitutional equal population requirement overrides inconsistent state laws.

The Voting Rights Act was designed primarily to combat discrimination and intimidation that were used to deny African Americans and other minorities the right to an effective vote. And it has had a tremendous impact. The graph at right shows the number of African-American federal and state legislators elected, growing from 99 when the Act was passed to 650 today.[103] And including local offices, there are today more than 9,000 African-American elected officials, about 5,000 Latino or Hispanic public officials, and far more Asian Pacific American and Native American officials than ever before.[104]

Some parts of the Voting Rights Act are permanent, and some are set to expire unless they are renewed periodically. Two sections of the Voting Rights Act are particularly relevant to redrawing district lines: section 2 (which is permanent) and section 5 (which was last renewed in 2006).[105]

SECTION 2

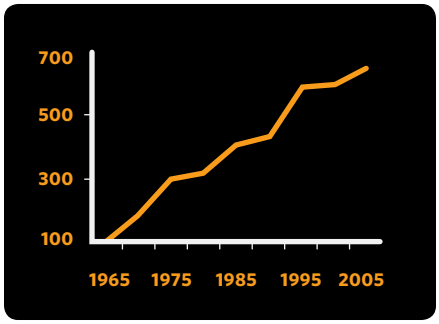
Section 2 prohibits any voting practice or procedure that results in the "denial or abridgement" of anyone's right to vote based on race, color, or minority language status.[106] In 1982, Congress amended Section 2 to clarify that, specifically, it prohibited laws or practices that denied minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice."[107] A violation of this type is sometimes called "**vote dilution**."

Many states had an ignominious history of using the redistricting process to dilute the vote of minority communities. In some cases, they would splinter a single community among many majority-white districts to eliminate minority voting power; in other cases, with larger minority populations, they would pack as many minority votes as possible into one district, to minimize the number of seats that minorities could control.[108]

SIGNING THE VOTING RIGHTS ACT

SOURCE: YOICHI R. OKAMOTO, LBJ LIBRARY COLL.

AFRICAN-AMERICAN LEGISLATORS



RELATED TOPICS: Race and the Census

In 2000, the Census expanded the way in which it accounted for an individual's racial identity, by allowing a respondent to check multiple categories indicating her race or ethnicity.

Before 2000, redistricting data contained 9 racial and ethnic categories; now, there are 126 distinct categories to consider. In 2001, the Department of Justice explained that it would usually consider individuals with a multi-racial identity as belonging to each indicated minority group for Voting Rights Act purposes. Thus, a voter checking both Black and White would be tallied with the Black population when analyzing minority voting opportunities; a voter checking both Hispanic and Black would be tallied with both Hispanic and Black populations when analyzing minority voting opportunities.

Section 2 *requires states to draw districts where minorities have the opportunity to elect a candidate of their choice if there is:*

1. *Large, compact minority population*
2. *Politically cohesive minority voting*
3. *Politically cohesive majority voting defeating minority candidates*

+

Totality of the circumstances showing diminished minority voting power

Section 2 provides some relief from such tactics. It gives voters the right to turn to the courts if, for example, a district could be drawn to give a minority community the opportunity to elect its candidate of choice, but the district lines instead split the community up into separate districts where its voting power is diluted. When litigants challenge a redistricting plan or part of a plan under Section 2, asserting that districts could be drawn to preserve minority voting power that is otherwise diluted, they must first show that:

- a minority population is sufficiently geographically compact (that is, living close together) that it would make sense to draw a district containing it;[109]
- the minority population (usually, the citizen voting-age minority population) is sufficiently large that it would have the opportunity to elect the candidate of its choice if it voted together;
- the minority population is "politically cohesive" – that is, that it usually votes for the same candidate; and
- the majority population usually votes for a different candidate, so that the majority population is usually able to defeat the minority-preferred candidate.[110]

When minority voters and majority voters reliably vote for different candidates, voting is said to be "**racially polarized**."

In ***majority-minority*** *districts, the majority of the voters are from the same minority racial or ethnic group. Some also include districts in which more than 50% of the voters are from two or more different minority groups, particularly if the different groups tend to vote in a similar pattern.*

In ***minority opportunity*** *districts, minorities have the opportunity to elect a representative of their choice. These are usually majority-minority districts, but in* ***minority coalition*** *districts, minority voters might comprise less than 50% of the district, and still elect their chosen representatives with support from some "crossover" white voters.*

In ***minority influence*** *districts, minorities constitute a sizable portion of the district, but cannot control the result of an election. There is substantial debate about the extent to which minority voters actually influence policy in such districts.*

If those attacking the plan can show that all of these conditions are satisfied, the court will then consider the "totality of circumstances": the total context in the state, including the extent of historical discrimination in voting and in other areas, and the extent to which minorities have been able to elect their chosen candidates anyway.[111] In the past, courts have paid particular attention to the proportion of districts controlled by minorities, compared to the minority percentage of the population – investigating, for example, whether a minority group with 10% of the population controls 10% of the districts.[112] If the court finds that, given the total state context, the power of the minority vote has been diminished, it may demand that a district be drawn to give the minority population the opportunity to elect a representative of its choice. Such districts are often known as "**minority opportunity districts**," or "**majority-minority districts**," because minorities in such districts will usually constitute the majority of the voters. These districts do not guarantee that minority-preferred candidates will be elected, but they are drawn so that if the minority population all votes together, their candidate – who may or may not be a member of a racial or ethnic minority group – will usually win.[113]

SECTION 5

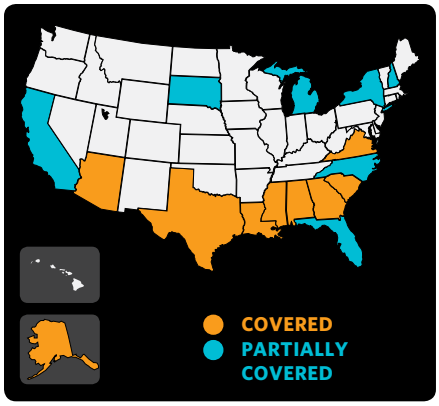
Section 5 of the Voting Rights Act also addresses discrimination, but works a little differently.[114] It targets specific states and localities – "**covered**" jurisdictions – that historically erected barriers to the franchise for African Americans and other minorities. In particular, Section 5 targets areas that had low levels of voter registration or participation – much of which was tied to disenfranchisement of minority voters – in 1964, 1968, or 1972. After ten years of steps to improve opportunities for minority voting, a covered jurisdiction may ask the federal court in Washington, D.C. to be released from Section 5, in a procedure known as "**bailout**."[115]

For those areas still covered by section 5, the Voting Rights Act requires federal approval, either from the Department of Justice or from the federal court in Washington, D.C., before any change to a voting procedure may take effect. This covers changes as small as one or two new polling places and as big as new registration requirements for every voter in the state. It also covers changes to district lines. This process is called "**preclearance**."

New district plans will be precleared if they (1) are not intended to dilute racial and language minority votes, and (2) leave racial and language minority voters no worse off than they were before the redistricting, using old district lines but new population data.[116] Under section 5, minority losses in one region of a covered jurisdiction may be compensated by gains elsewhere, but if minority populations have fewer opportunities to elect candidates of choice, the new districts will not be approved.[117]

Other than drawing districts in order to comply with section 2 or section 5 of the Voting Rights Act, the courts have not clarified exactly when a state may take the race of voters into account for drawing district lines. If race is the "predominant" reason for the shape of a district – something the courts generally assess by looking at how irregular the district's shape is, and then trying to figure out whether other factors better explain the irregular shape[118] – then the use of race must be precisely tailored to meet a goal that the courts will find "compelling." There have been relatively few attempts to test the scope of this standard in the redistricting context.[119] If race is simply thrown in the mix with other factors in drawing the lines, courts may be more forgiving, but again, there have been few clear rules deciding how much is too much.

SECTION 5 OF THE VOTING RIGHTS ACT



See Appendix B for more detail.

Section 5 *requires areas with historically low registration or voting rates to clear new district lines with the Department of Justice or the Washington, D.C. federal court. The new lines must leave minority voters no worse off than before.*

EFFECT OF VOTING RIGHTS ACTS, 100 MINORITY / 200 MAJORITY VOTERS

AT-LARGE (1 VOTE PER SEAT)

	SEAT 1	SEAT 2	SEAT 3
Majority	200	200	200
Minority	100	100	100

DISTRICTS (VRA) (1 VOTE TOTAL)

	SEAT 1	SEAT 2	SEAT 3
Majority	35	80	85
Minority	65	20	15

VOTING RULE (CVRA)(3 VOTES EACH)

	SEAT 1	SEAT 2	SEAT 3
Majority	200	200	200
Minority	300	0	0

RELATED TOPICS: Cumulative Voting

In the most familiar American elections, voters make an either/or choice for one representative per district, and the candidate with the most total votes (the **plurality**) is the exclusive winner.

An alternative to this system is **cumulative voting:** several representatives are elected from the same district, and a voter has multiple votes, which she may give all to one candidate, or spread among several candidates.

Many corporations use a system like this. Illinois once used this method to elect its state representatives, but changed the rules in 1980. Cumulative voting is still used in some local communities, like Peoria, Illinois and Amarillo, Texas.

CUMULATIVE BALLOT

YOU MAY OFFER UP TO 3 VOTES

	1	2	3
Joe Smith	○	○	○
Henry Ford	●	●	○
Jane Doe	○	○	○
Mary Hill	○	○	●

RESULTS

2 votes for Ford, 1 vote for Hill

STATE VOTING RIGHTS ACTS

Several states offer protection for minorities that is based on, but not tied directly to, the federal Voting Rights Act. These states generally prohibit drawing districts with "the purpose [ ] or the effect of diluting minority voting strength."[120]

California's **state voting rights act** is perhaps the most clearly articulated of these provisions.[121] As compared to its federal counterpart, the California law simplifies the proof for vote dilution: minority voters need only show that voting in the jurisdiction is racially polarized, and that the polarized voting has interfered with their ability either to elect candidates of their choice or to influence the outcome of an election.[122] The California law also protects the voting rights of geographically dispersed minorities, perhaps even beyond the protections offered by the federal Voting Rights Act.[123]

The California Voting Rights Act applies to "**at large**" multi-member elections, where the voters elect several officeholders from the same district. Consider a city council election where all voters in the city can vote to fill three different seats; each voter casts one vote for each seat (three votes total), and the top three candidates win. Even if the city is one-third minority voters, if voting is "racially polarized" – if minority voters and majority voters reliably vote for different candidates – the majority population should consistently be able to beat the minority voters for all three seats.

If the minority population is sufficiently geographically concentrated, both the California law and the federal Voting Rights Act would probably force the city to divide up into three districts, with enough minority voters in one district to give them the opportunity to elect at least one city council candidate of their choice. But if the minority population is too spread out, some courts have been hesitant to apply the federal Voting Rights Act as a solution. This is where the California law steps in: it requires the city to remedy the harm, even if individual districts are not the most appropriate solution. If, for example, the city elected council members with a different voting rule, like **cumulative voting** – where each voter can cast three votes, however she likes (e.g., one vote for each of 3 candidates, or all 3 votes for one candidate) – the minority voters should be able to combine their voting strength on one candidate to have an opportunity to elect that candidate to at least one seat on the city council.

CONTIGUITY

Although not required by the federal Constitution or federal statute, contiguity is one of several redistricting principles considered "traditional" by the Supreme Court[124] – though scholars have questioned the extent to which such principles were actually followed historically.[125]

A contiguous district is simply a district where you can travel from any point in the district to any other point in the district without crossing the district boundary. Put differently, a contiguous district is a district where all parts of the district are connected to each other.

Water creates a special case for contiguity. Most people consider districts divided by a waterway to be contiguous if a bridge runs across the water; island districts are generally contiguous as long as the island is part of the same district as the closest mainland, as in Washington's 2nd Congressional District. In Hawaii, where there is no mainland to consider, the state constitution prohibits the drawing of "canoe districts" – districts that are spread across more than one major island group, where you need a "canoe" to travel between different parts of the district – unless the federal equal population requirements require combining two or more islands in a single district.[126]

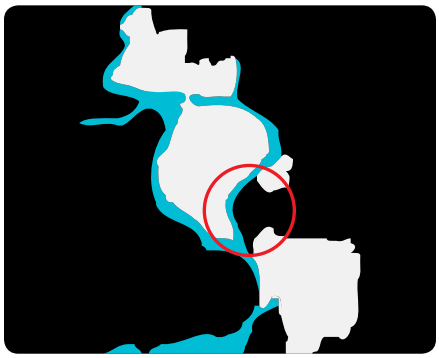
Sometimes, though, states use water as an excuse to fudge what it means for parts of the district to be "connected." New York's Congressional District 12, for example, is only barely contiguous: the portions of the district in Manhattan are connected to the portions in Brooklyn and Queens, as many island districts are connected to larger land masses, by three bridges and numerous subway lines – but the portions of the district in Manhattan are connected to *each other* only by 900 feet of a single highway. And those drawing the lines didn't even pretend to connect the pieces of New York's state Senate district 60, or the two halves of New Jersey's congressional district 13.

Sometimes city or town boundaries are not contiguous; this is often a product of annexations. This can, in turn, create non-contiguous legislative districts: Wisconsin's 61st assembly district, for example, is not contiguous, because it is drawn around portions of the city of Racine, which has a non-contiguous boundary.

Contiguity is one of the most common rules for drawing district lines. And to the extent that American districts generally represent geographic communities, it makes sense that no part of a district should be geographically separated from any other. On the other hand, it may be easier to represent communities that are not defined by geography – for example, voters of a certain race or political affiliation – by forming districts out of discrete pieces of a state, even when they are not contiguous.

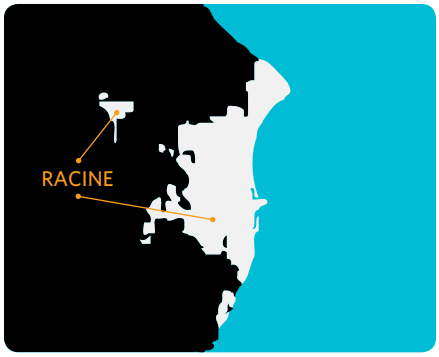
WA CONGRESSIONAL 2

NY SENATE 60



NJ CONGRESSIONAL 13

WI ASSEMBLY 61

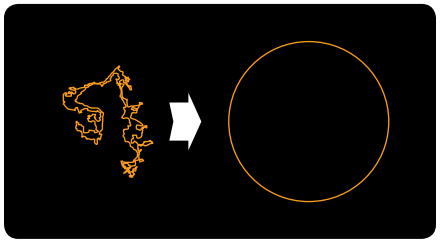


COMPACTNESS

Compactness has also been recognized as a "traditional" redistricting principle, though by many measures, districts were not, in the past, reliably compact.[127] Compactness is the only common rule for drawing a district that directly addresses the district's geometric shape. A district is generally considered compact if it has a fairly regular shape, with constituents all living relatively near to each other. A district shaped like a circle is very compact; a district with tendrils reaching far across a state is not.

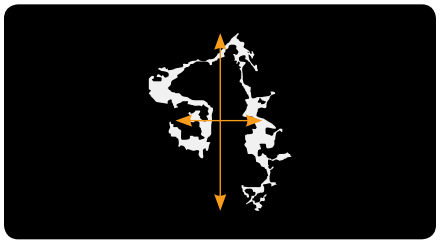
Beyond that I-know-it-when-I-see-it definition, there is little agreement about when a district is compact. Experts have proposed more than thirty different mathematical formulas to measure exactly how compact a district is.[128]

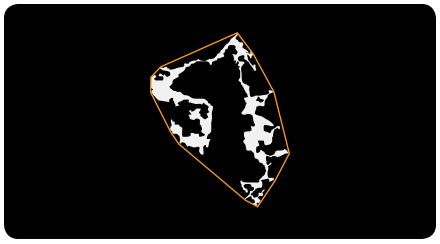
POLSBY-POPPER MEASURE



One set of compactness measures focuses on **contorted boundaries**: a district with smoother boundaries will be more compact, one with more squiggly boundaries will be less compact. Technically, these measures generally measure either the district's perimeter, the district's area as compared to the district's perimeter,[129] or the district's area as compared to the area of a circle with the same perimeter as the district (the "Polsby-Popper" test).[130] It may be easier to picture the last measure, currently used in Arizona,[131] by imagining a loop of string that follows the boundaries of a district, and then pushing that string out into a circle; the compactness formula compares the area of the district to the area of the circle.

SOME MEASURES OF DISPERSION





Another set of measures focuses on the district's "**dispersion**," or how spread out it is: a district with few pieces sticking out from the center will be more compact, a district with pieces sticking out farther from the district's center will be less compact. There are a few versions of those formulas. One formula compares the district's height at its highest part to its width at its widest part. (Using this measure, if the district were rotated, it might have a different score.) Another formula compares the district's area to the area of the smallest circle (the "Reock" test)[132] or polygon that can be drawn around it.

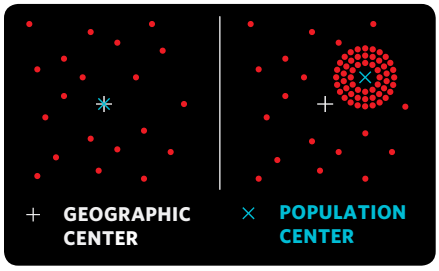
Still another set of measures compares the district's shape to its population "**center of gravity**": looking at where the population in a district lives, a district with its population center close to its geographic center will be more compact, and a district where the centers are farther away will be less compact.[133] In the figure to the right, the geographic center and the population center of the district on the left are in the same place. In the district on the right, however, the "city" in the northeastern corner shifts the population center away from the geographic center, giving it a slightly lower compactness score than the first district.

No single measure is uniformly "best" at identifying what we think of as compact districts, or at distinguishing less compact lines in low-population areas from those that twist and turn to carve up population centers. For example, most people think that the 1992 map for Florida Congressional district 3 is not compact. A compactness measurement focusing on boundaries would fit with that intuition. However, some measurements focusing on dispersion (like overall width v. overall height) would say that the district was, against our expectation, relatively compact. Measures focusing on boundaries, in contrast, may not fit our intuition for districts that are very long and thin but smooth.

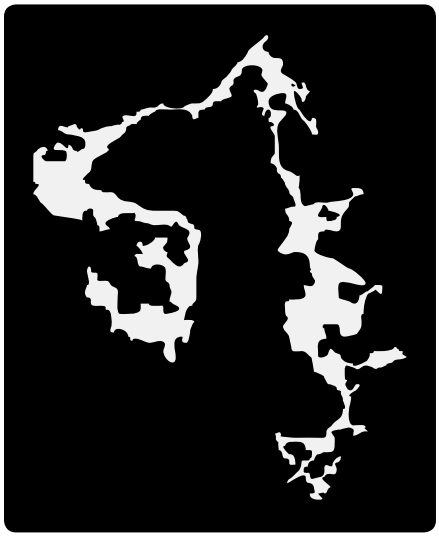
Most states that require compactness gloss over the different measurements by requiring that districts be "compact," without further explanation. A few states actually specify how compactness should be measured. In Iowa, for example, districts should be evaluated either by a measure comparing length and width, or by a measure comparing total district perimeter.[134] In Colorado, plans are also measured using district perimeter length, aggregated for all districts.[135] In Arizona, districts are measured using the Polsby-Popper test, comparing the district's area to the area of a circle with the same perimeter.[136] In Michigan, districts are measured using a variant of the Reock test, based on a circle drawn around the district.[137]

Whatever the measure, a focus on compactness – as with other criteria – has benefits and detriments. Preferring compact districts is based on the idea that people who live close to one another will likely form a community worthy of representation, with shared characteristics and common interests. (Indeed, the Supreme Court seems to have established a presumption that despite some shared characteristics, voters of the same race who live far from each other are not particularly likely to have race-based common interests that are worth representing.)[138] Compact districts may also make it easier for candidates – especially candidates for local office – to campaign on the ground, without having to travel great distances from one end of the district to another.[139]

POPULATION CENTER OF GRAVITY



FLORIDA CONGRESSIONAL DISTRICT 3, 1992



SOURCE: ELECTION DATA SERVICES, INC.

*Compactness requirements can either **embrace** or **carve up** communities, depending on how spread out the particular voters are.*

On the other hand, because compactness measures usually prefer regular geometric shapes like circles, emphasizing compactness is likely to cause districts to cut through communities that do not evolve in neat geometric patterns – including not just town boundaries, which often squirm in irregular ways[140] – but also communities of racial or ethnic minorities. Compact districts may not accommodate natural features like mountain ranges or rivers that disperse communities or cause them to meander. Depending on how the population is spread throughout a state, and the particular measure of compactness, it may also be very difficult to create compact districts that also have roughly equal population. And unless voters with different political preferences are very well integrated, requiring a district to be compact may limit a state's flexibility to draw competitive districts with voters of balanced partisan preferences.[141] Rather, especially if voters favoring one party tend to cluster in geographically small areas like urban centers, compact districts may "pack" these voters in and dilute their voting strength (see below).[142]

If trying to maximize each district's compactness gets in the way of these other criteria, one potential way to reconcile the tradeoffs is to set a particular compactness threshold. It is possible to use most compactness measures to give a particular district, or a particular plan, a numerical score. But as with the population equality standards discussed above, rather than pushing for the highest or lowest possible score in every case, some proposals would simply say that each district must be at least as compact as some threshold X. Other proposals would add or average the compactness scores for each district, so that the plan as a whole would be at least as compact as X, but individual districts could vary substantially.

POLITICAL AND GEOGRAPHIC BOUNDARIES

In addition to contiguity and compactness, the Supreme Court has also expressly recognized respect for political "subdivisions" of a state (like counties, towns, or wards) and respect for communities defined by shared interests as "traditional" redistricting principles.[143] Indeed, in most states, following political subdivisions was the *first* explicit rule for drawing district lines: before the Supreme Court required population equality in the 1960s, most states simply assigned representatives to counties or groups of counties, so that each district precisely followed county boundaries. Even after the population equality decisions, many state constitutions have kept this preference for preserving county boundaries where possible, or for splitting no more than a certain number of counties overall.

In other states, the principle has been extended: preserve counties when possible; if you must split a county, preserve townships; if you must split a township, preserve municipalities, then city wards, then individual voting precincts. Sometimes these political units are given preference in a different order. Depending on the layout of cities and townships in a particular state, the order may be significant: preserving the boundaries of Franklin County's townships (highlighted in the figure on the right) forces a set of choices quite different from preserving the county's municipal boundaries, represented by the gray spaces in the center.

TOWNSHIPS IN FRANKLIN COUNTY, OH

A small part of the reason for drawing district lines to preserve political boundaries is that voting precincts are usually wholly within a political boundary, and it is moderately less burdensome for election administrators if all election contests are the same within one precinct.[144] Another part of the reason for preserving political boundaries is that the extent to which district lines maintain these boundaries can be objectively measured, which provides an enforceable standard to reign in the twists and turns of gerrymanders. A third reason is that state legislators elected from districts comprising whole towns or cities may be more responsive to particular local needs.[145] But most of the reason is that political boundaries – especially counties and cities – are presumed to be fairly neutral, fairly good proxies for groups of people who share a common interest. When we talk about the fact that a particular legislator is from Detroit, or Des Moines, or San Francisco, we have an idea, right or wrong, about the kinds of people she might represent and the kinds of policies she might favor.

Of course, political boundaries do not neatly represent all shared interests. If communities of racial or ethnic minorities cross town or county lines, a district that follows political boundaries may slice up these communities. And just as with compactness, drawing districts along town or county lines may limit a state's flexibility to draw competitive districts with voters of balanced partisan preferences. Rather, especially if voters favoring one party tend to cluster in particular cities or counties, districts that follow political lines may "pack" these voters in and dilute their voting strength (see below).[146]

In addition to or instead of political boundaries, some states place a priority on drawing lines that conform to geographic boundaries: mountain ranges, significant rivers, prominent lakes or other bodies of water, and the like. These limitations are sometimes phrased in terms of facilitating candidates' ability to get around: Maine, for example, seeks to "minimiz[e] impediments to travel within the district, . . . [which] include, but are not limited to, physical features such as mountains, rivers, oceans and discontinued roads or lack of roads."[147]

Emphasizing geographic boundaries has some of the same benefits and limitations as discussed above with respect to political boundaries. Often, these geographic boundaries divide the population into different communities. Where they do not, following the boundaries may fragment the communities of interest. Following geographic boundaries may also yield districts that are less compact. And as with each other constraint, following geographic boundaries in rigid fashion leaves less flexibility to accomplish other objectives.

COMMUNITIES OF INTEREST

In a few states, those drawing the lines are explicitly asked not just to follow the political boundaries that are proxies for pockets of people with shared interests, but to preserve **communities of interest** directly, even if they spread over county or city lines. A community of interest is a group of people concentrated in a geographic area who share similar interests and priorities – whether social, cultural, ethnic, economic, religious, or political.[148]

Some people believe that it is best to keep communities of interest whole, so that each community of interest can have a chance to have its own legislator looking out for its interest in the legislature, and so that individual legislators feel particularly responsible to serve the discrete communities as communities. Others believe that it is best to split communities of interest up so that districts are more heterogeneous and each legislator must compromise to suit her constituents. There are also instances when a sizable community, like a city dominant in its region, may want to be split into two or more districts, in order to extend its influence in the legislature. Which answer is the right answer depends entirely on what you think representative districts should accomplish.[149]

In any event, even if your philosophy of representation defines preserving communities of interest as the ultimate substantive goal of all redistricting, that standard nevertheless has some limits. First, as clear and objective as political boundaries may be, communities of interest are notoriously fuzzy, because shared interests may be either vague or specific, and because people both move locations and change their interests over time. This fuzziness makes it fairly easy to manipulate district lines while claiming that the lines are drawn to embrace a particular community. (Some have proposed reducing the fuzziness somewhat by preventing district lines from dividing **census tracts**: geographical regions defined by the U.S. Census, usually with between 2,500 and 8,000 people, that generally share the same demographic characteristics, economic status, and living conditions.)[150]

Preserving communities of interest may also make it more difficult to ensure strict population equality, if different communities are different sizes within a state – or to keep districts optimally compact, if the communities are scattered or spread out. And again, though shared political interests may well have their own community, preserving communities of interest other than communities of like-minded partisans may make it more difficult to draw competitive districts with voters of balanced partisan preferences.

ELECTORAL OUTCOMES

Every set of district lines has a predictable electoral impact.

In addition to using the constitutional, statutory, and "traditional" principles above, district lines are drawn in many states with an eye to their likely electoral impact. Every set of lines has a predictable electoral impact. In some cases, however, it is apparent that the electoral impact of the lines – particularly the partisan impact – was the primary reason for drawing the lines as they are.

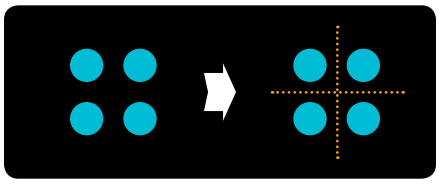
PARTISANSHIP

Partisan redistricting occurs when the people drawing the lines estimate that voters in a certain area are more or less likely to vote for a Democrat, Republican, or third-party candidate (or not to vote at all), and then group voters together in districts to increase the chance that candidates from a preferred party are elected.

The calculation that voters in a certain area will probably vote for a certain party's candidate are guesses – but they are very, very, very well-informed guesses. In many states, when voters register, they can declare their party affiliation; it is usually possible to find out how many people have registered with which parties, at least by county and often by precinct. Even more reliable are past election returns: although election officials don't record whom each voter voted for, they do compile results for each candidate in each precinct. If 67% of your precinct voted for President Bush, there's a 67% chance that you voted for President Bush.[151] And adding up the election results for many candidates over time means that it's usually possible to estimate the partisan preference of a given precinct, on average. Research has shown that these estimates are both relatively accurate and relatively stable over time.[152]

Those in control of redistricting may try to use these estimates to help candidates of one party or another, by drawing districts that make it easier for that party to win. When an entire redistricting plan is designed to make it easier for one party to win elections, it is known as a **partisan gerrymander**. It is not surprising to find that partisan gerrymanders occur most often when one political party completely controls the redistricting process.

"CRACKING"



The basic techniques of creating a partisan gerrymander are **cracking**, **packing**, and **tacking**.[153] **Cracking** is the act of dividing groups of people with the same characteristics – in this case, voters likely to vote for a particular party – into more than one district. With their voting strength divided, the group is more likely to lose elections.

For example, imagine a state with 10 legislative districts and 1,000 voters, narrowly split between the two major parties: 520 registered Democrats and 480 registered Republicans. The Republican voters make up 48% of the state as a whole. But if the districts are drawn to divide up (or "crack") the Republican voters so that there are 48 Republicans (and 52 Democrats) in each and every district, the Republicans are likely to lose all ten legislative races.

Packing is just the opposite – cramming as many people with the same characteristic into as few districts as possible. In these few districts, the "packed" group is more likely to win … but this drains their voting strength elsewhere. Consider the same state as above, but now imagine that the Republicans control the line-drawing. They might pack two districts with 100 registered Democrats apiece, and split the remaining Democratic voters so that there are 40 Democrats (and 60 Republicans) in each of the other eight districts. The Democratic candidates will probably win two races, but they are likely to lose all of the rest.

Tacking is the process of reaching out from the bulk of a district to grab a distant area with specific desired (usually partisan) demographics. Imagine our same state above, with the Republicans in control, and a consolidated area of 46 Democrats and 44 Republicans. If the Republicans can find a small portion of the state with 8 Republicans and only 2 Democrats, and "tack" it onto the consolidated area above, they will likely win the district. Tacking is also frequently used to add a particular politician's home to a district in which she is anxious to run.

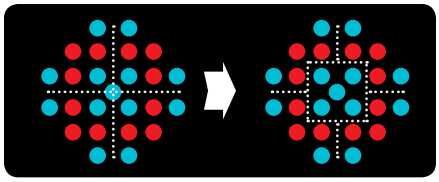
It may be easier to understand packing, cracking, and tacking through a visual example. The figure to the right shows a hypothetical state, with a population cluster near the center; though the voters are unevenly distributed, the state as a whole is evenly politically balanced at 40 Democrats (blue circles) and 40 Republicans (red circles).[154] Imagine that the state has to be divided into four districts of equal population.

As the figures to the right show, with a little creativity, it is fairly straightforward to "pack," "crack," and "tack" either Democratic or Republican voters. The figure on the right is a Democratic gerrymander, packing the Republicans so that it is likely that they win one seat, and likely that Democrats win three. Below that is a Republican gerrymander, with Democrats now packed and likely to win only one seat, and Republicans likely to win three. And farther below is another Republican gerrymander, with the small section of four Republicans at the lower right corner of the state "tacked" to the larger population in the lower left.

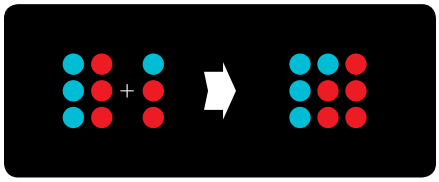
One common complaint about these gerrymanders is that prospecting for voters by party tends to interfere with other objectives of redistricting. For example, depending on where a party's supporters live, drawing lines that follow party preference may lead to districts that are not compact, that cross political boundaries, or that carve out chunks of social or economic communities of interest.

Another complaint about such gerrymanders is that they distort representation in the state overall. With 40 voters apiece in our hypothetical state, Democrats and Republicans enjoy equal support statewide – but depending on the district lines, either party can win a disproportionate number of seats in the legislature.[155]

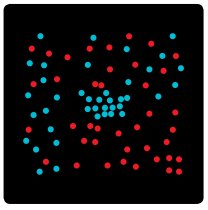
"PACKING"



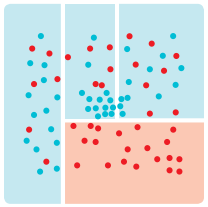
"TACKING"



HYPOTHETICAL STATE

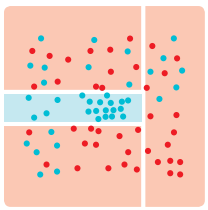


DEMOCRATIC GERRYMANDER



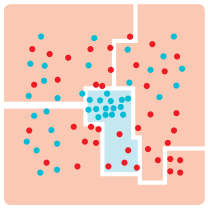
District 1	14 D	6 R
District 2	14 D	6 R
District 3	12 D	8 R
District 4	0 D	20 R

REPUBLICAN GERRYMANDER



District 1	8 D	12 R
District 2	20 D	0 R
District 3	6 D	14 R
District 4	6 D	14 R

REPUBLICAN GERRYMANDER



District 1	9 D	11 R
District 2	15 D	5 R
District 3	8 D	12 R
District 4	8 D	12 R

RELATED TOPICS:
Proportional Representation

In a system of "winner take all" districts, one party or another will usually win more legislative seats than its overall statewide support (for example, winning 57% of the seats with 51% of the vote).

Some other countries (and some local American jurisdictions) forego districts, and instead use a system of **proportional representation** – where 51% support translates as nearly as possible to 51% of the legislative seats. Critics express concern that such systems give undue power to party insiders at the expense of voters, and to fringe parties at the expense of mainstream ones. Several variants of proportional representation, with slightly different rules, may mitigate these concerns.

Still other places mix the two systems, electing some representatives from districts and others from jurisdiction-wide lists, in a manner designed to approach proportional representation in the legislature as a whole. In America, the Democratic Party's presidential primary system is such a mix: some delegates allocated in the primary process are elected proportionally across an entire state, and some are elected (also by proportional representation) within a "multi-member" district (see the "multi-member" discussion on p.65 below).

Some of this disproportion is the by-product of virtually *any* district lines, if a single seat is up for grabs by the candidate who wins the most votes. In this kind of "winner take all" system, the preferences of voters who support losing candidates do not translate into legislative seats, no matter how the districts are drawn. At best, losers in one district can hope that their preferred party wins by a comparable margin, in a district somewhere else in the state, to make up for the loss.

Because this rarely works out exactly, there is almost always a difference between a party's statewide support and the percentage of seats that it wins in an election. Some view this difference as a good thing, because it tends to produce legislative majorities that are more robust, and can therefore implement programmatic changes more easily. Some view it as a distortion to be avoided. Either way, it is to some extent an inherent part of "winner take all" elections.

Some of the disproportion, however, has to do with the particular way the districts are drawn, and may end up giving an extra bonus to one party or the other. In the extreme, districts might be drawn so that a party with a majority of the votes might consistently lose the majority of seats. When the way that districts are drawn in a state with a rough overall partisan balance makes it statistically more likely that the translation from votes to seats will favor one particular political party consistently over time, the redistricting plan is said to have **partisan bias**.[156] Some have proposed that states adopt rules to reduce the partisan bias of redistricting plans.[157] One such method, for example, rewards maps to the extent they achieve balance: if one district is likely to favor Republicans by 10%, over and above the general statewide trend, there should be another district in the state that is likely to favor Democrats by 10%. Another method to mitigate partisan bias would keep legislative seats in reserve – not allocated through the districting system, but allocated statewide to parties that have won district seats – in order to keep the total legislative representation roughly proportional to the parties' statewide support.[158]

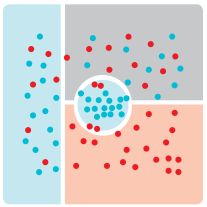
Minimizing partisan bias through district lines would limit partisan gerrymanders, but it would also likely affect many other redistricting principles. In fact, most redistricting principles that don't seem related to partisan outcomes have the potential to lead to skewed partisan results.[159] In our hypothetical state, for example, the population cluster at the center of the state might be a minority population to be protected under the Voting Rights Act, or a city with boundaries to be preserved. As seen in the figure on the right, in this particular state creating a district for that population also creates a district very likely to elect a Democrat. Or perhaps our hypothetical state requires a map with maximum compactness. In this state, the result is three districts likely to elect Democrats and one likely to elect a Republican. Relatively small shifts in either of these district plans can turn any given district from "likely red" to "likely blue," and vice versa.

These are, of course, made-up examples. But these principles will likely have a partisan impact in the real world as well. Indeed, election scholars have shown that because of broad population trends, certain redistricting principles increase partisan bias across the country – at the moment, in favor of the Republican Party.[160] For example, districts created under the Voting Rights Act, with enough minority voting strength to elect a candidate of choice, may be drawn in urban neighborhoods, where heavily Democratic African-American voters live next to heavily Democratic urban white voters, creating extremely heavily Democratic districts. These districts are effectively pre-"packed" with a high concentration of Democratic voters. And as seen to the right, packing Democrats in one district leaves fewer Democratic voters to go around in other districts, which may make it easier overall for Republicans to win elections.[161] Some think that compactness rules or respecting political subdivisions work the same way.[162] If Democrats are highly concentrated in cities and Republicans are more spread out in suburbs, a rule that forces districts to stay compact will likely end up packing many Democratic voters into a few tight urban districts. This leaves the remaining Democratic voters spread thinly among many suburban districts, which become more likely to elect Republican candidates.

Whether partisan bias is the result of an intentional gerrymander or the natural consequence of some other principle, there appears at present to be little legal limitation on how partisan a plan may be. Only a few states purport to limit partisanship, and these limitations are seldom enforced.[163] On the federal level, the Supreme Court has said that partisan gerrymanders may be challenged under the Constitution,[164] but five Justices have never agreed on a standard for deciding how much partisanship is too much. Several blatant partisan gerrymanders – from both parties – have been approved by the courts, and no plan has yet been ruled unconstitutional because it is an excessive partisan gerrymander.

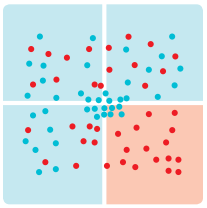
Most redistricting principles, even if they seem unrelated to partisanship, ***have the potential to lead to skewed partisan results.***

MINORITY DISTRICT



District 1	14 D	6 R
District 2	10 D	10 R
District 3	16 D	4 R
District 4	0 D	20 R

MAXIMUM COMPACTNESS



District 1	12 D	8 R
District 2	12 D	8 R
District 3	12 D	8 R
District 4	4 D	16 R

BIPARTISAN GERRYMANDERS AND INCUMBENT PROTECTION

*When neither party dominates a state legislature, the sitting politicians can create a **bipartisan gerrymander** by packing districts with their own supporters.*

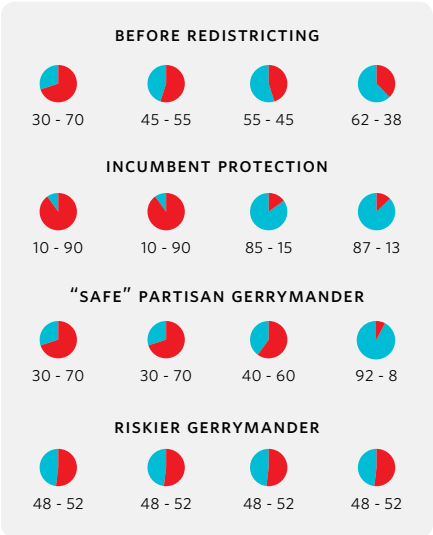
Just as those drawing the lines may try to create districts where it will likely be easier for one political party to win elections, they may also try to draw districts so that it will likely be easier for the current incumbent – or another candidate of the same party – to win re-election. These **bipartisan gerrymanders** happen most often when legislators are directly involved with the redistricting process, and control of the process is split (for example, if the two houses of the legislature – or the legislature and the governor's mansion – are controlled by two different parties). In these cases, the politicians may decide that if they won't be able to improve their own party's status at the expense of the opposition, they should just protect their own party's seats as best they can.

Many bipartisan gerrymanders are designed specifically to protect the existing incumbents. As in other partisan gerrymanders, line-drawers create an **incumbent protection gerrymander** by packing partisan supporters of an incumbent into her district. But for an incumbent protection gerrymander, not every like-minded voter will do: incumbents want most to keep the same voters with whom they have built up name recognition and goodwill over the years. Incumbent protection gerrymanders, then, tend to change existing district lines as little as possible.

There is an inherent tension between the attempt to protect incumbents and the attempt, discussed above, to promote partisan gain. In order to increase the number of districts that a party is likely to win, it makes sense to spread the party's supporters over the competitive districts. Put differently, to get the most gain for the party, it's better to win a lot of districts, even if that means winning by only a few points. (Scholars have noted that overly aggressive partisan gerrymanders may try to win too many districts by too few votes. That is, the party in control of the district lines may cut the likely margins so close that it ends up losing a number of races.) In contrast, an incumbent's highest priority is often winning just one district (her own) by a great many points. Spreading supporters thin in order to win many seats may cause individual incumbents to feel less secure.

In practice, the degree of support for a party in any given area may make it possible to achieve both objectives at the same time.[165] Consider, for example, the relatively evenly divided area at left:[166] in total, 52% of the voters lean Republican. Before redistricting, assume that the Republicans win two districts out of four. It may be possible to protect these incumbents by redrawing the district lines to pack two districts 90% full of likely Republican voters. Most such districts would be considered exceedingly "safe" for Republican candidates, and particularly for well-known incumbents. However, if the Republican party in our example also wanted to further a partisan gerrymander, it could do so without substantially jeopardizing its incumbents. It could spread supporters from the "packed" districts out into other districts in order to win more seats; rather than a district 90% full of likely Republican voters, districts of 70% Republican voters would still leave the party reasonably sure that its incumbents would be "safe." And that would leave enough likely Republican voters in a third district to give a Republican candidate a substantial advantage.

DIFFERENT GERRYMANDERS



COMPETITION

The goal of both partisan and bipartisan gerrymanders is to draw district lines with enough likely supporters that preferred candidates will be relatively insulated from broader political trends – that they will be "safe." And by and large, most legislators *are* safe, though gerrymandering is only one of several causes.[167]

In 2006, for example, 38% of the partisan state legislative races were wholly uncontested by a candidate from one of the major parties; that is, 38% of the time, either a Democrat or Republican did not even bother running for the seat.[168] And in federal races, 86% of the elections for the House of Representatives were won by more than a 10% margin, which political scientists generally consider a fairly comfortable win.[169] The vast majority of legislators coasted to victory. In response, many advocates – and in limited fashion, three states – have proposed rules to foster elections with robust **competition**.

In the context of drawing district lines, most discussions of competition discount or ignore **primaries**, when incumbents may theoretically be kept accountable through challenges by members of their own party (though incumbents enjoy advantages that make meaningful primary competition difficult to achieve in practice).[170] Instead, the focus is on drawing districts that make it likely that the *general* election will be close. Usually, this means trying to group voters so that the election returns are likely to be 55% to 45%, or closer. As in the gerrymanders above, line-drawers would put voters in particular districts based on their likely partisan preference – only in this case, they would attempt to balance the partisan voters evenly in a district rather than lumping all voters with a particular preference together.

As with all other redistricting principles, using district lines to foster competition has upsides and downsides. There are several benefits of fostering competition. First and foremost, competitive districts appeal to our sense of fairness, at least in one sense: in a competitive district, a candidate from either major party usually has a realistic chance to win the general election. If an election is as much about a contest as it is about representation, the contest in a competitive district feels more evenhanded. Competitive districts may also foster challenges from more qualified candidates; many good candidates will not even try to contest an election in a district where the opposing party reliably wins 80% of the vote.

Moreover, districts with an even partisan balance should theoretically cause incumbent legislators to cater more attentively to a wider range of their constituents, because they would be more worried that they might lose a close election.[171] A related claim is that evenly balanced districts tend to elect more moderate legislators, because the candidates have to aim for the middle of the political spectrum to increase their chances of getting elected;[172] this is an application of the **median voter theorem**, which assumes that a representative's

ideology tends to track the district's median voter. Also related is the claim that candidates in competitive districts will campaign with more vigor, spending more time and effort contacting voters and mobilizing them to vote. Finally, voters get excited by elections that are seen as competitive, and many assume that more people would vote – that **turnout** would be higher – if the districts were less slanted along party lines.

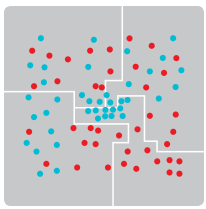
Because of campaign finance rules, term limits, the natural advantages of incumbency, and the quality of a specific campaign, among other factors, ***competitive districts*** *may not actually produce* ***competitive elections.***

While there is little dispute that competitive districts accomplish some of these objectives, there are reasons to be skeptical about their ability to accomplish others.[173] The most important caveat is that competitive districts will not always produce competitive elections, at least when an incumbent is running.[174] Incumbents are usually better able to raise campaign money, better positioned to get on the ballot, and more widely recognized within their districts.[175] Plenty of incumbents have run for office in competitive districts – or in districts where voters otherwise favor the *opposing* party – and have won in landslides.[176]

There may also be districts where balanced partisanship does not promote more balanced policies. If – a big, and empirically disputed "if" – voters are polarized in their partisan preferences, with little desire to cross party lines for particular candidates,[177] candidates may choose to focus on turnout more than policy: encouraging opposing voters to stay home, and depending on the more extreme voters in the "base" to bring victory on election day. It is not clear that a partisan balance in the district would have much of an impact on candidates' policies in such an environment – or that the increased campaign activity resulting from a closer race would produce better-informed voters. Finally, the intuition that more people vote when an election is competitive has certainly been demonstrated in races for President or for Governor. However, it is not clear whether even a high level of competition would motivate many more people to vote for a state representative if they weren't going to vote anyway.

It is also true that the impact of designing districts to encourage competition – just like the impact of designing districts to lock in a "safe" partisan seat, or the impact of designing districts to capture more transient communities – fades over time. Voters move in and out of districts, and parties fall relatively in and out of favor; though it is true that those drawing the lines can use past information to make a very accurate guess about voters' partisan preferences next year, predictions will be much less precise for voters' preferences eight years down the road.

MAXIMUM COMPETITION



District 1	10 D	10 R
District 2	10 D	10 R
District 3	10 D	10 R
District 4	10 D	10 R

As with each other criterion above, there are tradeoffs involved in drawing competitive districts – indeed, many of the same tradeoffs involved in drawing the uncompetitive, or "safe," districts described above. Depending on where a party's supporters live, drawing lines that follow party preference may lead to districts that are not compact, that cross political boundaries, or that carve out chunks of real communities of common interest.[178] For example, let's return for a moment to our hypothetical state. The figure on the left draws district lines

so that an equal number of Democrats and Republicans live in each district, but it has to break up the population cluster at the center of the state in order to do so. In a real world analog, drawing a competitive district in heavily Democratic San Francisco would likely require crossing the Bay Bridge to the eastern suburbs or drawing stringy districts stretching far down the peninsula and into central California.

In some regions of a state, it will usually be possible to accommodate multiple objectives: districts that preserve minority rights, embrace other communities, follow political boundaries, achieve partisan balance, and so on. Attempting to maximize competition in *each* district, however – as with an attempt to prioritize any other single objective, exclusively, in each district statewide – is likely to interfere with these other objectives. Maximizing competition also has a different impact in a state with a deeply divided electorate than it does in a state that heavily favors one party or another: in the latter circumstance, a district designed for competition strives to grant half of the likely vote to a party that, for whatever reason, has rendered itself unpersuasive in the region. Furthermore, some observers note that the more districts in a state that are designed to produce competitive elections, the more chance there is to switch party control of the legislature from year to year. Whether this potential for frequent switching is "good" or "bad" is in the eye of the observer; what to some looks like stability, looks to others like calcification.

Those who promote competitive districts usually do so in less extreme fashion, as part of a mix of objectives.[179] Arizona, for example, asks those drawing the lines to favor competitive districts, but only after all other criteria are satisfied.[180] Another proposal would set a threshold, requiring some but not all of a state's districts to be competitive. (There is no general agreement on the optimal number of competitive districts, or whether that number is similar for states that are evenly divided along partisan lines and for states that lean heavily to one party or another.)

Other proposals take a different approach. Rather than fostering competition directly, they suggest procedures that will help thwart specific attempts to make districts *un*competitive. To some degree, all of the states with commissions that insulate legislators from the decisionmaking process have removed the single biggest incentive to draw lines in order to make districts uncompetitive.

A few other states have attacked the tools rather than the motivation: these states prohibit line-drawers from looking at information on the past voting patterns of any given region, except where gauging the extent of polarized voting may be necessary to comply with the Voting Rights Act. Critics respond that the line-drawers are usually sufficiently expert in local partisan proclivities to understand how to reduce competition without relying on specific data; a ban on voting patterns would thereby serve to blind only the public to the partisan impact of the redistricting decisions.

*Rather than fostering competitive districts directly, some proposals focus on thwarting deliberate attempts to make districts **un**competitive.*

RELATED TOPICS:
Turnover and Term Limits

Much of the discussion above is in some way concerned with **turnover**: using the redistricting process either to help voters "throw the bums out" or to prevent voters from doing the same. Redistricting, however, is at best a blunt tool to manage turnover.

Campaign finance rules, ballot access rules, broad political trends, and a candidate's missteps in office or on the campaign trail likely have at least as much impact on whether the candidate wins or loses. Moreover, for any given district, turnover is a mixed blessing: it brings candidates with (potentially) fresh ideas but less experience and usually less power in the legislature as a whole.

Some states have directly addressed turnover by requiring **term limits**: laws forcing long-time legislators, who would otherwise likely be re-elected, to quit after a certain number of years in office. There are term limits for the U.S. President (basically, two terms), and the Supreme Court has said that there cannot be term limits for members of Congress; as for state legislators, each state can decide whether its legislators face term limits or not.

When term limits force an incumbent out of her seat, there will usually be a vigorous contest among multiple candidates to replace her – even more competitive if the districts are themselves balanced. Conversely, many quality candidates in term limit states may wait for a term to end rather than challenging an incumbent; the waiting game yields fewer contested elections and less turnover in the meantime.

POLITICIANS' HOMES

In the constellation of factors used to draw district lines, politicians' homes shine with special brilliance. Most states require that politicians live in the district they intend to represent. Therefore, the lines drawn around a politician's home will determine the district in which she can run for office. In the past, district lines have been drawn to enfold particular blocks, or even particular houses, to ensure that the targeted individuals are placed in the desired district.

Sometimes, district lines are specifically drawn to protect: a district with constituents favorably disposed to a candidate may be stretched to accommodate the home of the candidate in question, so that she may run in more favorable circumstances. In other circumstances, the lines are drawn to injure. For example, a district may be drawn to carve the home of a threatening challenger or long-standing incumbent out of an otherwise coherent neighborhood, separating the politician from her likely base of success. Or the lines may be drawn to place two incumbents' homes (usually, but not always, of the same party) in the same district, forcing them to run against each other, and using one incumbent to knock the other out of the legislature.[181]

A handful of states have responded to these incentives by prohibiting those drawing the lines from acknowledging a candidate's residence. (Some preclude the use of incumbents' homes, but not challengers' homes; others prohibit using any person's residence as a basis for drawing a district.) In theory, such a rule limits insiders' ability to gerrymander for individual or partisan gain, and instead focuses attention on group-oriented concerns. Critics, however, believe that such rules are honored largely in the breach: legislative confidants may know their legislators' homes well, and may simply draw the districts around residences without acknowledging that they are doing so. Moreover, without knowledge of a candidate's home, lines may *unwittingly* separate the candidate from the heart of her district or pair two incumbents: if some redistricting plans maliciously carve incumbents out of the districts they represent, it is also possible that flying blind will achieve the same effect.[182]

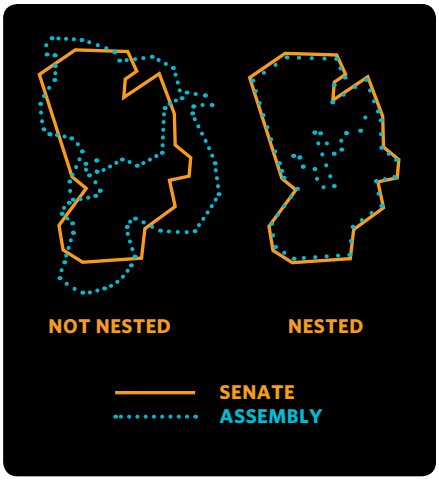
OTHER STRUCTURAL FEATURES

There are a few additional laws in some states that affect the structure of legislative districts, and thereby influence the process of drawing district lines.

NESTING

Nesting is the process of drawing districts so that districts for the upper legislative chamber contain two or more intact districts for the lower legislative chamber. For example, if each Senate district is composed exclusively of two Assembly districts, the Assembly districts are said to be "nested" within the Senate districts. Sometimes, a nested redistricting plan is created by drawing Senate districts first, and dividing them in half to form Assembly districts; sometimes the Assembly districts are drawn first, and clumped together to form Senate districts. Districts can be nested, of course, only if the number of seats in the state's lower chamber is a whole-number multiple of the number of upper chamber seats (e.g., 50 Senate and 100 Assembly seats, or 33 Senate and 99 House seats).

NESTING



Nesting certainly makes redistricting maps look cleaner, though the clean appearance alone is of questionable value. More tangibly, it reduces administrative burdens somewhat by reducing the number of different ballots that need to be prepared. And, of course, tying the maps for one legislative chamber to the maps for the other legislative chamber, nesting constrains the discretion of those drawing the lines.

As with the other principles above, however, limiting this discretion may also limit the extent to which those drawing the lines are able to achieve other objectives. Voters' residential patterns may make it difficult or impossible to draw minority opportunity districts or competitive districts in both the Senate and the Assembly, if the districts must be nested; without nesting, it may be easier to group different sets of voters for different purposes in each legislative chamber.[183] Moreover, if Senate and Assembly districts are not nested and divide the state in different ways, the legislature may itself be more diverse: there exists the potential for some constituencies not represented in one legislative chamber to be represented instead in the other. Whether this potential can be realized depends entirely on how the communities are spread geographically across the state.

RELATED TOPICS: Floterial Districts

In addition to the districts discussed above, a few state or local legislatures permit "floterial districts": districts that overlap portions of other districts in the same legislative chamber. It may be helpful to think of such districts as "floating above" the patchwork of more familiar districts: in the overlap areas, a voter can vote for both a candidate in the "regular" district and a candidate in the "floterial" district.

Sometimes, such districts may be used to maintain community boundaries without sacrificing equal population. For example, imagine a state where each district has to have 100 voters, but there are two adjacent towns with 150 voters apiece. One solution would create three mutually exclusive districts, each with 100 voters, carving up the towns.

A different solution would create a district of 150 voters for each town, plus one floterial district elected by the 300 voters of both towns together. In either case, 300 people elect 3 representatives total, so overall voting power is the same, though the floterial districts essentially give each voter two legislative representatives.

MULTI-MEMBER DISTRICTS

Multi-member districts are districts drawn just like the more familiar "single-member" districts, but instead send two or more representatives to the legislature. Since 1842, federal law has prohibited multi-member districts for Congress, but some state and many local legislatures still use multi-member districts. In states like New Jersey, one state legislative chamber is composed entirely of uniform multi-member districts, with 2 members apiece; in other states, each district is different. In 2003, for example, some New Hampshire districts were used to elect two state legislators apiece; other districts were served by up to 14 legislators.

In some instances, multi-member districts function almost like nested districts. In a nested system, one Senate district might have the same boundaries as two Assembly districts; in a multi-member system, one Senate district might have the same boundaries as a single Assembly district that elects two state representatives. Arizona, for example, uses this latter system; each district elects one state senator and two state representatives.[184] In other cases, multi-member districts for one legislative chamber are not tied to the districts of the other chamber: a Senate district and a multi-member Assembly district are entirely unrelated.

Because multi-member districts contain multiple representatives, they will typically cover a larger geographical area than a district with just one representative. They may therefore avoid the need to divide large communities, like a city that might otherwise be split in awkward ways with more familiar single-member districts. Some systems allow representatives to be chosen from anywhere within the district; others limit candidates to particular areas of the district, so that a city's voters might choose one representative from the north side, and one from the south side.

Moreover, depending on the **voting rule** – the system for casting and tallying votes in the district – multi-member districts can either squelch or foster minority voices. As explained above in the discussion of the Voting Rights Act, if each voter in the district may cast one vote for a candidate for each of the district's seats, and the winners are determined by simple majority vote, the majority will be able to defeat minority preferences for each of the district's legislators. In contrast, a voting rule like **cumulative voting**, used for many corporations; or **choice voting**, used for the Oscars; or another system of "proportional representation" may elect a variety of legislators with both majority and minority views, more closely approximating their relative levels of support within the district.[185] Such rules are relatively common outside of the United States, and still show up in America for elections in local jurisdictions. Until 1980, Illinois used the cumulative voting method to elect its state representatives.[186]

STATE LEGISLATIVE DISTRICTS: WHERE TO DRAW THE LINES

	KEEP POPULATION SUBSTANTIALLY EQUAL	DRAW COMPACT DISTRICTS (WHEN PRACTICABLE)*	FOLLOW POLITICAL BOUNDARIES (WHEN PRACTICABLE)*	PRESERVE COMMUNITIES OF INTEREST (WHEN PRACTICABLE)*	NEST SENATE AND HOUSE DISTRICTS	ELECT MULTIPLE MEMBERS FROM ONE DISTRICT
AK	Yes†	Yes		Yes	Required	
AL	Yes	Yes	County (for the Senate)	Yes		
AR	Yes		County (for the Senate)			Permitted
AZ	Yes	Area of circle with same perimeter	Yes	Yes	Required	Required
CA	Yes	Yes	Yes	Yes		
CO	At most 5% total deviation	Total perimeter	Yes	Yes		
CT	Yes		Town (for the House)			
DE	Yes					
FL	Yes					Floterial permitted
GA	Yes					Permitted
HI	Yes	Yes	Census tract	Yes	Required if practicable	Permitted
IA	At most 1% average deviation, at most 5% total deviation	Length-width, total perimeter	Yes		Required	
ID	Yes	Yes	County, Precinct	Yes	Required	Required
IL	Yes	Yes			Required	
IN	Yes					
KS	Yes	Yes	Yes	Yes		
KY	Yes		County			
LA	Yes		Yes			
MA	Yes		County, Town, City			
MD	Yes	Yes	Yes			Permitted

* *In most states, standards like requiring compactness, following political boundaries, and preserving communities of interest must be followed only as closely "as is practicable," leaving substantial flexibility to the redistricting body. That is, a redistricting body must generally draw districts that are compact, but individual districts may be noncompact in order to serve other objectives. And in every state, such standards are always subordinate to federal equal population limits and to the federal Voting Rights Act.*

† *A "yes" entry in this table indicates a legal requirement that is not more precisely articulated: for example, a requirement that districts must have "substantially equal" population or that they must be "compact."*

STATE LEGISLATIVE DISTRICTS: WHERE TO DRAW THE LINES (cont'd)

	KEEP POPULATION SUBSTANTIALLY EQUAL	DRAW COMPACT DISTRICTS (WHEN PRACTICABLE)*	FOLLOW POLITICAL BOUNDARIES (WHEN PRACTICABLE)*	PRESERVE COMMUNITIES OF INTEREST (WHEN PRACTICABLE)*	NEST SENATE AND HOUSE DISTRICTS	ELECT MULTIPLE MEMBERS FROM ONE DISTRICT
ME	Yes†	Yes	Yes	Yes		
MI	Yes	Area of circle around district	County			
MN	At most 2% deviation from ideal	Yes	County, City, Town	Yes	Required	
MO	Yes	Yes	County			
MS	Yes	Yes	County, Election district			Floterial permitted
MT	At most 1% deviation from ideal, except to keep political boundaries intact	Length-width	County, City		Required	
NC	Yes	Yes	County	Yes		Only if necessary
ND	Yes	Yes	County, City		Required	Permitted
NE	Yes	Yes	County			
NH	Yes		Town, Ward, Place			Permitted
NJ	Yes	Yes[9]	Municipality		Required	Required
NM	Yes	Yes				
NV	Yes					
NY	Yes	Yes	County, Town, City block			
OH	Yes	Yes	County, Township, Municipality, City ward		Required	
OK	Yes	Yes (for the Senate)	County	Yes (for the Senate)		
OR	Yes		Yes	Yes	Required	
PA	Yes	Yes	County, City, Town, Ward			
RI	Yes	Yes	Yes[10]			

[9] *In New Jersey, the courts have said that noncompact districts may be tolerated to achieve partisan balance, but not to achieve partisan advantage. See Davenport v. Apportionment Commission,* 319 A.2d 718,722-23 (N.J. 1974).

[10] *In Rhode Island, the courts have interpreted the state constitutional requirement that districts be "compact" to include more than geometric regularity of district shape, including the idea that districts should generally follow political boundaries. See, e.g., Parella v. Montalbano,* 899 A.2d 1226 (R.I. 2006)*; see also* 2001 R.I. Pub. Laws ch. 315.

* *In most states, standards like requiring compactness, following political boundaries, and preserving communities of interest must be followed only as closely "as is practicable," leaving substantial flexibility to the redistricting body. That is, a redistricting body must generally draw districts that are compact, but individual districts may be noncompact in order to serve other objectives. And in every state, such standards are always subordinate to federal equal population limits and to the federal Voting Rights Act.*

† *A "yes" entry in this table indicates a legal requirement that is not more precisely articulated: for example, a requirement that districts must have "substantially equal" population or that they must be "compact."*

STATE LEGISLATIVE DISTRICTS: WHERE TO DRAW THE LINES (cont'd)

	KEEP POPULATION SUBSTANTIALLY EQUAL	DRAW COMPACT DISTRICTS (WHEN PRACTICABLE)*	FOLLOW POLITICAL BOUNDARIES (WHEN PRACTICABLE)*	PRESERVE COMMUNITIES OF INTEREST (WHEN PRACTICABLE)*	NEST SENATE AND HOUSE DISTRICTS	ELECT MULTIPLE MEMBERS FROM ONE DISTRICT
SC	Yes†					
SD	Yes	Yes	Yes	Yes	Required	Required
TN	Yes	Yes	Split at most 30 counties			
TX	Yes		County			Permitted
UT	Yes					
VA	Yes	Yes				
VT	Yes	Yes	County	Yes		Permitted
WA	Yes	Yes	County, Municipality	Yes	Required	Required
WI	Yes	Yes	Ward	Yes	Required	
WV	Yes	Yes (for the Senate)	County (for the Senate)	Yes		Permitted
WY	Yes					Permitted

* *In most states, standards like requiring compactness, following political boundaries, and preserving communities of interest must be followed only as closely "as is practicable," leaving substantial flexibility to the redistricting body. That is, a redistricting body must generally draw districts that are compact, but individual districts may be noncompact in order to serve other objectives. And in every state, such standards are always subordinate to federal equal population limits and to the federal Voting Rights Act.*

† *A "yes" entry in this table indicates a legal requirement that is not more precisely articulated: for example, a requirement that districts must have "substantially equal" population or that they must be "compact."*

SPECIFIC STATE CRITERIA FOR CONGRESSIONAL DISTRICTS[11]

AK	1 congressional district	MT	1 congressional district
AL	None	NC	None
AR	None[12]	ND	1 congressional district
AZ	Same as state districts	NE	None
CA	Same as state districts	NH	None
CO	None	NJ	None
CT	None	NM	None
DE	1 congressional district	NV	None
FL	None	NY	None
GA	None	OH	None
HI	Same as state districts	OK	None
IA	Same as state districts	OR	Same as state districts
ID	Same as state districts	PA	None
IL	None	RI	None
IN	None	SC	None
KS	Same as state districts	SD	1 congressional district
KY	None	TN	None
LA	Same as state districts	TX	None
MA	None	UT	None
MD	None	VA	Same as state districts
ME	Mostly the same as state districts[13]	VT	1 congressional district
MI	Same as state districts	WA	Same as state districts
MN	Same as state districts	WI	None
MO	Same as state districts	WV	None[12]
MS	None	WY	1 congressional district

[11] *The Supreme Court has required that all congressional districts within a state must be as equal in population as possible. This table summarizes additional requirements, imposed by each state, for drawing their congressional districts.*

[12] *In the 2001 cycle, Arkansas and West Virginia drew congressional districts consisting entirely of whole counties, without further equalizing population. See* Ark. Code §§ 7-2-101 – 105; W. Va. Code § 1-2-3. *These districts have not been challenged in court.*

[13] *For its state legislative districts, Maine requires that its advisory commission "give weight to the interests of local communities."* Me. Rev. Stat. tit. 21-A, § 1206-A. *There is no similar requirement for congressional districts.*

SUGGESTIONS FOR REFORM

VII. SUGGESTIONS FOR REFORM

There are no silver redistricting bullets, no single set of structures or principles or criteria that are uniformly "best."

Different people have different legitimate goals for political representation – different ideas about how the public should be represented, how power should be apportioned, which political cleavages matter and which do not, how to make the various tradeoffs when goals conflict, and even different ideas about who should decide the answer to these questions, and how.

Accordingly, different people offer different assessments of the most pressing problem with their own status quo, and the most promising solution. Some think that the existing process for redrawing their legislative lines is just fine. Others bemoan a conflict of interest at work in drawing the lines. Still others complain that their districts look aesthetically bizarre, or that they promote lopsided elections, or that they overvalue certain votes and undervalue others, or that they split towns, or that they fracture real communities, be they racial or ethnic or cultural or economic or ideological or defined by some other characteristic.

In order to figure out whether a particular system is flawed, and another best suited to your goals, you first have to agree on what you're trying to accomplish.

If the system must be designed to fulfill several goals at once, the process of accommodation and compromise will inevitably leave some goals less than optimally fulfilled. Moreover, a redistricting system may work wonderfully in one state and disastrously in another. Laws interact with each other, and yield different effects in different political cultures and demographic climates. Context matters – quite a bit.

That said, there are a few ideas that we at the Brennan Center suggest considering. On balance, we feel that they further the goals that *we* think important out of a redistricting process: district lines drawn by a meaningfully independent body with meaningful guidance, constraint, and transparency, designed to achieve meaningful and equitable diversity of representation. Others will have different goals, and different preferred means to accomplish them.

Our goals:

- *Meaningful independence*
- *Meaningful guidance*
- *Meaningful and equitable diversity of representation*

These ideas also reflect our belief that it is important to tailor reforms to root problems, rather than merely to attack symptoms. It is undeniably true that many current legislative districts look strange on paper, and many districts are packed with like-minded partisans. These symptoms, however, would not concern us if there were nevertheless fair and equitable representation for real communities by politicians accountable to their constituents. Rather, the symptoms cause concern because they reflect a deeper problem with the current process in most states: an inevitable incentive for incumbents to pick and choose various voters for various districts – at the expense of real communities, and thereby to the detriment of the legislative process as a whole.

We take primary aim at that natural incentive. Most of the ideas below thus reflect our attempt to find trusted decision-makers with meaningful independence from the incumbents to be elected from the districts in question, and to vest these decision-makers with power and flexibility to reconcile competing objectives and arrive at any number of discrete compromises. Given that redistricting decisions are inevitably fraught with both intended and unintended consequences, we aim to establish boundaries for those who draw the lines, without forcing them into a straitjacket.[187]

Many of these ideas may work effectively only if implemented in tandem with each other, and in tandem with other electoral reforms, including laws governing campaign finance and ballot access. Some of these ideas are already governing redistricting decisions somewhere in the country; others are merely proposals or ideas in need of further study. Similarly, some may be politically feasible tomorrow; others will likely face a much longer incubation period. Moreover, we do not pretend that the ideas below represent an exclusive list; innovation is continuous, and there are likely additional worthy ideas just around the corner.

IDEAS WORTH CONSIDERING, FROM EXISTING MODELS

- **Redistrict only once per decade** *(see page 16).* Eighteen states currently prohibit redistricting more than once per decade for state legislative districts, and four do the same for congressional districts. Although this rule maintains the status quo even when districts represent outdated demographic profiles toward the end of a decade, it should on balance promote stability and avoid the exaggerated effects of repeated gerrymanders.[188]

- **Use an independent commission** *(see page 22).* Independence in this context is not an attempt to force individuals to abandon their private partisan affiliations or leanings, or to find individuals who have neither; rather, it attempts to sever the tie between incumbent legislators and the ability to draw the districts where they will run. Five states use independent commissions to draw state legislative or congressional district lines, or both. The American Bar Association[189] recently adopted a recommendation that every state follow suit. If designed appropriately – a very big "if" – independent commissions can avoid the motivation for shenanigans like drawing districts to exclude a potent challenger. And they may be the only effective means to do so.[190]

- **Empower a redistricting body of appropriate size** *(see page 26).* A redistricting body of 5 or even 7 individuals may be too small to reflect the diversity of a state in any meaningful way.[191] Groups larger than 15 may be too large to function smoothly. Somewhere in between, a redistricting body may be able to represent – and effectively negotiate compromise among – many of the state's constituencies.

- **Maintain partisan balance** *(see page 25).* Given the consistent mischief to other objectives wrought by overly partisan redistricting plans, the partisan composition of a redistricting body should not be left to chance. Several states deploy bodies with an even number of line-drawers selected by the legislative leaders (and presumably evenly affiliated with each major party); those partisans must then agree on a tiebreaker. Other proposals permit multiple tiebreakers. Still others would allow a body like the state Supreme Court to nominate tiebreakers, subject to the legislative leaders' veto.[192] Arizona creates a role in the nominating process for individuals unaffiliated with either major political party; it may be wise to consider requiring that the tiebreaker be similarly unaffiliated.

- **Preserve independence through the body's composition** *(see page 24).* A redistricting body is not necessarily independent from self-interested legislators even when no members are incumbents. Arizona uses a nonpartisan body distinct from the legislature to designate nominees; although the legislative leaders choose 4 of its 5 independent commissioners from this nominee pool, the fifth is chosen not by the legislative leadership, but by agreement of the other four commissioners. Idaho prohibits recent lobbyists or candidates for office from sitting on its commission. Bills in other states would prohibit relatives of legislators or recent legislative staff or employees from sitting on a commission as well.[193] Still other proposals would subject commission staff to the same restrictions.

- **Preserve independence through the body's procedures** *(see page 39).* The more transparent the redistricting proceedings, the less motivation to serve the narrow immediate interests of individual incumbents. Several states conduct redistricting business only in public session, with ample notice before meetings are held, and at least some opportunity for public testimony. Proposals expand on these open meetings procedures by suggesting a ban on pertinent *ex parte* communications, other than between commissioners and their staff.[194] Transparency is also furthered in states that make demographic and political data available to the public, and that facilitate public comments and public submission of districting proposals. Some proposals would expand on this give-and-take, by requiring the redistricting body to produce a public report stating the reasons for each choice of district lines.

- **Preserve independence through the body's funding.** A body may be composed of independent personnel, with independent procedures, and still be dependent on the legislature for its funding. In Alaska, the legislature expressed its displeasure with a commission's lines by limiting the commission's budget and funding a lawsuit against the commission's work.[195] Arizona's constitution, in contrast, sets forth a structure for funding its independent commission well before the commission's work begins. With funding secure, the commission may draw the district lines without feeling beholden to the legislature's power of the purse.

- **Allow the legislature a final tweak** *(see page 23).* One of the downsides of independent redistricting is that legislators really do tend to know their districts inside and out. Allowing the legislature a final opportunity to tweak commission lines may both facilitate the passage of redistricting reform in the first place, and permit an escape valve to correct unintended negative consequences of particular redistricting decisions, at least on the margins. Washington State allows its legislature to modify a commission's plan, affecting no more than 2% of the population in any given district, and only if it can muster a 2/3 vote in each house. Requiring the legislature to justify any such changes publicly may mitigate the potential to use this safety valve for legislators' narrow personal gain.

- **Expressly prioritize criteria** *(see page 42).* Several states require their redistricting bodies to abide by several criteria when drawing the lines (e.g., a 5% population variance, preserved county lines). Few, however, expressly designate which criteria should yield to the others in the event of a conflict (Arizona, Colorado, and Iowa are among the few exceptions). States should expressly remind redistricting bodies that they must first comply with federal constitutional equal protection mandates and the statutory requirements of the Voting Rights Act – but beyond that, it is also useful to clearly designate some criteria as more important, others as subsidiary, and still others as equally important and therefore able to yield to each other according to the demands of the local political geography. Clear priorities let the public, those drawing the lines, and the courts that may eventually review a plan know what to expect.[196] It is also important to keep in mind that if it a plan places a high priority on maximizing or minimizing easily measured criteria, like county splits or population equality or compactness or competition, the mathematical imperative could prevent substantial consideration of criteria designated a lower priority.

- **Protect minority representation** *(see page 47).* California's state Voting Rights Act makes dilution easier to prove, and provides protections for dispersed minorities that may extend beyond the safeguards offered by the federal Voting Rights Act. Localities are free to experiment with various policies, including different districting schemes and different voting rules: the overriding question is merely ensuring that minority votes are not systematically diluted. Several upcoming lawsuits involving provisions of the federal Voting Rights Act will better indicate whether such provisions are likely to withstand legal challenge.

- **Allow meaningful space for communities of interest** *(see page 54).* The residential housing patterns of various communities do not always conform to neat political, geographic, or geometric demarcations, and as a result, many states expressly grant their redistricting bodies discretion to draw district lines that maintain the integrity of particular communities of interest. One means to ensure space for such communities is to prioritize their protection; another means is simply to leave sufficient flexibility in the other criteria that those drawing the lines will be able to bend a line, on the margins, in order to keep a community intact.[197] Under either approach, it may be worthwhile to investigate whether communities of interest in a given state can be more objectively "grounded" by requiring that they be composed of whole census tracts.[198] And under either approach, it may be worthwhile to require that the redistricting body publicly identify the particular community protected by any district's deviation from other, more objective, criteria.[199]

- **Reveal information sequentially** *(see page 63).* In any redistricting system with partisan actors, the temptation to use political data to try to secure partisan advantage is immense. Arizona attempts to address this problem by forbidding the use of party registration and voter history data until a draft set of maps is drawn, at which point the political data may be used to double-check for unintended consequences – but without political data, it is impossible to check for full compliance with the Voting Rights Act, and Arizona's first state legislative maps were indeed rejected by the Department of Justice.[200] That said, it may be worth considering using Arizona's model not for all political data, but for candidate residence.[201] It may also be worth considering publishing the final draft maps, before candidates' residences are revealed, in order to anchor the (potentially) less politicized draft.

- **Provide for streamlined court review** *(see page 27).* Redistricting plans are often challenged in court by those who fear losing voting power under the new plan. Without a designated forum for resolving these disputes, litigants may "shop" among various state and federal courts for the judge or judges that seem most favorably inclined; those decisions are inevitably appealed, consuming precious time in an election cycle. Several states have limited the potential for strategic gaming and delay by giving one state court – usually the state's Supreme Court – exclusive jurisdiction over any challenge.[202] Though this will not eliminate accusations of partisanship, it at least speeds the resolution of any litigation. These states may also require the court to place the highest priority on redistricting cases, to further limit the chance of uncertainty over redistricting lines as the upcoming elections approach.

IDEAS WORTH CONSIDERING, NOT YET IMPLEMENTED STATEWIDE

- **Count prisoners at home** *(see page 16).* Incarcerated individuals – disproportionately poor and minorities – are currently tallied for redistricting purposes where they are imprisoned. This artificially inflates the voting power of prison districts, where the prisoners generally cannot vote and are not meaningfully represented, at the expense of their home communities. Incarcerated individuals should be counted for redistricting purposes in the communities where they lived before their incarceration. In 2007, applicable bills were introduced in both Michigan and New York.

- **Promote diversity in the redistricting body** *(see page 26).* A redistricting body should optimally reflect the diversity of its state; those selecting the members of such a body should be instructed accordingly. In New York in 2006, a bill required those appointing members of an independent commission to "give due consideration to reflecting the geographic, ethnic, and racial diversity of the state in appointments to the commission."[203] This balances the need for a clear mandate with the need to avoid potential constitutional difficulty.

- **Preserve independence through the body's voting rule** *(see page 26).* In many commission proposals, there is much importance placed on a tiebreaker, selected by a majority of commissioners otherwise affiliated with or selected by partisan interests. This tiebreaker should be relatively neutral, or at least acceptable to commissioners from both major parties. There still exists the possibility, however, that he or she will be outvoted. In order to mitigate the possibility of bipartisan collusion, the support of that tiebreaker should be required to pass any given plan.[204]

- **Provide for partisan balance in the body's staff** *(see page 25).* No one is more important and less visible in the redistricting process than the technical consultants who actually supply the data, advise the decision-makers of the redistricting body, and execute the mechanics of drawing the lines themselves.[205] No law regulating the redistricting process has yet sought to ensure that the responsibilities of the posts are carried out in a bipartisan, multi-partisan, or nonpartisan manner. To guard against partisan bias in the crucial mechanics of redistricting, the responsibilities of the chief consultant to the redistricting body should be split between representatives of the major political parties. Furthermore, if a commission is deployed with safeguards to preserve the commissioners' independence, staff should be selected using safeguards no less robust.

- **Use a flexible equal population standard** *(see page 42).* The constitution generally requires state legislative districts with no more than 10% total population variance; various states have set themselves still lower thresholds. A proposal in New York in 2006 took a slightly different approach, requiring groups of neighboring districts to reflect the appropriate proportion of the statewide population: 10% of the districts should have about 10% of the population, 20% of the districts should have about 20% of the population, etc. This allows flexibility for an individual district or two to be slightly over- or under-populated in pursuit of other goals, but also ensures that no substantial region of the state has districts that are consistently over- or underpopulated.

- **Employ "accountability seats"** *(see page 57).*[206] Much of the partisan dissatisfaction with particular districting plans stems from the gap between overall statewide support for a party and the proportion of districts that party is able to win: it seems intuitively unfair to many that a party can have 65% support but win only 52% of the legislative seats. To some extent, that gap is inherent in any majority-win districted system. "Accountability seats" – known in academic circles as a **mixed-member proportional** voting system – help reduce the disparity. In a system with accountability seats, most of the legislative seats – say 80 out of 100 – are familiar; citizens vote for candidates in those districts just as they do today. The remaining 20 seats, the "accountability seats," are used to bring a party's representation in the legislature in line with its statewide support. So, for example, if the Republicans won 44 of the 80 districted seats, but won statewide support of 58%, Republicans would be assigned 14 of the 20 accountability seats, filled through a statewide party list. In total, the Republicans would have 58 of the 100 legislative seats, matching their overall statewide showing.

THE REFORM PROCESS

Just as there is no single optimal redistricting system for all purposes, there is no single optimal path to reform. In some states, the voters have pushed reform directly, through the initiative process, or found a champion of reform in the governor's mansion. In other states, a legislative majority sensing a shift in the political winds has sought reform, in part, to stave off the excesses of a retributive redistricting effort by an opposing party on the threshold of power.

Still, recent experience with reform proposals, successful and unsuccessful, does suggest a few best practices for those seeking reform. Again, we do not pretend that the lessons below represent an exclusive list, or that they guarantee success if properly implemented. Nevertheless, we hope that they increase the likelihood that reform can be achieved … and that it will deliver the benefits anticipated.

- **Address the problem, not the symptom.** The most obvious signs of redistricting dysfunction may be symptoms, not problems. For example, some reformers highlight districts with exceedingly irregular shape, but do not believe that a district's shape itself either impedes or facilitates fair and equitable representation. Focusing on symptoms may lead to "solutions" that do not correct the underlying problems with the status quo – or that lead to other undesirable consequences. Reformers are better served by thinking through the goals of representation and the ways in which those goals are not adequately served by the status quo.

- **Do not overpromise.** Proponents of the redistricting initiative approved by Arizona voters in 2000 emphasized its potential to create more competition. However, the initiative proposal itself allowed the new redistricting commission to consider competition only after satisfying several other criteria;[207] furthermore, competitive districts increase the likelihood of, but do not guarantee, competitive races. When the first few elections in the new districts were not substantially competitive, some were disgruntled, and the public debate over the extent of the commission's obligation to create competition spilled over into the courts.[208] This rancor was caused, in part, by the way in which the reform was marketed, and might have been avoided with a more balanced sales pitch.

- **Engage minority constituencies early.** In substantial part because of the Voting Rights Act, minority legislators now occupy some senior legislative positions, and may be suspicious of attempts to remove redistricting power from the legislature just as they have arrived in positions of substantial influence. Proponents of reform should engage minority constituencies early in the process, to ensure that proposals adequately protect minority rights, and to gather support, tacit or explicit, for the need for reform.[209]

- **Leave time for education.** Research shows that knowledge about how districts are currently drawn, much less the available alternatives, is not widespread. Where public approval is part of the reform process, proponents would do well to leave ample time for education. In Arizona, for example, the 2000 initiative was the culmination of a decade of reform efforts in the public eye.

- **Beware the enthusiastic support of only one major party.** Redistricting initiatives failed in 2006 in both California and Ohio, in part, because they were perceived as attempted partisan power grabs: by Republicans in California and by Democrats in Ohio. Enthusiastic support by one major party – without equivalent enthusiasm from the other – could well prove fatal to a public initiative in a closely divided state, no matter how substantial the nonpartisan credentials behind the idea.[210]

- **Pay attention to the effective date of the proposal.** Proposals that have called for redrawing the district lines immediately upon the reform's passage have been repeatedly portrayed as partisan power-grabs by whichever party stands to benefit most in the short term – and that characterization has hastened their defeat.[211] It may seem frustrating, given the effort required for any redistricting reform, to postpone the effects until the next regular redistricting, just after the census. Reform delayed, however, may be preferable to reform denied.

- **Draw test maps to look for unintended consequences.** In the abstract, it is difficult to gauge the practical impact of multiple conflicting criteria that a redistricting body may have to consider. *After* agreeing on the goals that redistricting reform should serve, and developing a structure to further those ends, drawing a few test maps may reveal unanticipated effects of the structure in question. The point is not the appearance of a final plan, but an understanding of the constraints in place throughout the process: an instruction to minimize county splits or to nest Senate and Assembly districts, for example, may limit available options in a way that only becomes clear once you start drawing. Test maps can also reveal unanticipated quirks of a state's political geography.[212] In Ohio, for example, some townships are not contiguous, and look more like shotgun spray than regular polygons; a proposal that would preserve townships in a single district therefore creates constraints that may not be obvious from the text of the proposal itself.

APPENDICES

APPENDIX A.
RECAP OF REDISTRICTING CHOICES

The list below recaps some of the choices involved in a redistricting system. There are other options, not listed here; this summary is intended only as a sort of quick-reference reminder of the choices to be confronted. As discussed frequently throughout this paper, some or all of these choices may conflict with each other, and it may be necessary to prioritize among them.

WHEN TO DRAW

- **Once per decade**: Districts may be redrawn only once per decade
- **More than once**: Districts may be redrawn more than once per decade, at certain times (e.g., if a court declares a plan invalid, or if a court draws a plan because the primary body ran out of time)
- **As often as desired**: Districts may be redrawn as often as desired

WHO DRAWS

PRINCIPAL STRUCTURE

- **Legislature**: The legislature draws the lines
- **Advisory commission**: An advisory commission creates a draft plan, which the legislature can adopt, modify, or ignore
- **Backup commission**: The legislature draws the lines, but a backup commission steps in if the legislature cannot come to an agreement
- **Commission + legislature**: A non-legislative commission draws the lines, but the legislature can modify the plan in moderate fashion
- **Commission**: A non-legislative commission draws the lines

ROLE OF INDIVIDUAL LEGISLATORS

- **Legislature**: The legislature draws the lines, so all legislators (at least in the majority party) are directly involved in drawing the lines
- **Politician commission**: Some legislators (usually the leadership) are on the commission that draws the lines
- **Leadership chooses**: Some legislators (usually the leadership) select some or all of the commissioners who draw the lines; though they don't draw the lines themselves, they indirectly control the process
- **No legislators**: No legislators are involved, directly or indirectly
- **No legislators or staff**: Neither legislators nor legislative staff or lobbyists are involved, directly or indirectly

ROLE OF GOVERNOR

- **Veto**: The governor may veto a proposed plan
- **No veto**: The governor may not veto a proposed plan

VOTING RULE

- **Majority**: A simple majority is enough to approve a plan
- **Tiebreaker**: A simple majority is enough to approve a plan, but that majority must include the vote of a relatively neutral tiebreaker
- **Supermajority**: A supermajority is required to approve a plan

PARTISANSHIP

- **Always partisan**: The redistricting body will almost always have a partisan imbalance (e.g., the legislature draws the lines, or a commission is composed of an odd number of elected officials)
- **Sometimes partisan**: The redistricting body will sometimes have a partisan imbalance (e.g., the legislature draws the lines with a gubernatorial veto, or commissioners are chosen in such a way that it's possible but not certain to have more from one party than from another)
- **Bipartisan**: The redistricting body is divided between the major parties
- **Multipartisan**: The redistricting body is evenly multipartisan
- **Tiebreaker**: The redistricting body is evenly bipartisan or multipartisan, with a tiebreaker chosen by members of both or multiple parties
- **Nonpartisan**: The redistricting body is structured to be nonpartisan

WHO DRAWS (CONT'D)

SIZE OF THE BODY

- **Legislature**: The redistricting body is as large as the legislature
- **9-15 members**: The redistricting body is a commission of 9-15 people
- **3-7 members**: The redistricting body is a commission of 3-7 people
- **Sole decision maker**: One person draws the lines

DIVERSITY

- **Geographic**: The redistricting body reflects geographic diversity
- **Race/Ethnicity**: The redistricting body reflects racial or ethnic diversity
- **Gender**: The redistricting body reflects gender diversity
- **Partisan**: The redistricting body reflects partisan diversity

COURTS

- **Empowered**: Courts may draw district lines themselves (if the main redistricting body violates the law, or fails to act in time)
- **Deferential**: If lines are illegal, the main redistricting body redraws the lines; courts may draw lines only if the main body does not act in time
- **Open**: Any court can hear challenges to redistricting plans
- **Supreme Court**: No state court other than the state Supreme Court can hear redistricting challenges, and those cases get priority on the docket
- **Automatic**: The state Supreme Court will automatically review any plan, without the need to file a challenge

HOW TO DRAW

STARTING POINT

- **Current map**: Lines are redrawn starting with the existing district lines
- **Set point**: Lines are redrawn starting anew at a certain point of the map
- **Grid**: Lines are redrawn starting anew with a regular grid
- **No constraint**: No particular starting point is determined

DISCRETION

- **Full discretion**: The redistricting body has full discretion to draw lines as it pleases, with no constraints other than federal law
- **Some constraints**: The redistricting body has some discretion to draw the lines, but only within constraints set by the state
- **Automatic**: The redistricting body is essentially ministerial, and only acts to decide which plans best maximize certain criteria

TRANSPARENCY

- **Closed-door**: Lines are redrawn in private
- **Data available**: Redistricting data is made available to the public, possibly with software to use the data
- **Public submission**: The public may submit redistricting plans
- **Hearings**: Hearings are held to discuss redistricting plans, potentially with draft maps publicized for specific public input
- **Justification**: Final plans are submitted with a written justification of the particular choices made
- **Open meetings**: All meetings of the redistricting body are or will be public, either at the time or preserved for later public disclosure
- ***Ex parte* contacts**: All contacts with members of the redistricting body are public, either at the time or preserved for later public disclosure

WHERE TO DRAW

EQUAL POPULATION

- **Federal limit**: The largest district is no more than 10% larger than the smallest district
- **Proportion**: 10% of the districts must contain approximately 10% of the population, but individual districts may deviate somewhat
- **Total deviation**: The largest district is no more than X% larger than the smallest district
- **Average deviation**: The districts deviate no more than X% from the ideal population, on average
- **Individual deviation**: Each district is not more than X% different from the ideal population
- **Absolute equality**: There is as little difference between each district's population as possible

MINORITY REPRESENTATION

- **Federal limit**: The plan complies with the Voting Rights Act
- **Independent protection**: The plan prevents dilution of minority votes, no matter how the federal Voting Rights Act is interpreted
- **Eased proof of violation**: The state has a standard of proof for vote dilution that is easier to meet than the federal Voting Rights Act
- **Voting rule**: The plan incorporates districts with different voting rules, which prevent minority vote dilution without drawing specific minority opportunity districts

CONTIGUITY

- **Non-contiguous**: Some districts are not contiguous
- **Water**: All districts are contiguous except when crossing water
- **Contiguous**: All districts are fully contiguous, including districts that span water, but are joined by bridges or ferry routes

COMPACTNESS

- **Noncompact**: Some districts are not compact
- **General**: Districts seem compact by eyeballing, but there is no standard definition of compactness
- **Perimeter**: Districts must meet a threshold limit of compactness, using one of the measures driven by district perimeter
- **Dispersion**: Districts must meet a threshold limit of compactness, using one of the measures driven by district dispersion
- **Population**: Districts must meet a threshold limit of compactness, using one of the measures driven by population center of gravity
- **Max compact**: Districts must be drawn to maximize a compactness score, using a specific measure

POLITICAL / GEOGRAPHIC BOUNDARIES

- **No constraint**: There is no particular need to follow political or geographic boundaries
- **General**: Districts generally follow political and geographic boundaries when that does not interfere with other objectives
- **Total counties**: Districts split no more than X number of counties
- **Minimum counties**: Districts split the minimum number of counties
- **Minimum splits**: Districts split the minimum number of counties, towns, wards, precincts, and blocks

COMMUNITIES OF INTEREST

- **No constraint**: There is no particular need to draw districts to encompass communities of interest
- **Divide**: Districts generally divide communities of interest to force legislators to resolve competing goals
- **General**: Districts generally preserve communities of interest whole, when that does not interfere with other objectives
- **Articulate**: Districts preserve communities of interest whole, and the redistricting body must explain the communities of interest protected

WHERE TO DRAW (CONT'D)

COMPETITION

- **No constraint**: There is no particular need to draw districts with a particular political outcome in mind
- **Draw blind**: Districts must be drawn without access to data about voter partisanship, except where necessary to implement federal law
- **General**: Districts are generally drawn to foster district partisan balance, when that does not interfere with other objectives
- **Threshold**: X% of the districts must be drawn so that the partisan balance of the district is within 10%
- **Maximum competition**: Districts must be drawn so that as many districts as possible have a partisan balance within 10%

PARTISAN BIAS

- **No constraint**: There is no particular need to limit one party's advantage in the likelihood of winning a total number of seats
- **Draw blind**: Districts must be drawn without access to data about voter partisanship, except where necessary to implement federal law
- **Reduce bias**: Districts where the likely partisan outcome reduces the total partisan bias are favored
- **Minimize bias**: The plan must minimize either party's advantage in the likelihood of winning a total number of seats
- **Accountability seats**: The plan sets districts aside, outside of the district system, to make the total seats match the total votes more closely

CANDIDATES' HOMES

- **No constraint**: There is no rule relating to candidates' or incumbents' homes, one way or another
- **Incumbent protection**: Two incumbents' houses may not be put in the same district if possible
- **No consideration**: Districts may not be drawn in order to protect or harm particular candidates or incumbents
- **Draw blind**: Districts must be drawn without information about where candidates or incumbents live

NESTING

- **No constraint**: State House or Assembly districts need not be nested inside state Senate districts
- **Nested**: State House or Assembly districts must be nested inside state Senate districts
- **Floterial**: Districts for the same legislative chamber may overlap each other

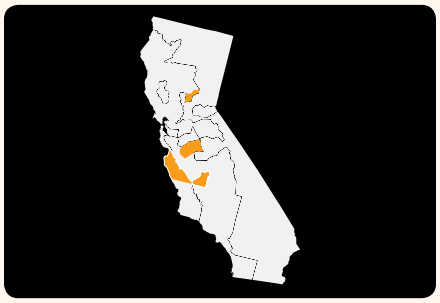
MULTI-MEMBER DISTRICTS

- **Single-member**: All districts elect one and only one representative
- **Multi-member**: Some or all districts may elect multiple representatives
- **Voting rule**: Some or all districts may elect multiple representatives, using proportional voting rules like cumulative or choice voting

APPENDIX B. JURISDICTIONS COVERED BY SECTION 5 OF THE VRA

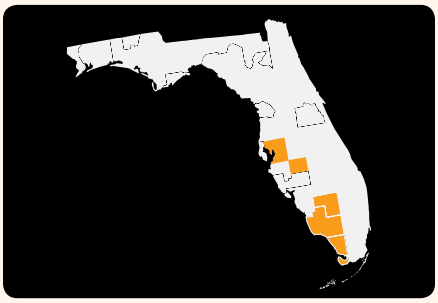
Covered as a whole: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia

CALIFORNIA



Kings, Merced, Monterey and Yuba Counties

FLORIDA

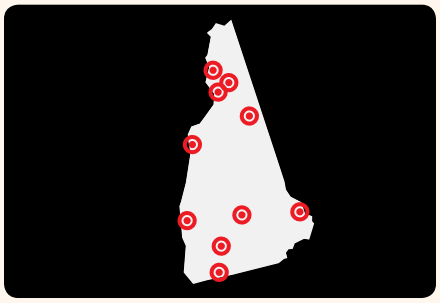


Collier, Hardee, Hendry, Hillsborough and Monroe Counties

MICHIGAN

Clyde and Buena Vista Townships

NEW HAMPSHIRE

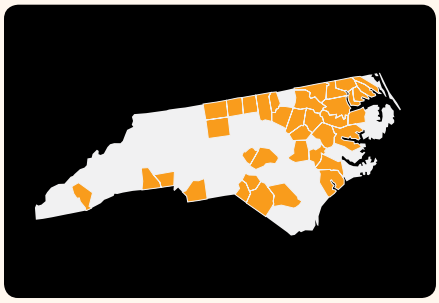


Rindge, Pinkhams Grant, Stewartstown, Stratford, Benton, Antrim, Boscawen, Newington and Unity Towns; Millsfield Township

NEW YORK

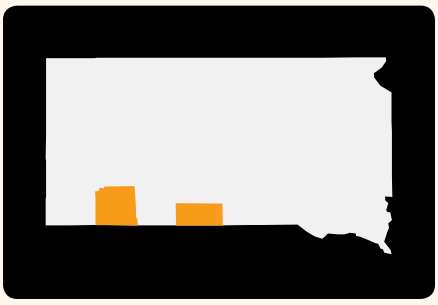
Bronx, Kings and New York Counties

NORTH CAROLINA



Anson, Beaufort, Bertie, Bladen, Camden, Caswell, Chowan, Cleveland, Craven, Cumberland, Edgecomb, Franklin, Gaston, Gates, Granville, Green, Guilford, Halifax, Harnett, Hertford, Hoke, Jackson, Lee, Lenoir, Martin, Nash, Northampton, Onslow, Pasquotank, Perquimans, Person, Pitt, Robeson, Rockingham, Scotland, Union, Vane, Washington, Wayne and Wilson Counties

SOUTH DAKOTA



Shannon and Todd Counties

APPENDIX C.
ADDITIONAL RESOURCES

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Herbert Asher et al., *Reforming Ohio's Democracy: What's Wrong, What We Can Do About It* (Oct. 3, 2006), *available at* http://www.ohiocitizen.org/moneypolitics/2006/study/title.htm.

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League of Women Voters, The Campaign Legal Center & The Council for Excellence in Government, *Building A National Redistricting Reform Movement: Redistricting Conference Report* (2006), *available at* http://www.campaignlegalcenter.org/attachments/1641.pdf.

Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive Or Illusory?*, 33 U.C.L.A. L. Rev. 1 (1985).

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David Lublin & Michael P. McDonald, *Is It Time to Draw the Line? The Impact of Redistricting on Competition in State House Elections*, 5 Election L.J. 144 (2006).

The Marketplace of Democracy (Michael P. McDonald & John Samples eds., 2006).

Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States, 2001-02*, 4 State Pol. & Pol'y Q. 371-95 (2004), *available at* http://sppq.press.uiuc.edu/4/4/mcdonald.pdf.

Mexican American Legal Defense and Education Fund, NAACP Legal Defense and Education Fund & National Asian Pacific American Legal Consortium, *The Impact of Redistricting in Your Community: A Guide to Redistricting, available at* http://www.maldef.org/publications/pdf/Redistricting_Manual.pdf.

Minnesota Legislative Reference Library, *Redistricting 2000,* http://www.leg.state.mn.us/lrl/issues/redist00.asp.

National Conference of State Legislatures, *Redistricting Research and Presentations,* http://www.ncsl.org/programs/legismgt/redistrict/research.htm.

Richard G. Niemi *et al., Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. Pol. 1155 (1990).

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SELECTED REFORM PROPOSALS

The following represent a few of the recent specific proposals for redistricting reform, many with components we find admirable. That said, these proposals are listed here for reference only; the fact that any given proposal is or is not listed here should not imply the Brennan Center's approval or disapproval.

Sam Hirsch, *A Model State Constitutional Amendment to Reform Redistricting* (2006), ***at*** http://tinyurl.com/33s46v.

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Comm. for Fair Elections, Initiative 05-14 (Fla. 2006), ***at*** http://election.dos.state.fl.us/initiatives/fulltext/pdf/41643-1.pdf.

Comm. on Election Law, Ass'n of the Bar of the City of New York, *A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders* (2007), ***at*** http://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

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H.J.R. 4, 127th Gen. Assem., Reg. Sess. (Ohio 2008), ***at*** http://www.legislature.state.oh.us/res.cfm?ID=127_HJR_4.

ENDNOTES

ENDNOTES

[1] U.S. Const. art. I, §2, cl. 3.

[2] *See, e.g.*, N.Y. Const. art. III, § 4 (setting the size of the State Senate).

[3] Office of the Clerk, U.S. House of Representatives, Congressional Apportionment, *at* http://clerk.house.gov/art_history/house_history/congApp.html.

[4] Act of Aug. 8, 1911, ch. 5, Pub. L. No. 62-5, 37 Stat. 13; Reapportionment Act of June 18, 1929, ch. 28, Pub. L. No. 71-13, 46 Stat. 21, 26–27.

[5] Office of the Clerk, Congressional Apportionment, *supra* note 3.

[6] *Id.*

[7] *Id.*

[8] In 2010, there will be another census, and congressional seats will again be apportioned among the states based on their population. As of early 2008, according to various population projections, at least seven states (Arizona, Florida, Georgia, Nevada, Oregon, Texas, and Utah) are expected to gain seats; at least ten states (Illinois, Iowa, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, and Pennsylvania) are expected to lose seats. *See* Election Data Services, New Population Estimates Continue Trend for Congressional Apportionment, But Point to Changes for 2010 (2007), *at* http://www.cqpolitics.com/cq-assets/cqmultimedia/pdfs/2007_12_27edsstudy.pdf.

[9] Paul J. Weber, *Madison's Opposition to a Second Convention*, 20 Polity 498 (1998).

[10] Some accounts credit Gilbert Stuart, the artist better known for painting George Washington's familiar portrait, as the creator of the cartoon; others credit Elkanah Tisdale. Similarly, some credit Benjamin Russell as the editor who gave the "Gerry-Mander" its name; others credit a Mr. "Alsop"; still others, James Ogilive. *See, e.g.*, Charles Sumner Olcott, The Life Of William Mckinley 82 (1916); 2 The American Historical Record 276 (Benson J. Lossing, ed. 1873); 27 New-england Historical and Genealogical Register and Antiquarian Journal 421 (1873).

[11] Jim Sanders, *Precursor to Prop. 77 "Orchestrated Well,"* Sacramento Bee, Oct. 19, 2005, at A3; *Democrats Might Gain Only 1 House Seat in Redistricting*, Ventura County Star, Aug. 15, 2001.

[12] Hanh Quach & Dena Bunis, *All Bow to Redistrict Architect*, Orange County Register, Aug. 26, 2001.

[13] The "hand," at the eastern end of current district 11, excised a portion of what had been Cranwell's district 14. Lindsey Nair, *Redistricting Effectively Moves Cranwell*, Roanoke Times, Apr. 24, 2001.

[14] Jonathan P. Hicks, *In District Lines, Critics See Albany Protecting Its Own*, N.Y. Times, Nov. 2, 2004.

[15] To mitigate the effects of redrawing the lines, in the first election after a redistricting, New York State allows candidates to run for office in any district in the county where they live, whether they live in the district itself or not. N.Y. Const. art. III, § 7. In 2002, just after the redistricting, Jeffries took advantage of this provision, and again earned nearly 40% of the primary vote against Green. By 2004, however, Jeffries could no longer run in Green's district without moving his house, and despite the fact that Green had been convicted for billing the state for false travel expenses, he faced no challenger in the primary. Hicks, *supra* note 14.

[16] N.Y. State Bd. of Elections, Election Results, ***at*** *http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_8301:35_8306&_dad=portal.*

[17] Bush v. Vera, 517 U.S. 952, 1019 n.18 (1996) (Stevens, J., dissenting).

[18] *See* David Barboza & Carl Hulse, *Texas' Republicans Fume; Democrats Remain AWOL*, N.Y. Times, May 14, 2003, at A17; Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. Times, Oct. 13, 2003, at A1; Editorial, *The Soviet Republic of Texas*, Wash. Post, Oct. 14, 2003, at A22; T*exas: Democrats on the Run, Again*, N.Y. Times, July 29, 2003, at A18; *Texas Search for Democrats is Ruled Illegal*, N.Y. Times, July 12, 2003, at A7.

[19] League of United Latin American Citizens (LULAC) v. Perry, 126 S. Ct. 2594, 2613 (2006).

[20] *Id.*

[21] *Id.* at 2622.

[22] Greg Jefferson, *Rodriguez Upsets Incumbent Bonilla*, San Antonio Express-News, Jan. 9, 2007.

[23] Albert Bergesen & Max Herman, *Immigration, Race, and Riot: The 1992 Los Angeles Uprising*, 63 Am. Soc. Rev. 39 (1998).

[24] *See, e.g.*, Coalition of Asian Pacific Americans for Fair Redistricting, Fair Representation, Coalition Building, Political Empowerment, at 5, ***at*** *http://www.apalc.org/pdffiles/capafrsum.pdf.*

[25] U.S. Census Bureau, About 2010 Census, ***at*** *http://www.census.gov/2010census/about_2010_census/.*

[26] *Id.*

[27] *See* 2 U.S.C. § 2a.

[28] Pub. L. No. 94-171, 89 Stat. 1023 (1975). The Census Bureau reviews its own data after the census is complete, to try to estimate whether it made any systematic mistakes, and if so, how large; these estimates are usually released later as a statement of the "overcount" or "undercount" of certain groups. After the 2000 Census, the review process itself was sufficiently flawed that the extent of any overcount or undercount in 2000 is not clear. U.S. Gov't Accountability Office, Census 2000: Design Choices Contributed to Inaccuracy of Coverage Evaluation Estimates, GAO-05-71 (2004).

[29] A "census block" is a physical area set by the U.S. Census Bureau; it is the smallest geographic unit for which the Census Bureau collects data. In some cases, it will be the same area as a city block, but especially in rural areas, it can be substantially larger. *See* U.S. Census Bureau, Glossary: Census Block, *at* http://factfinder.census.gov/home/en/epss/glossary_c.html#census_block.

[30] *See generally* Justin Levitt & Michael P. McDonald, *Taking the "Re" out of Redistricting*, 95 Geo. L.J. 1247 (2007).

[31] *See generally* Michael P. McDonald, *A Comparative Analysis of Redistricting Institutions in the United States*, 2001–2002, 4 St. Pol. & Pol'y Q. 371 (2004).

[32] There have been at least two bills offered in the 110th Congress that would set a federal standard for most congressional districts to be drawn by commissions: the Fairness and Independence in Redistricting Act of 2007, H.R. 543 and S. 2342, and the Redistricting Reform Act of 2007, H.R. 2248.

[33] In North Carolina, for example, the Governor may not veto a redistricting law approved by the state legislature. N.C. Const. art. II, § 22(1), (5). In Mississippi, though the Governor may veto a Congressional plan, redistricting for the state legislature is accomplished by joint resolution, which is not subject to a Governor's veto. Miss. Const. art. XIII, § 254; Robert Pear, *Citing Race Bias, U.S. Vetoes 2 States' Redistricting*, N.Y. Times, July 3, 1991.

In Maryland, the Governor has a somewhat inverted role. The Governor proposes a redistricting plan, which the legislature may adopt or modify; the legislature may also substitute its own plan. If, however, the legislature does not act by the 45th day of the session, the Governor's default plan becomes binding. Md. Const. art. III, § 5.

[34] Iowa Code §§ 42.3, 42.5; Me. Const. art. IV, pt. 3, § 1-A; N.Y. Legis. Law § 83-m (2007); 17 Vt. Stat. §§ 1904-06, 1907. In 2001, Rhode Island used an advisory commission in order to redraw the district lines after "downsizing" its Assembly from 50 Senators and 100 Representatives to 38 Senators and 75 Representatives. It is not clear whether Rhode Island will use the advisory commission structure again for the 2010 cycle. *See* 2001 R.I. Pub. Laws ch. 315; Parella v. Montalbano, 899 A.2d 1226 (R.I. 2006).

[35] Ohio Rev. Code § 103.51.

[36] N.Y. Legis. Law § 83-m (2007).

[37] Me. Const. art. IV, pt. III, § 1-A.

[38] Iowa Code §§ 42.3, 42.5.

[39] Conn. Const. art. III, § 6(c); Ill. Const. art. IV, § 3(b); Miss. Const. art. XIII, § 254; Okla. Const. art. V, § 11A; Tex. Const. art. III, § 28. *See also* Ind. Code § 3-3-2-2.

[40] Conn. Const. art. III, § 6(c).

[41] Okla. Const. art. IV, § 6.

[42] Tex. Const. art. III, § 28.

[43] Ill. Const. art. IV, § 3(b).

[44] Ark. Const. art. VIII, § 1; Colo. Const. art. V, § 48; Haw. Const. art. IV, § 2; Mo. Const. art. III, §§ 2, 7; N.J. Const. art. IV, § 3, ¶ 1; Ohio Const. art. XI, § 1; Pa. Const. art. II, § 17.

[45] Ark. Const. art. VIII, § 1.

[46] Colo. Const. art. V, § 48.

[47] N.J. Const. art. IV, § 3 ¶ 1.

[48] Mo. Const. art. III, §§ 2, 7.

[49] Ariz. Const. art. IV, pt. 2, § 1; Idaho Const. art. III, § 2; Idaho Code § 72-1502; Mont. Const. art. V, § 14(2); Mont. Code §§ 5-1-101-05; Wash. Const. art. II, § 43; Wash. Rev. Code § 44.05.030-.100. At present, Montana has only one congressional district.

[50] Ariz. Const. art. IV, pt. 2, § 1.

[51] Wash. Rev. Code § 44.05.100.

[52] *See* Proposition 77, Redistricting: Initiative Constitutional Amendment, *at* *http://www.sos.ca.gov/elections/bp_nov05/voter_info_pdf/entire77.pdf.*

[53] *Cf.* Heather K. Gerken, *The Double-Edged Sword of Independence*, 6 Election L.J. 184 (2007) (describing such a system in British Columbia for evaluating voting rules, rather than district lines).

[54] *See* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 79 (2004).

[55] Ariz. Const. art. IV, pt. 2, § 1.

[56] Alaska Const. art. VI, § 8; Ariz. Const. art. IV, pt. 2, § 1; Idaho Const. art. III, § 2(6); Mont. Code § 5-1-105; Wash. Rev. Code § 44.05.060; *see also* Haw. Const. art. IV, § 2; Mo. Const. art. III, §§ 2, 7.

[57] Idaho Code § 72-1502; Wash. Const. art. II, § 43; Wash. Rev. Code § 44.05.050.

[58] California Voters First Initiative, ***at*** *http://votersfirstca.com/*.

[59] Ill. Const. art. IV, § 3(b).

[60] Idaho Const. art. III, § 2; Wash. Const. art. II, § 43. In Missouri, 70% of the commissioners, who are appointed in even numbers by each party, must approve any final plan. *See* Mo. Const. art. III, §§ 2, 7.

[61] N.J. Const. art. IV, § 3, ¶ 2 (requiring the Chief Justice of the Supreme Court to appoint a tiebreaker). Colorado allows each of the legislative leaders to appoint one commissioner, allows the Governor to appoint three, and allows the Chief Justice of the Supreme Court to appoint four; in 1980 and 2000, the Chief Justice's choices were criticized as partisan appointments. *See, e.g.*, Bob Ewegen, Opinion, *The Midnight Gerrymander*, Denver Post, May 10, 2003, at B25.

[62] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1; Haw. Const. art. IV, § 2; Mont. Const. art. V, § 14(2); Pa. Const. art. II, § 17. In Washington, a fifth commissioner chosen by the other four acts as chair, but does not vote. Wash. Rev. Code § 44.05.030.

[63] Ariz. Const. art. IV, pt. 2, § 1.

[64] California Voters First Initiative, *at* http://votersfirstca.com/.

[65] Idaho uses an independent commission; though the state constitution states that 2/3 of commissioners must approve a plan before it can become law, because there are six commissioners, this voting rule (requiring 4 affirmative votes) is actually the same as a simple majority requirement in most circumstances. *See* Idaho Const. art. III, § 2(2), (4).

[66] Me. Const. art. IV, pt. 1, § 3; Me. Const. art. IV, pt. 2, § 2; Me. Rev. Stat. tit. 21-A, § 1206; Mo. Const. art. III, §§ 2, 7.

[67] Conn. Const. art. III, § 6(c).

[68] *See, e.g.*, Colo. Const. art. V, § 48.

[69] *See, e.g.*, Morgan Kousser, *Reapportionment Wars: Party, Race, and Redistricting in California*, 1971-1992, *in* Race and Redistricting In the 1990s, at 134, 169-70 (Bernard Grofman, ed. 1998).

[70] Miss. Const. art. XIII, § 254.

[71] Alaska Const. art. VI, § 8; Colo. Const. art. V, § 48.

[72] N.J. Const. art. IV, § 3, ¶ 2.

[73] *See generally* Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131 (2005).

[74] Those states include Florida, Georgia, Maryland, Maine, Minnesota, New Hampshire, North Carolina, South Carolina, South Dakota, Texas, and Wisconsin. *See* In re Constitutionality of House Joint Resolution 25E, 863 So.2d 1176, 1177-78 (Fla. 2003); Larios v. Cox, 314 F. Supp. 2d 1357 (N.D.Ga. 2004); In re Legislative Districting of State, 370 Md. 312 (2002); In re 2003 Apportionment of the State Senate, 827 A.2d 844 (Me. 2003); Zachman v. Kiffmeyer, Case No. C0-01-160 (Minn. Spec. Redist. Panel Mar. 19, 2002), http://www.courts.state.mn.us/documents/CIO/redistrictingpanel/Final_Legislative_Order.PDF; Burling v. Chandler, 148 N.H. 143 (2002); Below v. Gardner, 148 N.H. 1 (2002); Stephenson v. Bartlett, 357 N.C. 301, 304-05 (2003); Colleton County Council v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002); Bone Shirt v. Hazeltine, 387 F. Supp. 2d 1035 (D.S.D. 2005); Balderas v. Texas, No. 6:01CV158, 2001 WL 34104833 (E.D. Tex. 2001); Baumgart v. Wendelberger, No. 01-C-0121, 02-C-0366, 2002 WL 34127471 (E.D. Wis. 2002).

[75] *See* Gary W. Cox & Jonathan N. Katz, *Bias, Responsiveness, and the Courts, in* Elbridge Gerry's Salamander: The Electoral Consequences Of The Reapportionment Revolution 87-105 (2002); *cf.* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum. L. Rev. 1 (2008) (discussing the correlation between the party of the President appointing federal judges and the rate at which those judges find a violation of the Voting Rights Act).

[76] *See, e.g.*, Colo. Const. art. V, § 48(1)(e); Fl. Const. art. III, § 16(c), (e); Kan. Const. art. X, § 1(b).

[77] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1 (14).

[78] 13 U.S.C. § 141.

[79] Maine, for example, redraws its districts to take effect in the third year of each decade: 1993, 2003, 2013, etc. Me. Const. art. IV, pt. 1, § 2; *id.* pt. 2, § 2.

[80] *See, e.g.*, Alaska Const. art. VI, § 8 (appointing commissioners by September 1, XXX0); Ariz. Const. art. IV, pt. 2, § 1 (collecting nominees for the commission by January 8, XXX1); N.J. Const. art. IV, § 3, pt. 1 (appointing commissioners by November 15, XXX0); Vt. Stat. tit. 17, § 1904 (selecting advisory commissioners by July 1, XXX0); Wash. Const. art. II, § 43 (appointing commissioners by January 31, XXX1).

[81] Micah Altman et al., *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 Soc. Sci. Computer Rev. 334, 339 (2005). Professor Michael McDonald has collected the state websites providing redistricting data and other information about the redistricting process. *See* Michael McDonald, United States Elections Project, 2001-2002 Redistricting in the 50 States, *at* *http://elections.gmu.edu/redistricting.htm* (last visited Feb. 22, 2008).

[82] *See generally* Bruce E. Cain & Karin Mac Donald, Transparency and Redistricting (2006), *at* *http://swdb.berkeley.edu/redistricting_research/Transparency_&_Redistricting.pdf.*

[83] *See, e.g.*, N.J. Const. art. II, § 2, ¶ 4.

[84] *Cf.* Cain & Mac Donald, *supra* note 82, at 5 (discussing open-meetings requirements for groups of three or more).

[85] For all but the simplest plans, even if it were possible to quantify all of the measures of each redistricting criterion, computers might not have the capacity to draw the district lines. Given the need to reconcile various criteria, and given the number of potential combinations involved in most redistricting plans, the calculations involved in identifying a single "winning" plan may be so computationally complex that they become practically unsolvable by computers under common conditions. *See generally* Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 Rutgers Computer & Tech L.J. 81 (1997). In contrast, though it will also be impossible for any human to find an *optimal* solution, people are fairly well equipped to find reasonably balanced solutions that reconcile various complex objectives.

[86] *See, e.g.*, Micah Altman, *Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders*, 17 Pol. Geography 989, 1000-04, 1006-07 (1998).

[87] Kirksey v. Board of Supervisors, 554 F.2d 139, 141 (5th Cir. 1977); Frank R. Parker, Black Votes Count: Political Empowerment In Mississippi After 1965, at 153-56 (1990).

[88] Micah Altman, *Traditional Districting Principles: Judicial Myths vs. Reality*, 22 Soc. Sci. Hist. 159, 180-81 (1998).

[89] States that based representation on towns rather than counties had an even more pronounced disparity. In Vermont, the biggest district – the town of Burlington -- had 872 times as many people as the smallest district. Arthur L. Goldberg, *The Statistics of Malapportionment*, 72 Yale L.J. 90 (1962).

[90] The Supreme Court applied an equal population standard to Congressional districts in *Wesberry v. Sanders*, 376 U.S. 1 (1964), to state legislative districts in *Reynolds v. Sims*, 377 U.S. 533 (1964), and to local government districts in *Avery v. Midland County, Tex.*, 390 U.S. 474 (1968).

Gray v. Sanders, 372 U.S. 368 (1963), implemented the "one person, one vote" standard for statewide offices, by striking down a system that aggregated votes within counties and then tallied the counties to determine a winning candidate. Under such a system, the statewide offices were effectively elected by county "districts" of unequal population.

[91] Wesberry v. Sanders, 376 U.S. 1, 7-8, (1964).

[92] Karcher v. Daggett, 462 U.S. 725, 730 (1983). In the 2001 cycle, Arkansas and West Virginia drew congressional districts consisting entirely of whole counties, without further equalizing population. *See* Ark. Code §§ 7-2-101 – 105; W. Va. Code § 1-2-3. These districts have not been challenged in court.

The strict equal population standard usually requires absolute equality among Congressional districts within a state. From state to state, however, the population of Congressional districts will vary slightly, because each state has a whole number of Congressional seats. For example, based on the 2000 census, each Congressional district contained an average of 646,952 people. However, the single Congressional district in Montana had 905,316 people; Utah's three districts each had about 745,571 people; Nebraska's three districts each had about 571,790 people; and Wyoming's single Congressional district had 495,304 people. Karen M. Mills, U.S. Census Bureau, Congressional Apportionment: Census 2000 Brief tbl. 1 (2001), ***at*** *http://www.census.gov/prod/2001pubs/c2kbr01-7.pdf.*

[93] Reynolds v. Sims, 377 U.S. 533, 579 (1964). The different standards are based on different Constitutional clauses. Congressional district population disparities are regulated by the Apportionment Clause, U.S. Const. art. I, §2. State legislative district population disparities are regulated by the Equal Protection Clause, U.S. Const. amend. XIV, §1.

[94] Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (noting that state legislative districts may generally vary in population by up to 10% without establishing a prima facie case under the Fourteenth Amendment).

[95] Mahan v. Howell, 410 U.S. 315 (1973); Voinovich v. Quilter, 507 U.S. 146 (1993). In these cases, the states' goal of preserving existing political boundaries was considered compelling enough to justify overall ranges of higher than 10 percent. Political boundaries are discussed in more detail, below.

[96] Cox v. Larios, 542 U.S. 947 (2004) (summarily affirming district court decision that deviation in state legislative districts of less than 10% violates the Equal Protection clause when deviation is not justified by a permissible purpose).

[97] Colo. Const. art. V, § 46.

[98] H.R. Con. Res. 2 (Minn. 1991), *at* http://www.commissions.leg.state.mn.us/gis/html/hcr2.htm.

[99] Iowa Code § 42.4(1)(a).

[100] Comm. on Election Law, Ass'n of the Bar of the City of New York, *A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders* (2007), app. D, *at* http://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

[101] Bush v. Vera, 517 U.S. 952, 958-59, 962-64 (1996) (plurality opinion); *see also* Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900, 916 (1995).

[102] *See* King v. Ill. Bd. of Elections, 979 F.Supp. 619, 621-22 (N.D.Ill.1997), *aff'd*, 522 U.S. 1087 (1998); *see also* Bush v. Vera, 517 U.S. 952, 994 (1996) (O'Connor, J., concurring); League of United Latin American Citizens (LULAC) v. Perry, 126 S. Ct. 2594, 2642 (2006) (Stevens, J., concurring in part and dissenting in part).

[103] For the number of federal and state African-American legislators in various periods, see Mildred L. Amer, Black Members of the United States Congress: 1870-2007 (CRS Report for Congress No. RL30378, 2007); Charles E. Jones, *African American State Legislative Politics*, 30 J. Black Stud. 741, 741 (2000); Lisa Handley & Bernard Grofman, *The Impact of The Voting Rights Act on Minority Representation, in* Quiet Revolution In The South 335, 345 tbl. 11.1 (Chandler Davidson & Bernard Grofman eds., 1994); Joint Ctr. for Political & Econ. Studies, Black Elected Officials: A Statistical Summary 2000, *at* http://www.jointcenter.org/index.php/content/download/1809/12453/file/BEO-00.pdf; Joint Ctr. for Political & Econ. Studies, Black Elected Officials: A National Roster, 1995 (1995); *see also* data from the Joint Center for Political and Economic Studies for 2005. Other sources place the number of current federal or state African-American legislators at 571. *See, e.g.*, Pei-te Lien *et al., The Voting Rights Act and the Election of Nonwhite Officials*, 40 PS: Pol. Sci. & Pol. 489, 490, 492 (2007).

[104] The Gender and Multi-Cultural Leadership Project, *National Database of Non-White Elected Officials* (2007), *at* http://www.gmcl.org/database.htm.

[105] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

[106] 42 U.S.C. § 1973; *see also* U.S. Dep't of Justice, Civil Rights Division, Voting Section, The Voting Rights Act of 1965, *at* http://www.usdoj.gov/crt/voting/intro/intro_b.htm.

[107] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982).

[108] *See generally* J. Morgan Kousser, Colorblind Injustice (1999).

[109] It is possible that the courts would allow minority populations to satisfy this first criterion even when they are somewhat geographically separated – as in a concentrated group of Latino voters in one part of a state, and another concentrated group of Latino voters in another part of the state fairly far away – as long as these populations are sufficiently culturally similar to justify one district. The Supreme Court introduced the idea briefly in a 2006 case, League of United Latin American Citizens (LULAC) v. Perry, 126 S. Ct. 2594, 2619 (2006), but did not really explain how far the principle would extend, or in what context it would be required. Scholars have coined the term "cultural compactness" to refer to the cultural similarity of different minority populations. *See* Daniel R. Ortiz, *Cultural Compactness*, 105 Mich. L. Rev. First Impressions 48, 50-51 (2006), *at* http://students.law.umich.edu/mlr/firstimpressions/vol105/Ortiz.pdf.

[110] Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); Growe v. Emison, 507 U.S. 25, 40-41 (1993); LULAC, 126 S. Ct. at 2614; *see id.* at 2617-19 (discussing compactness).

[111] Thornburg, 478 U.S. at 36-38, 44-45, 79-80.

[112] *See* LULAC, 126 S. Ct. at 2614, 2619-21.

[113] Just as majority-minority districts may elect individuals who are not members of racial or ethnic minority groups, minority representatives may be elected by majority-white districts, though such elections are still relatively rare. *See* Lien, *supra* note 103, at 490-91; Penda D. Hair & Pamela S. Karlan, *Redistricting for Inclusive Democracy* 35 (2000), *available at* http://www.advancementproject.org/RFD.pdf; Adam Nossiter, *Race Matters Less in Politics of South*, N.Y. Times, Feb. 21, 2008.

[114] 42 U.S.C. § 1973c.

[115] *See generally* J. Gerald Hebert, *An Assessment of the Bailout Provisions of The Voting Rights Act, in* Voting Rights Act Reauthorization Of 2006, at 257-75 (Ana Henderson ed., 2007).

[116] *See* 42 U.S.C. § 1973c; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006).

[117] Georgia v. Ashcroft, 539 U.S. 461, 479 (2003). Section 5 of the Voting Rights Act measures only changes from the status quo. Section 2 focuses not on change, but on the absolute right of compact minority populations to be free from efforts to dilute their vote, and therefore works differently. Under section 2, the state may not dilute the votes of a minority in a certain area, even if it provides for minority opportunities elsewhere, unless both groups of minorities have a right under section 2, and both cannot be accommodated at once. Johnson v. De Grandy, 512 U.S. 997, 1019 (1994); LULAC, 126 S. Ct. at 2616-17, 2620.

[118] Shaw v. Reno, 509 U.S. 630 (1993).

[119] For example, the Supreme Court has said that a specific effort to correct prior racial discrimination may be an interest sufficiently "compelling" to let governments draw districts based on race, Shaw v. Hunt, 517 U.S. 899, 909-10 (1996), but thus far, the courts have not directly confronted such a case.

[120] Kan. Legis. Research Dept., Guidelines and Criteria for 2002 Kansas Congressional and Legislative Redistricting (2001), *at* http://skyways.lib.ks.us/ksleg/KLRD/Redistrct/documents/Guidelines.PDF; *see also* Iowa Code § 42.4(5); H.R. Con. Res. 2 (Minn. 1991); Or. Stat. § 188.010. *Cf.* Wash. Rev. Code § 44.05.090 ("The commission shall exercise its powers to provide fair and effective representation . . . .").

[121] Cal. Elec. Code §§ 14025-14032.

[122] Cal. Elec. Code §§ 14027-14028; *see also* Sanchez v. City of Modesto, 145 Cal.App.4th 660, 669 (Cal. Ct. App. 2006).

[123] There is some debate about the extent to which section 2 of the federal Voting Rights Act protects minority voters who are geographically dispersed. In a series of Supreme Court cases in the 1980s and 1990s, minority voters protested that their votes had been "diluted" by a refusal to draw districts where substantial concentrations of minorities might have had the power to elect a representative. The Court said that, in these sorts of cases, the litigants first had to prove that the failure to draw the appropriate districts was the cause of the "dilution." More specifically, the Court said that in order to bring a claim for dilution, litigants have to show (among other things) that the minority population voted sufficiently similarly, was sufficiently large, and lived sufficiently close together that a reasonable district could have been drawn to give it the opportunity to elect a representative. *See* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); Growe v. Emison, 507 U.S. 25, 39-41 (1993). The requirement that the minority population live close together – that it be "compact" – has often been repeated as a threshold requirement for dilution claims. Some, however, think that the compactness requirement applies only to dilution claims where the alleged problem is the failure to draw appropriate districts. If the cause of the "dilution" is some other barrier, like a voting rule that keeps geographically dispersed minorities from electing a representative when they might otherwise be able to do so without the particular voting rule, the federal Voting Rights Act might grant those geographically dispersed minorities protection. *See, e.g.*, Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 364-79 (1998).

[124] Miller v. Johnson, 515 U.S. 900, 916 (1995); *see also* Shaw v. Reno, 509 U.S. 630, 647 (1993).

[125] Altman, *supra* note 88.

[126] Haw. Const., art. IV, § 6(1), (3).

[127] Altman, *supra* note 88.

[128] *See generally* Richard G. Niemi *et al., Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. Pol. 1155 (1990); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights*, 92 Mich. L. Rev. 483, 536-59 (1993).

[129] See Colo. Const. art. V, § 47(1).

[130] Daniel D. Polsby & Robert D. Popper, *Partisan Gerrymandering: Harms and a New Solution* (The Heartland Institute, Heartland Policy Study No. 34, 1991).

[131] *See* Ariz. Indep. Redistricting Comm'n, Reporter's Transcript of Proceedings, Public Session, at 164 (Feb. 7, 2004), *available at* http://www.azredistricting.org/Meetings/PDF/AIRCTranscriptsPublicSession2-07-04.pdf; Ariz. Indep. Redistricting Comm'n, Definitions, *at* http://www.azredistricting.org/?page=definitions (last visited Feb. 18, 2008).

[132] Ernest C. Reock, Jr., *A Note: Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. Pol. Sci. 70 (1961).

[133] This test was a part of the compactness measure used in Iowa until 2007. *See* Iowa Code §42.4(4)(c) (2006). In 2007, Iowa replaced the population-dispersion test with a measure of total perimeter. *See* 2007 Ia. Legis. Serv. ch. 78, § 6 (West) (S.F. 479).

[134] Iowa Code §42.4(4).

[135] Colo. Const. art. V, § 47(1).

[136] *See* Ariz. Indep. Redistricting Comm'n, Reporter's Transcript of Proceedings, *supra* note 131, at 164; Ariz. Indep. Redistricting Comm'n, Definitions, *at* http://www.azredistricting.org/?page=definitions (last visited Feb. 18, 2008).

[137] *See* Mich. Comp. L. §§ 3.63(c)(vii), 4.261(j).

[138] *See* League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2617-19 (2006).

[139] That said, a district comprising several population centers connected by a thin strip of highway may be very easy to travel around, but will seldom be very compact.

[140] *See, e.g.*, Bruce E. Cain *et al.*, Competition and Redistricting in California: Lessons for Reform 8-9, 26 (2006) (showing city boundaries of Bakersfield and Fresno, California), *at* http://swdb.berkeley.edu/redistricting_research/Competition_&_Redistricting.pdf.

[141] *See infra* text accompanying note 157.

[142] *See, e.g.*, Altman, *supra* note 86, 1000-04, 1006-07.

[143] Miller v. Johnson, 515 U.S. 900, 916 (1995).

[144] If the races are not all the same within one precinct (and in many precincts, they are not), voters in different districts but voting at the same precinct will vote different ballots.

[145] The Shape of Representative Democracy: Report of the Redistricting Reform Conference, Airlie, Va., at 12 (2005), *available at* http://www.campaignlegal-center.org/attachments/1460.pdf. *But see* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?,* 33 U.C.L.A. L. Rev. 1, 29-30 (1985) (suggesting that towns split between districts might be able to command the attention of multiple legislators, rather than simply one).

[146] *See, e.g.*, The Reform Institute, Beyond Party Lines: Principles for Redistricting Reform 16 (2005).

[147] Me. Rev. Stat. tit. 21-A, § 1206-A.

[148] Some have argued that a community of interest can be based on a "media market," the geographic area covered by a specific group of local broadcast television stations. *See, e.g.*, Diaz v. Silver, 978 F.Supp. 96, 123-24 (E.D.N.Y. 1997); *see also* Nielson Co., Local Television Market Universe Estimates (2008) (listing the media markets), *at* http://tinyurl.com/2jbn4j.

[149] *See, e.g.*, The Reform Institute, *supra* note 146, at 15.

[150] *See* U.S. Census Bureau, Census Tracts and Block Numbering Areas, *at* http://www.census.gov/geo/www/cen_tract.html; Sam Hirsch, A Model State Constitutional Amendment to Reform Redistricting (2006), *at* http://tinyurl.com/33s46v.

[151] Less prominent statewide races – like state treasurer or comptroller – are even better means to predict the voters' underlying party preference, because individual candidates tend to be less well known. However, for the same reason, fewer voters cast ballots for these "downballot" offices. *See* Michael P. McDonald, *Redistricting and Competitive Districts, in* The Marketplace Of Democracy 222, 224 (Michael P. McDonald & John Samples eds., 2006).

[152] For a discussion of the various measures of the underlying partisanship of a district, see Simon Jackman *et al., Measuring District Level Partisanship with Implications for the Analysis of U.S. Elections*, 70 J. Pol. ___, *at* *3-7 (forthcoming 2008), *available at* http://jackman.stanford.edu/papers/download.php?i=0.

[153] "**Stacking**" is a fourth method used to make it easier for one party to win, when the jurisdiction permits winner-take-all elections of multiple representatives from one district. Stacking is the act of swallowing substantial minority populations in bigger, multi-member, winner-take-all districts; although these voters might have been able to control a smaller single-member district, their votes will be ineffective in the larger population.

[154] For simplicity's sake, these illustrative maps assume that every individual is also an active voter. In reality, those drawing the lines take into account citizenship, registration, and turnout rates in order to estimate the partisan impact of any particular decision.

[155] These examples, of course, assume that individuals reliably follow their overall partisan preference in voting for particular legislators. In reality, voters vote for individual candidates, and though partisan preference is still the strongest predictor of how citizens vote in any given election, a candidate's personal qualities or campaign tactics or policy platform or any number of other factors might cause someone to cast a ballot for a candidate across party lines.

[156] *See* Gary King & Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 Election L.J. 2 (2007).

It is important to distinguish **partisan bias** from **responsiveness**. Partisan bias is a measure of the extent to which plans favor a particular party consistently over time, so that the party wins more seats with a certain percentage of the vote than its opposing party would. For example, if the Democrats are likely to win 60% of the seats with 53% of the votes, but the Republicans are likely to win only 55% of the seats with 53% of the votes, the plan would be said to have partisan bias.

In contrast, responsiveness is the measure of the difference between seats and votes: whether any party with 51% of the votes could expect to win 51% of the seats, or 53% of the seats, or 60% of the seats; and whether winning 1% more votes would result in 1% more seats, or 2% more seats, or 5% more seats. A plan in which either party is likely to win 70% of the seats with 51% of the votes has no partisan bias, but is very "responsive." In many ways, responsiveness refers to the degree to which districts are drawn with internal partisan balance: the degree to which individual districts are "competitive."

The two measures address two different ways in which the fairness of election outcomes can be judged based on party. Partisan bias addresses a party's chances that, over time, it will have a structural advantage, making it easier for that party than for its rivals to gain legislative seats based on a given level of support. Responsiveness addresses the degree to which small changes in electoral sentiment translate to clear changes in the overall legislative composition.

[157] Grofman & King, *supra* note 156, at 21-30; Sam Hirsch, *The United States House of Unrepresentatives*, 2 Election L.J. 179, 212 (2003).

[158] FairVote, *Reforms to Enhance Independent Redistricting* (2007), *at* http://www.fairvote.org/media/pep/redist_reform_enhance_0506.pdf.

[159] *See, e.g.*, Persily, *supra* note 73, at 1158; Hirsch, *supra* note 157, at 211-12. *See also* James A. Gardner, *What Is "Fair" Partisan Representation, and How Can It Be Constitutionalized?*, 90 Marq. L. Rev. 555, 565-82 (2007) (discussing an inevitable conflict between the effort to achieve partisan fairness and the effort to divide states into territorial districts).

[160] *See, e.g.*, Hirsch, *supra* note 157, at 192-96.

[161] When minority voters are "packed" into a majority-minority district, leaving fewer minorities in the surrounding areas, the effect is sometimes known as "**bleaching**." The extent of "bleaching", and the degree to which it is responsible for broader political trends, is hotly contested. *See, e.g.*, Hair & Karlan, *supra* note 113, at 25.

[162] *See* Altman, *supra* note 86, at 1000-06; Lowenstein & Steinberg, *supra* note 145, at 23-27.

[163] *See, e.g.*, 29 Del. Code § 804 (districts may "not be created so as to unduly favor any person or political party"); Haw. Const. art. IV, § 6 ("No district shall be so drawn as to unduly favor a person or political faction."); Idaho Code § 72-1506 ("Counties shall not be divided to protect a particular political party or a particular incumbent."); Iowa Code 42.4(5) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator . . . or other person or group."); Or. Stat. § 188.010 ("No district shall be drawn for the purpose of favoring any political party, incumbent legislator or other person."); Wash. Const. art. II, § 43 (districts "shall not be drawn purposely to favor or discriminate against any political party or group."). *See also* Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (refusing to approve a deviation from equal population justified by partisan gerrymandering).

[164] Davis v. Bandemer, 478 U.S. 109 (1986); Vieth v. Jubelirer, 541 U.S. 267, 306-317 (2004) (Kennedy, J., concurring in the judgment); League of United Latin American Citizens v. Perry, 126 S. Ct. 2594, 2607 (2006).

[165] Grofman & King, *supra* note 156, at 13-14; Hirsch, *supra* note 157, at 210.

[166] The graphical format for presenting these hypothetical districts is indebted to Michael McDonald; *see, e.g.*, McDonald, *supra* note 151, at 231.

[167] Gary C. Jacobson, *Competition in U.S. Congressional Elections, in* Marketplace Of Democracy 27, 43-44 (Michael P. McDonald & John Samples eds., 2006).

[168] State Legislative Nominees, Ballot Access News (Richard Winger ed., 2006), *at* http://www.ballot-access.org/2006/110106.html#10.

[169] *See* Gary C. Jacobson, *Referendum: The 2006 Midterm Congressional Elections*, 122 Pol. Sci. Q. 1, 23 (2007).

[170] For more discussion on the limits of primaries in producing meaningful competition, particularly where incumbents are concerned, see Stephen Ansolabehere *et al., The Decline of Competition in U.S. Primary Elections, 1908–2004, in* Marketplace Of Democracy 74 (Michael P. McDonald & John Samples eds., 2006).

[171] *Cf.* John D. Griffin, *Electoral Competition and Democratic Responsiveness*, 68 J. Pol. 911 (2006) (finding that competitive districts produce legislators who are more responsive to slight changes in the ideological leanings of the district).

[172] *See, e.g.*, Thomas E. Mann, *Polarizing the House of Representatives: How Much Does Gerrymandering Matter?, in* 1 Red And Blue Nation? 263, 274-79 (David W. Brady & Pietro S. Nivola eds., 2006) (noting a pull toward the center in competitive districts, but also finding substantial partisan differences, even in these districts); Robert S. Erikson & Gerald C. Wright, *Voters, Candidates, and Issues in Congressional Elections, in* Congress Reconsidered 132, 150-51 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1997) (same).

[173] Even if competitive districts were better able to produce competitive elections, some commentators have questioned the normative value of competitive elections themselves. *See, e.g.*, Thomas L. Brunell, Redistricting and Representation (2008); Justin Buchler, *The Statistical Properties of Competitive Districts*, 40 PS: Pol. Sci. & Pol. 333 (2007).

[174] *See, e.g.*, Cain *et al., supra* note 140, at 11.

[175] The fact that incumbents fare better in elections than challengers, all else being equal, is well documented, but there is ample debate about the cause. *See, e.g.*, Jamie L. Carson *et al., Candidate Quality, the Personal Vote, and the Incumbency Advantage in Congress*, 101 Am. Pol. Sci. Rev. 289, 290-91 (2007); Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections*, 1 Election L.J. 315 (2002); Stephen Ansolabehere *et al., Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage*, 44 Am. J. Pol. Sci. 17 (2000); Gary W. Cox & Jonathan N. Katz, *Why Did the Incumbency Advantage in U.S. House Elections Grow?*, 40 Am. J. Pol. Sci. 478 (1996).

[176] *See, e.g.*, Cain *et al., supra* note 140, at 4.

[177] *See, e.g.*, Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 Am. J. Pol. Sci. 35 (2000); Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict within the American Electorate*, 58 Pol. Res. Q. 219, 220-21 (2005); Daniel H. Lowenstein, *Competition and Competitiveness in American Elections*, 6 Election L. J. 278, 282 (2007). Some believe that increasing polarization is an effect rather than a cause: voters are less inclined to cross party lines not because the voters are polarized, but because the parties and candidates have become more polarized. *See, e.g.*, David C. Kimball, *A Decline in Ticket Splitting and the Increasing Salience of Party Labels, in* Models Of Voting In Presidential Elections 161 (Herbert F. Weisberg & Clyde Wilcox eds., 2003); *see also* Morris P. Fiorina, Culture War? The Myth Of a Polarized America (2005). Whichever came first, it seems likely that the voter and party polarization trends reinforce each other.

[178] *See, e.g.*, Cain *et al., supra* note 140, at 5, 24, 26.

[179] *See, e.g.*, McDonald, *supra* note 151, at 240-41 (discussing the potential downsides of maximizing competition but explaining the potential to draw some competitive districts).

[180] Ariz. Const. art. IV, pt. 2, § 1(14)(F); Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843 (Ariz. Ct. App. 2005). Washington and Wisconsin also promote competitive districts, but not in any particular priority order: in Washington, the redistricting commission "shall exercise its powers to provide fair and effective representation and to encourage electoral competition," Wash. Rev. Code § 44.05.090, and in Wisconsin, the legislature declared that among other objectives, it gave due consideration to "competitive legislative districts." Wis. Stat. § 4.001(3).

[181] *See, e.g.*, Larios v. Cox, 300 F. Supp. 2d 1320, 1329-30 (N.D. Ga. 2004) (describing such an attempt in Georgia). In other cases, states will draw districts specifically to avoid pairing any two incumbents; this practice has been specifically approved by the Supreme Court. *See* Bush v. Vera, 517 U.S. 952, 964 (1996).

In a few circumstances, external circumstances will *require* two incumbents to run against each other; for example, if the population drops in a state with 30 representatives, so that the state receives 29 representatives after the next redistricting, unless an incumbent representative retires, at least two incumbents will be pitted against each other in vying for the remaining 29 seats.

[182] Indeed, in 2004, an independent Special Master acting on federal court orders drew state legislative districts in Georgia without any information as to the location of candidates' homes, and ended up pairing several senior minority incumbents in a way that might have violated the Voting Rights Act. When the effect was called to his attention, the Special Master redrew the district plan to avoid these unintended consequences. *See, e.g.*, Br. Amicus Curiae of Georgia Legislative Black Caucus, Larios v. Cox, No. 1:03-CV-693-CAP (N.D. Ga. 2004) (No. 197).

Likewise, in Iowa, where the advisory commission may not consider the address of any incumbent, the commission's first plan in 2001 paired 50 incumbents out of 100 in the state House, and 20 incumbents out of 50 in the state Senate. That plan was rejected by the legislature. Editorial, *Back to Plan A*, Des Moines Register, June 2, 2001, at 8A.

[183] *See generally* Bruce E. Cain & Karin Mac Donald, T*he Implications of Nesting in California Redistricting* (2007), *at* http://tinyurl.com/322cxx.

[184] Ariz. Const. art. IV, pt. 2, § 1(1).

[185] Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413, 1502 (1991); Hair & Karlan, *supra* note 113, at 37-38.

Even when multi-member districts are coupled with favorable voting rules, single-member districts drawn for minorities might still provide greater benefit for minority populations in at least one circumstance: when there is a substantial difference between the voting population and the total population. Because districts are generally apportioned based on the total population, a minority opportunity district with a substantial portion of nonvoters may allow relatively fewer minority voters to elect the representative of their choice. *Cf.* Lowenstein & Steinberg, *supra* note 145, at 50-51 (discussing the difference between voter population and total population in areas with high concentrations of minorities). For example, in a district of 100 people where everyone votes and the votes are entirely polarized, 51 minority voters will be needed to elect a representative of choice; if, in that same district, 20 people do not vote, 41 minority voters can establish control. Unless the nonvoting population is both large and spread out, however, multi-member districts will tend to dilute this effect. Whether one system or the other will benefit the minority population in any particular instance will depend on the size and dispersion of both the minority community and the group of nonvoters.

[186] *See* Ill. Const. Of 1870, art. IV, § 7; Ill. Const. art. IV, § 2 (1970).

[187] Following Professors Bernard Grofman and Howard Scarrow, we aim to temper the worst excesses of "partisan lust" and individual self-interest, without "blindfold[ing our] cartographers." Bernard Grofman & Howard A. Scarrow, *Current Issues in Reapportionment*, 4 L. & Pol'y Q. 435, 444 (1982).

[188] The Shape of Representative Democracy, *supra* note 145, at 10-11, 20-22.

[189] *See* ABA H. Delegates, Daily Journal: 2008 Midyear Meeting, Report No. 102A (2008), ***at*** *http://www.abanet.org/leadership/2008/midyear/docs/Daily_Journal.doc*; ***see also*** A.B.A. Sec. Admin. L. Reg. Prac., Report to the House of Delegates, No. 102A (2008), ***at*** *http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredtwoa_102A_FINAL.doc*.

[190] The Shape of Representative Democracy, *supra* note 145, at 9.

[191] Ari Weisbard & Jeannie Wilkinson, Drawing Lines: A Public Interest Guide to Real Redistricting Reform 14 (2005), ***available at*** *http://www.demos.org/pubs/caredisreport.pdf*.

[192] Hirsch, *supra* note 150.

[193] Because "employment" by the legislature may not include consultants who, for all practical purposes, work for the legislature or individual legislators, it may be more effective to limit commission membership to those who have not earned a majority of their income from the legislature, or from individual legislators or candidates.

[194] Weisbard & Wilkinson, *supra* note 191, at 17; The Reform Institute, *supra* note 146, at 8.

[195] Michael P. McDonald, Enhancing Competitiveness in Redistricting, *at* http://elections.gmu.edu/enhancing.htm (last visited Mar. 1, 2008).

[196] Weisbard & Wilkinson, *supra* note 191, at 7; Hair & Karlan, *supra* note 113, at 23.

[197] Maine, for example, instructs that its commission "shall recognize that all political subdivision boundaries are not of equal importance and give weight to the interests of local communities when making district boundary decisions." Me. Rev. Stat. tit. 21-A, § 1206-A.

[198] Hirsch, *supra* note 150.

[199] Weisbard & Wilkinson, *supra* note 191, at 11.

[200] Navajo Nation v. Ariz. Ind. Redistricting Comm'n, 230 F. Supp. 2d 998, 1003 (D. Ariz. 2002).

[201] Persily, *supra* note 73, at 1163.

[202] In any event, litigants are still able to choose to litigate either in the state's Supreme Court or in federal court.

[203] S. 5940, 2007 Leg., 230th Sess. (N.Y. 2007).

[204] In some proposals, this is expressed explicitly, by requiring the affirmative vote of the tiebreaker in order to pass a plan. In other proposals, this is instead expressed by giving the tiebreaker more votes than the sum of the remaining commission members.

[205] *See, e.g.*, Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. Colo. L. Rev. 1029, 1031 (2001).

[206] FairVote, *Reforms to Enhance Independent Redistricting* (2007), *at* http://www.fairvote.org/media/pep/redist_reform_enhance_0506.pdf.

[207] The proposition – now codified in Arizona's state constitution – provided that "[t]o the extent practicable, competitive districts should be favored," but only "where to do so would create no significant detriment to" five other goals of higher priority. Ariz. Const. art. IV, pt. 2 § 1; *see also* Ariz. Minority Coalition for Fair Redistricting v. Ariz. Ind. Redistricting Comm'n, 211 Ariz. 337, 352-54 (App. Div. 1 2005).

[208] *Id.*

[209] *See, e.g.*, League of Women Voters *et al.*, Building A National Redistricting Reform Movement: Redistricting Conference Report 23 (2006), *at* http://www.campaignlegalcenter.org/attachments/1641.pdf.

[210] *Id.* at 6-7, 24.

[211] *Id.* at 7, 13.

[212] Michael P. McDonald, *Regulating Redistricting*, 40 PS: Pol. Sci. & Pol. 675, 677 (2007).

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League of Women Voters Minnesota
Redistricting Briefing Paper

LEAGUE OF WOMEN VOTERS MINNESOTA

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Table of Contents

I. Background

a. LWV Position on Redistricting

The League of Women Voters believes in representative government and in the individual liberties established in the Constitution of the United States.

> LWVMN seeks to promote an open governmental system that is representative, accountable and responsive.
>
> LWVMN supports timely redistricting based substantially on population and affecting all state and local governmental bodies. It further supports definite procedures to ensure prompt redistricting by the Legislature or by a reapportionment commission.

b. Definition

i. What is Redistricting?

Simply put, "after the number of legislators is set, redistricting is the process of redrawing the lines of each legislative district."[1] Michael McDonald, of George Mason University, notes that "through redistricting, political parties seek to control government, incumbents seek job security, and minority groups seek representation."[2]

The first step in redistricting is the census; the next census will begin in March 2010. By law the final population numbers must be reported to the President in December of 2010.[3] The President passes this information, along with a formula to determine how to appropriate the seats, to Congress. The apportionment process requires:[4]

- The appointment population of each state
- The number of Representatives to be allocated among the states
- A method to use for the calculation

The number of Congressional seats for each state is determined by the results of the census. The total number of U.S. House of Representative members is 435 seats.[5] In 1960, the Supreme Court ruled that districts must be close to the same size in population.[6] Based on this ruling, district lines need to be redrawn to ensure that each Congress member represents a similar number of people. According to Tom Gillaspy, Minnesota State Demographer, if Minnesota maintains its eight (8) congressional districts, there will need to be major changes in district boundaries to ensure equal population distribution in all of the congressional districts. District 6 has 99,000 more people than the other districts. Also, District 2 will have to get smaller.[7]

In Minnesota, the task of redrawing districts falls to the Minnesota Legislature.[8] The Governor may veto the Legislature's redistricting plan.[9] Three of the last four (1971, 1981, and 2001) redistricting plans were determined by the courts because the Legislature and/or the governor could not agree.[10]

ii. Gerrymandering

Gerrymandering typically has negative connotations. In the media and the general public, gerrymandering is viewed as manipulation of borders of districts "for *some* sort of advantage."[11] Gerrymandering can be partisan or bi-partisan. Partisan gerrymandering occurs when the political party in power during the redistricting process draws lines that will benefit that party.[12] Partisan gerrymandering is blamed for many problems with the current system of redistricting including: reducing competitiveness, increasing partisan rancor, contributing to the dilution of minority voters, and splitting communities of interest.[13,14] Bi-partisan gerrymandering happens when members of all parties work together to protect those who are currently elected.[15]

c. Principles of Redistricting

i. Contiguousness, Population Equality, and Compactness

Contiguousness, population equality, and compactness are considered traditional redistricting principles by the Supreme Court.[16] According to these principles all district boundaries must be drawn using one line only (contiguousness), the population of each district should be almost equal (population equality), and the districts must be relatively compact in their size and shape (compactness).[17] In addition, a 1962 Supreme Court ruling established the principle of "one person, one vote". In the case of Congressional districts the Supreme Court ruled that "one person, one vote" means congressional districts must be exact to "absolute mathematical equality."[18]

Redistricting issues arise more frequently with the remaining principles: minority representation, communities of interest, and competitiveness. As the interpretation is more subjective, these are more complicated principles to implement.[19,20]

ii. Minority Representation

The Voting Rights Act of 1965 provides the overriding law on the issue of minority representation in congressional and legislative districts. Section 2 of the Voting Rights Act ensures that everyone has the right to vote regardless of race, color, language, etc. Section 2 prohibits the practice of "vote dilution" whereby redistricting is used to separate minority communities and thus diminish their voting power.[21]

iii. Communities of Interest

The communities of interest principle states that it is beneficial to keep communities with similar economic, cultural, ethnic or political concerns together. For example, a farming district has more in common with other farming districts than it has with a large city nearby. Keeping the urban, suburban, and exurban populations in separate districts is another example of communities of interests. This principle is not well-defined and can result in odd shaped districts. On the other hand, it makes sense to keep communities which share similar problems together so that they may have representatives who understand those issues.

iv. Competitiveness

The principle of competitiveness states that when considering the districts, line-drawers should draw lines that will make the general election close. "Usually, this means trying to group voters so that the election returns are likely to be 55% to 45%, or closer".[22] Like the communities of interest principle, this principle is difficult to implement. A 2007 survey conducted by the Pew Research Center, in association with the Brookings Institution and the Cato Institute, found that most Americans did not have a consistent understanding of whether their districts were competitive[23]. As a society we have a wide range of understandings of what constitutes competitiveness in elections.

II. Redistricting Reform Proposals

In Minnesota, the state Legislature produces a plan that the governor may either veto or approve. If the Legislature and/or the governor cannot agree, the courts determine the final redistricting plan. This has happened in three of the last four decades. A word of caution when examining and advocating for redistricting plans: there is no one objective solution. Three reform options being considered and evaluated by citizen groups and lawmakers in Minnesota are: Independent Commissions, Iowa Model, and the Carlson-Mondale Plan.

a. Independent Commissions

An independent commission is currently used by six (6) states for federal redistricting and by a dozen (12) states for state legislative redistricting.[24,25] In 1972, commissions drew eight (8) redistricting maps. This number increased to fifty-four (54) drawn in 2002.[26] Who sits on an independent commission, how they are selected, and what authority they have varies from state to state. In Arizona, the commission consists of five members including two Democrats, two Republicans, and one Independent.[27] They must not have held an elected or partisan office.[28] The model also follows strict, defined sets of requirements and the members operate under a goal-oriented, process-based structure.[29]

b. Iowa- Nonpartisan Legislative Support Staff

Unique among redistricting formats is the Iowa model. There, the Legislative Services Agency (LSA), a nonpartisan legislative support staff chosen by the majority and minority leaders, draws up the redistricting map.[30] The plan is sent to the legislature for approval and eventually the governor's signature or veto. The Legislature may make changes to the maps after rejecting the second map.[31] Although the Legislature still holds considerable power, McDonald notes that the well-defined criteria under which the staff agency makes its maps is valuable and could be replicated by other states.[32] The Iowa model attempts to take the overt partisan battles out of the hands of those who are making the maps. If the maps are made with well-defined criteria and drawn by people who claim to use a nonpartisan approach to drawing them, then the Iowa plan is a good first, but potentially cumbersome, step toward removing some partisan influences.

c. Carlson-Mondale Plan

Former Republican Governor Arne Carlson and former Democrat Vice President Walter Mondale have proposed a plan to have an independent commission take over the process

of redistricting in Minnesota. In addition to support from former speakers of the House from both parties and along with Thomas E. Mann of the Brookings Institution, and Norm Ornstein of the American Enterprise Institute,[33] this plan is receiving significant attention as Minnesota approaches the 2010 Census and the upcoming redistricting. The plan proposes, "a nonpartisan, independent, five-member commission made up of retired appellate court judges."[34] Four of the retired judges would be appointed, one each by the majority and minority leader of the Senate and one each by the majority and minority leader of the House. The four judges would then select the fifth judge.[35] The commissioners would produce two or three redistricting plans that the Legislature could reject, but not modify.[36]

Senator Larry Pogemiller and Senator Ann Rest introduced the Mondale-Carlson proposal to the Minnesota Senate. The bill (S.F. No. 182) would establish the principles that should be used in drawing the district boundaries including guidelines on equal population, contiguousness, compactness, minority representation, communities of interest, and political competitiveness.[37]

In his analysis of the bill, Peter S. Wattson, Minnesota Senate Counsel, explained the process of submitting and approving the plans. The commission would submit to the Legislature, by April 30, for its approval but not modification, the plan that it had created. If the first plan were not approved, the commission would have two (2) weeks to submit a new plan that the Legislature could approve or deny. If the second plan were rejected by the Legislature, the commission would submit a third and final plan that the Legislature could approve, deny or modify.[38] As with other states' commissions, this proposed commission would not have the final say in the map. The Legislature would maintain its ability to reject the first two plans and then make its changes on the third submission.

The Minnesota Democracy Network Steering Committee and Justin Levitt of the Brennan Center for Justice at New York University Law School have concerns about this bill in its existing format. Their recommendations for alterations are that:[39]

- A timeline be added to the bill so that a plan is adopted in a current session and not be drawn into a later session of the Legislature. This recommendation is in line with LWVMN support of timely and prompt redistricting.
- Instead of a fifth judge, the four judges select three capable members of the public to ensure representation of the geographic and demographic diversity of the state.
- All political and demographic data be made available to the public, in addition to the three public hearings put forth in the bill.
- There be a thirty-day period for public comment and these comments be considered in the first plan.

LWVMN does not support mid-decade redistricting. Redistricting should be done only when new census data has been distributed.

III. Summary

The issue of redistricting will receive more and more public attention in the next year for two reasons. First, the 2010 census will determine whether Minnesota retains or loses its eighth Congressional representative. In addition, the census will determine the need to alter district boundaries within the state in order to equalize populations. As described above, there is no perfect way to approach redistricting. Educating the public and keeping this issue front of mind are the best ways to attain LWVMN's goals of representative, accountable and responsive government.

[1]Levitt, Justin with Bethany Foster. A Citizen's Guide to Redistricting. (New York, NY: Brennan Center for Justice at NYU School of Law, 2008), page 6. Available at http://www.brennancenter.org/page/Democracy/2008redistrictingGuide.pdf .
[2] McDonald, Michael P. "A Comparative Analysis of Redistricting Institutions in the United States, 2001-02". State Politics and Policy Quarterly, Volume 3, No. 4 (Winter 2004), page 371.
[3] U.S. Census Bureau. "2010 Census Timeline: Key Dates". Washington D.C. Available at http://2010.census.gov/2010census/about_2010_census/013279.html
[4] U.S. Census Bureau. Apportionment of the U.S. House of Representatives. Washington D.C. Available at http://www.census.gov/population/www/censusdata/apportionment/files/apportn.pdf
[5] Apportionment of the U.S. House of Representatives.
[6] Levitt, Justin. 16.
[7] Gillaspy, Tom. "Redistricting". Audio recording of presentation. Woodbury Senior High School. Woodbury, MN. 2 March 2009.
[8] For a compressive overview of Minnesota law on the redistricting, see "Redistricting Law 2010". Prepared by National Conference of State Legislatures. Page 209-211. Available at http://www.senate.mn/departments/scr/redist/Red2010/Redistricting_Law_2010.pdf
[9] Levitt, Justin. 31.
[10] Moe, Roger. "Redistricting". Audio recording of presentation. Woodbury Senior High School. Woodbury, MN. 2 March 2009.
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[39] The Minnesota Democracy Network Steering Committee consists of Mike Dean, Director of Common Cause, Dan McGrath, Executive Director of Take Action Minnesota, Marcia Avner, Public Policy Director of the Minnesota Council of Nonprofits, and Keesha Gaskins, Executive Director of the League of Women Voters Minnesota.

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The Impact of Redistricting in YOUR Community

A GUIDE TO REDISTRICTING

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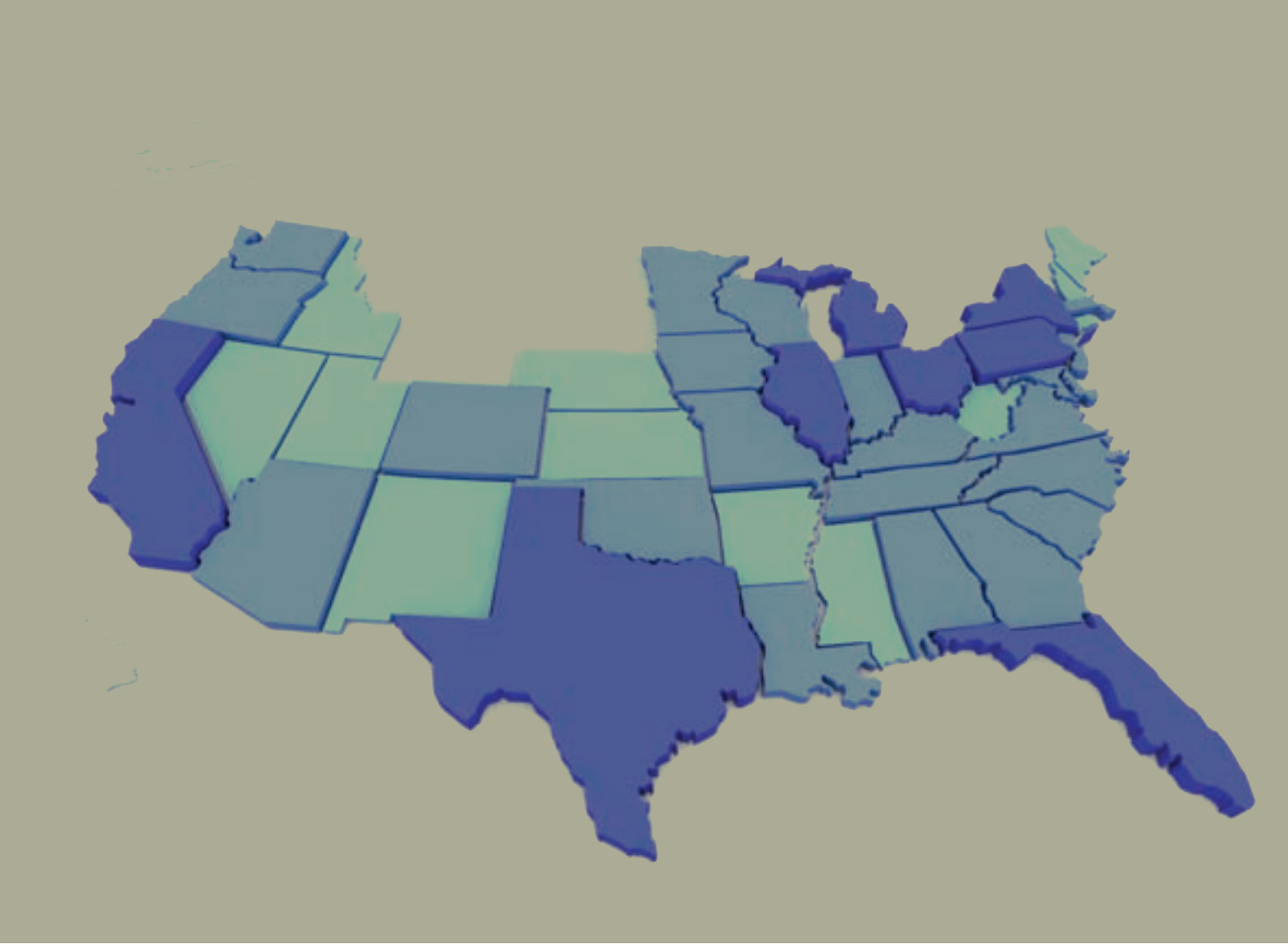

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THE IMPACT OF REDISTRICTING IN YOUR COMMUNITY

A Guide to Redistricting

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Collaborative Redistricting Guide

By the year 2011, America's demographics will have greatly changed and we will have become a much more diverse nation. You've probably noticed these changes taking place in your neighborhoods and schools. African Americans, Asian Americans, Latinos, Native Americans, Native Hawaiians, and Pacific Islanders make up at least one-half of the residents in one out of every ten of the nation's counties.[1]

The changing face of America raises important questions throughout our society, especially in electoral politics. Are minorities fairly represented at all levels of politics? Do we have an equal voice and an equal opportunity to elect representatives who consider our needs and interests?

The process called "redistricting" will determine how our local school board, city council, state legislative and congressional districts are drawn. How can our communities participate? How can we ensure that our interests are being heard and represented by our elected officials? How can we ensure that the voting strength of our communities is not weakened? What are the important factors to consider in redistricting?

This handbook will answer these questions by laying out the importance of getting involved with the redistricting process, and providing resources and contact information.

The Legal Framework for Redistricting

In this handbook, you will find information about the legal issues involved in redistricting, including information about how recent U.S. Supreme Court decisions impact your redistricting efforts. This handbook is not intended to be a complete summary of redistricting law. It is only intended to provide a basic understanding of the fundamentals of redistricting laws as they currently exist.

Community Concerns Related to Redistricting

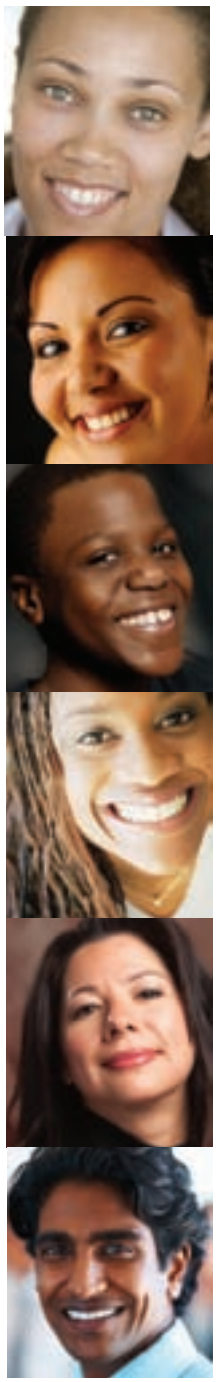
You will also find information that will help you get involved in your local, state and congressional redistricting processes. You will obtain guidance for determining where lines for districts should be drawn, analyzing socioeconomic data on your communities to see if communities of interest exist, gathering historical data on minority communities, and using training materials to educate yourself and your community about the redistricting process.

The Importance of the Voting Rights Act

Finally, you will find analyses that explore issues relevant to our communities. For example, how does the Voting Rights Act help ensure that voters receive language assistance to vote? How is the redistricting process influenced by the requirements of the Voting Rights Act?

Additional issues addressed in this handbook include the redistricting reform movement and how it affects our ability to protect minority voting rights, as well as the role of noncitizens in the redistricting process. You will also find a handy appendix that includes practical information, such as a glossary of redistricting terms and important information about the deadlines and procedures that apply in your state during the redistricting process.

Our hope is that this handbook will encourage and assist your community in participating in this important event of redistricting. Redistricting following the census will determine political representation for the decade to come, and we must ensure that our communities' voices are heard, their needs addressed, and their rights protected.



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Chapter 1

Frequently Asked Questions About Redistricting

How is the census connected to redistricting?

The federal government counts how many people reside in the United States once every ten years for reapportionment, among other purposes. The census count happens at the beginning of each decade. The accuracy of the census count is very important as the distribution of federal funds at the local level and the distribution of political power at all levels of government depend on it.

The census is also important because redistricting is based on the population data collected by the decennial census. During redistricting, the political lines are redrawn so that each district is equal in population size based on the decennial census data.

After the 2010 Census, most of the census data relevant to redistricting will be publicly available by April of 2011. Some redistricting data may be released later in 2011. The U.S. Census Bureau will release all other data after 2012. *(See* Chapter 7 for more information about the link between the census and redistricting.)

What is the redistricting process?

Redistricting is the process by which census data is used to redraw the lines and boundaries of electoral districts within a state. This process affects districts at all levels of government — from local school boards and city councils to state legislatures and the United States House of Representatives.

Is there a difference between reapportionment and redistricting?

Yes. Reapportionment and redistricting are two different concepts, but many people mistakenly refer to them as though they mean the same thing.

Reapportionment is the allocation of the 435 seats in the U.S. House of Representatives (House) to each state and does not involve map drawing. The 435 House seats are divided among the 50 states based upon each state's population as determined by the census. The larger the state population, the more congressional representatives (and districts) the state will be allocated.

Redistricting, on the other hand, involves map drawing—the actual division or drawing of the district boundaries for United States congressional representatives and state or local officials elected within a state. Redistricting can occur at any level of

government. Even if a state does not gain or lose a seat during reapportionment, it must redraw districts to make them equal in population size.

Why is the redistricting process important?

How and where districts are drawn in your state will often determine if your community can elect representatives of choice to sit on your local school board, city council, state legislature and Congress. It can also influence whether or not your elected officials respond to your needs, such as ensuring equal educational opportunities or health care for everyone.

When does the redistricting process take place?

Redistricting takes place every ten years, soon after data from the census is received. Each state will receive census information regarding the population, age and race of its residents. However, different states will have different timelines for finishing the redistricting process. (*See* Appendix 2, Redistricting in Your State).

Are there any examples of redistricting plans harming minority voters?

Minority voters have frequently faced discrimination in voting during the redistricting process. The following examples summarize some of the most egregious acts that denied opportunities for minority voters to elect a candidate of choice in recent redistricting cycles.

African Americans

During the redistricting process in the State of Louisiana that followed the 2000 Census, Louisiana adopted a discriminatory plan for its State House of Representatives that worsened the position of Black voters.

The results of the 2000 Census showed that the African-American population in Louisiana increased in real numbers and as a percentage of the overall state population. In January of 2001, however, the Louisiana legislature created a redistricting plan that completely eliminated a majority-minority district in the New Orleans area where there was no Black population loss according to the 2000 Census. The proposed redistricting plan also reduced the percentage of African-American voters in several other districts where African-Americans had a reasonable opportunity to elect their candidate of choice.

With regard to the proposed elimination of the New Orleans district, the State admitted that it eliminated the district in a conscious effort to limit African-American voting strength in the New Orleans area and to increase electoral opportunities for white voters. In the state's view, white voters were entitled to proportional representation in Orleans Parish, though proportionality did not exist for African-Americans elsewhere in the state or under the Voting Rights Act.

Notwithstanding this discrimination, Louisiana sought judicial approval for its reapportionment plan under Section 5 of the Voting Rights Act (*see* chapter 5 for more information) and vigorously argued that its 2001 redistricting plan was valid. On the eve of trial, and after fifteen months of litigation, evidence emerged that the 2001 plan violated the State's own redistricting principles. It was only at that point that the State withdrew the discriminatory redistricting plan and created a new redistricting plan that did not dilute African-American voting strength.

This is only one of many examples of the unlawful exclusion of African-American voters and their representatives from the redistricting process. Most notably, every initial state legislative redistricting plan for the Louisiana House of Representatives has drawn an objection since the Voting Rights Act was passed in 1965.

Asian Americans

Involvement in the redistricting process has been a relatively recent endeavor for Asian Americans. Asian American participation in redistricting began after the 1990 Census. Historically, areas with significant Asian American populations were split into different districts, reducing the voting power of those populations.

In 1992, the riots in Los Angeles took a heavy toll on many neighborhoods, including the area known as Koreatown. It is estimated that the city suffered damages of more than $1 billion, much of it concentrated on businesses operated by Koreans and other Asian immigrants. When residents of these neighborhoods appealed to their local officials for assistance with the cleanup and recovery effort, however, each of their purported

representatives – members of the City Council and the State Assembly – passed the buck, claiming that the area was a part of another official's district. This was because new district lines drawn after the 1990 Census fractured Koreatown. Koreatown, barely over one mile square, was split into four City Council districts and five State Assembly districts, and because Asian Americans did not make up a significant portion of any official's constituency, officials were left with little incentive to respond to the Asian American community.[1]

In Chicago, there was similar fracturing during redistricting efforts. Even though the Asian American population is now nearly 5% of the state's population, and in some neighborhoods, Asian Americans make up around 30% of the population, no Asian American has ever been elected to the Illinois General Assembly or any statewide office, or the Chicago City Council.[2] After the 2000 Census, five Illinois Senate districts were over 10% Asian American; yet, after the lines were redrawn in 2001, only two Senate districts were over 10% Asian American. The 2001 redistricting divided Chicago's Chinatown—a compact community whose members have common ground in terms of history, ethnicity, language, and social concerns—from two Illinois Senate districts into three Senate districts, and from three Illinois House districts into four House districts.[3] In addition to the Chicago Chinatown area, there are several other Asian American communities that have been fragmented by past redistricting, including the area encompassing Devon Avenue, Lincolnwood, and Skokie, which was divided into two different Senate districts, and the Albany Park area in Chicago, which was similarly divided.[4]

Latinos

After the 2001California statewide redistricting, MALDEF challenged the legality of three California districts. MALDEF asserted that two congressional districts had been racially gerrymandered to exclude Latino voters in order to limit the influence of the Latino vote. MALDEF also challenged a state legislative district under the Voting Rights Act because it was not drawn as a majority-Latino district. The court ruled against MALDEF and the districts were allowed to stand.

In 2003, Texas redrew its congressional district boundaries and dismantled the Latino-majority 23rd Congressional District along the U.S.-Mexico border. The incumbent in that district, who was not the preferred candidate of Latinos, faced an increasing threat of removal by the growing Latino electorate in the district. In order to shore up the re-election chances of the incumbent, Texas moved over 100,000 Latinos out of the 23rd Congressional District and reduced the Latino citizen voting age population of the district from 57% to 45%. MALDEF represented Latino voters of Congressional District 23 in a challenge to the redistricting plan and in 2006 won a ruling from the U.S. Supreme Court that Texas had discriminated against Latinos in violation of Section 2 of the federal Voting Rights Act. (*See* Chapter 4 for more information on Section 2.)

How can my involvement in redistricting make a difference for my community?

Your voice and participation in the redistricting process can help ensure that the redistricting plans adopted by your jurisdiction do not harm your community. (*See* Chapter 3 for more detailed information on how you can get involved in the redistricting process.)

[1]Carol Ojeda-Kimbrough, Eugene Lee, & Yen Ling Shek, UCLA Asian American Studies Center, *The Asian Americans Redistricting Project: Legal Background of the "Community of Common Interest" Requirement 6* (2009), *available at* http://www.aasc.ucla.edu/policy/CCI_Final(2).pdf. *See also* Justin Levitt with Bethany Foster, *A Citizen's Guide to Redistricting*, Brennan Center for Justice (July 1, 2008), *available at*, http://www.brennancenter.org/content/resource/a_citizens_guide_to_redistricting/.

[2]*The Voting Rights Act and Other Legal Requirements of Redistricting: Hearing Before the Ill. S. Committee on Redistricting* (2009) (statement by the Asian American Institute), *available at* http://www.aaichicago.org/PDF%20Files/AAI%20Dec%208%202009%20IL%20Senate%20Redistricting%20Committee%20Testimony.pdf.

[3]*Id.*

[4]*Id.*

Chapter 2

Key Redistricting Standards and Concepts

This chapter focuses on key redistricting standards and concepts, and highlights some of the changes in the law over the last decade. It also identifies resources and strategies to help you protect your community's voting rights during the upcoming redistricting cycle.

Who does the redistricting?

After the release of census data, political bodies such as state legislatures, county commissions, city councils and school boards begin the process of redistricting. Usually, each political body redistricts itself. For example, the state legislature is generally responsible for redrawing the lines for congressional districts as well as state house and state senate districts. Likewise, local governments at the county and city level redraw their own district lines.

In certain instances, redistricting is not left to the incumbent politicians, but rather is performed by one or more redistricting commissions. These commissions are discussed in further detail in Chapter 9.

Each state has its own deadlines governing when redistricting must be completed. (*See* Appendix 2, Redistricting in Your State.)

How many people go into a single district?

In the 1960s, the U.S. Supreme Court established the "one person, one vote"[1] rule, one of the most basic principles of redistricting. The rule requires that legislative and congressional districts be of equal population, meaning that each district of the same type must have the same number of people.

The one person, one vote standard for legislative districts may vary by state but the Supreme Court has developed a standard of population equality that requires state and local legislative districts to differ by no more than ten percent from the smallest to the largest, unless justified by some "rational state policy."[2] There is a higher standard of equality, however, for congressional districts. Congressional districts must be virtually equal in population, unless justified by some "legitimate state objective."[3]

The process of redrawing a district, therefore, starts by determining the "ideal" population. In a single-member district plan, the "ideal" population is equal to the total population of the jurisdiction divided by the total number of districts. For example, if a state's population is one million and there are ten legislative districts, the "ideal" population of each district is 100,000. Any amount less or greater than this number is called a "deviation." As stated above, the law allows for some deviations in state and local redistricting plans. However, when redrawing congressional plans, you must strive for the "ideal" population.

Are there any additional federal requirements that govern redistricting?

Jurisdictions must also comply with the federal requirements of the Voting Rights Act during redistricting. A number of states explicitly identify compliance with the Act at the top end of their list of traditional redistricting principles to underscore the importance of complying with this federal law during the redistricting process. Compliance with the Voting Rights Act helps ensure protection of minority voting rights during the redistricting process.

[1] *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).
[2] *See White v. Regester*, 412 U.S. 755 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973).
[3] *See Karcher v. Daggett*, 462 U.S. 725 (1983).

How does the Voting Rights Act impact the redistricting process?

Section 2 of the Voting Rights Act prohibits minority vote dilution. Section 2 provides that a voting practice is unlawful if it has a discriminatory effect. A voting practice has a discriminatory effect if, based on the totality of circumstances, minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Section 2 also prohibits the enactment of redistricting plans (and other voting practices) that were adopted with a discriminatory purpose. Section 2 of the Voting Rights Act is discussed more fully in Chapter 4 of this handbook.

Section 5 of the Voting Rights Act prohibits the enforcement or administration by covered jurisdictions of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first receiving preclearance from the U.S. Department of Justice or the U.S. District Court for the District of Columbia (the federal court in Washington, D.C.). A full discussion of Section 5 is included in Chapter 5 of this handbook.

Why are Voting Rights Act protections important?

During the redistricting process, state and local officials may create districts that fairly reflect minority voting strength, or they may move to dismantle districts that provide minority voters an opportunity to elect candidates of their choice. In the latter case, such action could be based on partisan or incumbency motivations or even a misinterpretation about the role that race can play in redistricting. Being able to discuss Voting Rights Act protections can help position you to advocate, protect, and defend the interests of minority voters from discriminatory decisions during the redistricting process.

What role does race play in redistricting?

Those charged with the responsibility of drawing district lines generally rely upon census data to determine where people live. These data can also be used to show the racial and ethnic composition of an area. Although the Supreme Court's decision in *Shaw v. Reno, 509 U.S. 630 (1993),* prohibits certain uses of race in redistricting, the Voting Rights Act still requires the creation of districts that provide an opportunity for minorities to elect a candidate of choice when certain conditions are met. Race remains a permissible consideration if and when necessary to satisfy a compelling state interest, such as compliance with the requirements of the Voting Rights Act. In addition, states may also voluntarily choose to provide minority voters opportunities to elect a candidate of choice even when the Voting Rights Act does not require them to do so.[4] In fact, race is always a part of the redistricting process and merely being race-conscious or aware of race during the redistricting process is not, by itself, illegal.[5] Indeed, state and local officials must give some consideration to race to help ensure that the redistricting plans they create do not dilute minority voting strength and comply with the requirements of the Voting Rights Act.

The Supreme Court has clearly stated that a redistricting plan will not be held invalid simply because the "redistricting is performed with consciousness of race" or because a jurisdiction intentionally creates a majority-minority district.[6] A plaintiff challenging a majority-minority district for improperly using race to draw the district:

> must show at a minimum that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations. Race must not simply have been a motivation for the drawing of a majority-minority district, but the predominant factor motivating the legislature's districting decision. Plaintiffs must show that a facially neutral law is unexplainable on grounds other than race.[7]

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[4] *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009).

[5] *See United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw*, however, that 'the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.'") (citation omitted) (emphasis in original).

[6] *Easley v. Cromartie*, 532 U.S. 234, 253-54 (2001) (quoting *Bush v. Vera*, 517 U.S. 952, 958 (1996)); A majority-minority district is a district where the minority population is a numerical majority (fifty percent plus one or more) of the population in the district.

[7] *Easley*, 532 U.S. at 241 (citations omitted) (internal quotation marks omitted). Among the "race-neutral districting principles" are "compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests." *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (citing *Shaw*, 509 U.S. at 647).

The Court's decision in *Easley v. Cromartie* clarified the heavy burden on those plaintiffs who argue that the state has relied too heavily on race in creating minority districts where states also base districts on party affiliation.[8] Under *Easley,* when race and partisan affiliation are highly correlated, the plaintiff must also prove that a plan that is more consistent with traditional redistricting criteria and less racially imbalanced would achieve the same partisan balance.[9] Moreover, states and local jurisdictions still have the responsibility to comply with the Voting Rights Act, including creating majority-minority districts to avoid diluting minority voting strength. Even though race can be a factor considered in the redrawing of district lines, it is also particularly important to respect legitimate "traditional redistricting principles" in the process.[10]

What role do communities of interest play in the redistricting process?

A community of interest can be defined in various ways. It can be a neighborhood or community that would benefit from being maintained in a single district because of shared interests, views or characteristics. During redistricting, a community of interest should be kept together within the same district to the extent possible.

For some minority communities, the community of interest approach is a mainstay of their redistricting efforts. This is particularly true for Asian American communities, which are often not large enough in population size to constitute majority-minority districts by themselves. Where Asian American communities are not large enough to constitute majority-minority districts they may be characterized as a community of interest in order to advocate for districts that promote responsive representation by elected officials and protect against the fracturing of their communities. Communities of interest can be multi-racial communities that include Latino, Asian American and/or African American populations.

What are traditional redistricting principles?

In redrawing district boundaries, officials may identify some set of "traditional redistricting principles" to help guide the process in your state or locality. These principles may include compliance with federal requirements such as one person, one vote and the Voting Rights Act. These principles may also include considerations deemed important at the local or state level including preserving cores of districts and respecting natural boundaries.

It is important, however, to ensure that officials are not elevating subjective traditional redistricting principles above compliance with the one person, one vote principle or the Voting Rights Act of 1965. There may be instances where local traditional redistricting principles need to give way to federal requirements such as compliance with the one person, one vote rule or the Voting Rights Act. Indeed, the Supreme Court recently observed that "[i]t is common ground that state election-law requirements . . . may be superseded by federal law."[11]

How can you determine whether traditional redistricting principles are being used to achieve other objectives?

Determining traditional redistricting principles can be done by examining the legislative history and any court decisions on voting issues in your area. It will also be important to determine whether the state has deviated from any of these redistricting criteria in the past to meet other redistricting goals, such as protecting incumbents. For example, if the state has been willing to compromise compactness in order to protect an incumbent in the past, you could ask why the state is unwilling to relax its desire for compactness in order to now meet your community's redistricting goals.

[8] 532 U.S. 234

[9] *Id.* at 258.

[10] Plaintiffs seeking to prove a case under the doctrine outlined in *Shaw v. Reno* must "show[] that race, rather than politics, predominantly accounts for the result." *Easley*, 532 U.S. at 257.

[11] *Bartlett,* 129 S. Ct. at 1239 (2009).

What are some examples of traditional redistricting principles?

1) Compactness and Contiguity
"Compactness" and "contiguity" are terms used to refer to the appearance of a district.

Contiguity is simple to evaluate. A district is contiguous if all of the lines that create it are connected. A district consisting of two or more unconnected areas is not contiguous. Of course, the degree to which all districts in a particular map are contiguous can be limited by natural boundaries.

Measuring compactness is more complex because there is no one particular method for measuring compactness. In some cases, the **appearance and function** of a district may be the appropriate measure of compactness. If an appearance and function analysis is used, those drawing the lines will consider the overall shape of the district, looking to see how tightly drawn the lines are and how smooth the edges are. If the districts drawn are too irregular-looking, it may become a signal to the courts that the lines may have been motivated by a desire to engage in race-based redistricting, which may be held unlawful.[12]

In other cases, a **mathematical formula** may be the best way to measure compactness. There are various methods for calculating the compactness of a district including looking at how the population is distributed within the district, measuring the borders of the district, or evaluating the area of the district.

Many state laws require compactness in redistricting, but fail to define or specify how compactness is determined. If a state fails to define compactness, it can lead to difficulty in determining whether the ultimate map is, in fact, compact.

Both compactness and contiguity are important principles because a map that is not "compact or contiguous" can serve as the basis of a racial gerrymandering lawsuit. The consideration of the compactness of a district may help avoid lawsuits and could also prove helpful in advocating for districts to be drawn in particular ways. For this reason, redistricting authorities that believe a plan is likely to be challenged for lack of compactness or contiguity may be less likely to adopt the plan.

At the same time, the Voting Rights Act may require the creation of a majority-minority district to avoid minority vote dilution. Efforts to achieve perfect compactness and contiguity may lend to the creation of districts that fail to comply with the Voting Rights Act.

[12] *See Shaw*, 509 U.S. 630.

2) Communities of Interest
In seeking to preserve communities of interest, district line drawers should be careful not to divide populations or communities that have common "needs and interests."[13] Communities of interest can be identified by referring to the

census, demographic studies, surveys, or political information to assess what social and economic characteristics community members share. You can also talk to community activists, civic leaders, and review local reports and studies. Some examples of relevant social and economic characteristics are:

- Income levels
- Educational backgrounds
- Housing patterns and living conditions (urban, suburban, rural)
- Cultural and language characteristics
- Employment and economic patterns (How are community residents employed? What is the economic base of the community?)
- Health and environmental conditions
- Policy issues raised with local representatives (concerns about crime, education, etc.)

While much of this information will be available through census data, your local government may also be a good source of information. Often, local governments compile information on school enrollment and attrition rates, socio-economic disparities, crime rates, etc.

[13] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006).

You should also supplement these sources by gathering information through stakeholder surveys and organizational interviews, as well as information conveyed at public hearings. Additionally, you should identify the issues of special concern for your area, by talking to community activists, politicians, and civic leaders, and reviewing local reports and studies.

Finally, courts have also played a role in identifying communities of interest and you should determine whether courts in your state have identified or rejected state-specific standards for articulating communities of interest.

Once a sufficient amount of data is collected, maps showing how the socioeconomic data impacts a geographic area can be produced. The resulting maps may demonstrate particular similarities among individuals. For example, a map showing poverty-level residents, non-high school graduates, or households that predominantly speak a language other than English can be used as an indication of a "community of interest" within a particular geographic area.

3) Protection of Incumbents and Achieving Political Goals
The term "political gerrymander" has been defined as the "practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."[14] However, courts have had difficulty determining when officials illegally use partisanship in the redistricting process. In 2004, the Supreme Court ruled, in a fractured opinion, that it was unable to adjudicate a political gerrymandering claim that arose in Indiana. The Court did not, however, foreclose the possibility that it would intervene when sufficient facts and a manageable standard were available.[15] It remains to be seen whether we will see more of these kinds of challenges during the upcoming redistricting cycle.

What remains clear, however, is that jurisdictions cannot divide cohesive groups of minority voters who are able to elect a candidate of choice in order to protect an incumbent or political party.

Is there software that can help me understand the redistricting process better?

Yes. Computer programs capable of performing calculations with geographic data are available. The computer programs that perform these tasks are known as Geographic Information Systems (GIS). GIS programs are sophisticated, and users may require some time, and possibly formalized training, to learn their operation. There are some programs that have been specifically tailored for redistricting, so they include functions to calculate compactness measures. If your group's membership does not include people with advanced computer skills, seek help in your community from high school teachers, community college or university students and faculty, and others.

[14]Black's Law Dictionary 696 (7th ed.1999).
[15]*See Vieth v. Jubelirer*, 541 U.S. 267 (2004).

Chapter 3

Participating in the Redistricting Process

Who may participate in the redistricting process?

Anyone may participate! Interested parties—including non-profit organizations, community leaders, and political parties—may use maps and population counts of their states, counties and cities to advocate for where they believe district boundaries should be drawn. This information can also be used to present alternative maps to redistricting decision-makers. All redistricting proposals, including alternative redistricting plans, should be closely analyzed to ensure that they do not violate the Voting Rights Act of 1965 or the U.S. Constitution. Alternative redistricting proposals should be presented to the appropriate

governmental body or committee before the redistricting deadlines that have been established in each state. Interested parties can also aid the redistricting process by presenting testimony about your community, its interests, and evidence of ongoing discrimination faced by your community.

Why should I participate in the redistricting process?

Participating in redistricting will give your community a voice, which is critical to ensuring that it has equal access to the political process. This participation can also encourage citizens to register, vote, and remain politically engaged. It can also help lead to the adoption of redistricting plans that provide minority communities a meaningful opportunity to elect candidates who represent their interests on issues that are important to their lives, from getting street lamps in their neighborhoods, to securing safe schools and new playgrounds. Take advantage of opportunities to participate in all phases of the redistricting process!

What happens when redistricting plans are adopted without meaningful participation by minority communities?

Until fairly recently, minority residents have often had little say in the creation of redistricting plans approved by state legislatures. As a result, in some instances, minority communities were divided up, fractured and placed into many different districts (known as "cracking"). In other instances, they were unnecessarily concentrated in a small number of districts, which prevents fair representation across a greater number of districts (known as "packing"). Since the 1980s and 1990s, we have seen progress that is largely attributable to the protections afforded by the Voting Rights Act and more engagement of minority communities in the redistricting process. (*See* Chapter 4 for more information about cracking and packing.)

Community members can testify at public hearings about proposed maps and provide feedback on the maps proposed by the official redistricting body and others. This is particularly important when proposed maps are detrimental to your community. A proposed map can be detrimental, for instance, if it fractures your community and prevents opportunities for your community to elect a candidate of choice.

In addition, if you live in a Section 5 jurisdiction, you can participate by sending Comment Letters to the U.S. Department of Justice regarding the submitted redistricting map. Your Comment Letter can explain how the proposed redistricting map impacts your community. (*See* Chapter 5 for more details.)

Can a community member present his or her own redistricting map?

If you are interested in presenting an alternative redistricting map that could improve opportunities for your community to elect a candidate of choice, there are several steps you as a community member will need to take in order to get involved:

- Determine at what level(s) of government you want to get involved (i.e. Congressional, state, county or city redistricting).
- Determine the schedule of hearings, and any deadlines for the submission of maps and testimony.
- Learn what resources will be made available to members of the public for data analysis and mapping.
- Advocate for public access to all redistricting plans created by the redistricting body.
- Determine the rules for submitting alternative maps (i.e., whether one must submit a map for the entire jurisdiction being redistricted, or whether one can submit a partial map for just one district or regional area).
- Find out when the PL 94-171 data will be released to the public in your state.[1]
- Identify any additional sources of data you can rely on, including data you may need to collect yourself (such as exit poll data and surveys).
- Discuss your proposed alternative plan with other stakeholders and racial minority communities. Work together to create a map that everyone can agree on.
- Conduct an analysis of the potential legal claims your alternative map may face if the redistricting plan is drawn the way you prefer.
- Conduct an analysis to help ensure that your alternative map is able to withstand any legal challenge.
- Conduct discussions with legislative members to learn what their priorities are (and to find out what pitfalls to avoid).

How can I create an alternative map if I don't have the financial resources, software, or redistricting expertise?

Even if you do not have the capacity to produce your own map, you can get involved in the redistricting process to ensure your community's needs and concerns are heard. One way to participate is to work in coalition with other communities and organizations that are engaged in the redistricting process. Even if you do not have the capacity to create your own map, a collaborative effort may provide the opportunity for you to take your community's needs and concerns into consideration if one of the coalition partners has the capacity to conduct mapping and create an alternative map. Additionally, you can always comment on other people's proposed maps, regardless of whether you have proposed an alternative map yourself.

[1]Public Law 94-171, enacted in 1975, directs the U.S. Census Bureau to make special preparations to provide redistricting data within one year following Census

What other benefits are there to working in coalition with other communities?

Collaboration can help lead to a better understanding of other communities' needs and concerns. At the same time, a collaborative process can lay the groundwork for achieving a strong collective voice.

Why do we need to involve experts in the 2011 redistricting process?

Experts can help ensure that officials are drawing plans that comply with one person, one vote requirements and the Voting Rights Act of 1965. Experts can also help support your advocacy efforts during redistricting. The following individuals may provide value in your redistricting advocacy efforts: map drawers, demographers, political scientists, historians, and attorneys. Local colleges or universities may be a good place to locate individuals with the relevant expertise.

1. A **map drawer** uses census data to draw or redraw redistricting maps. He or she can help map demographic information such as where people of a particular income, education, immigration status, occupation or other background live. He or she will also analyze the proposed redistricting maps and create alternative maps on behalf of your community.

2. A **demographer** will analyze census data and the characteristics of the population in a given geographic area. He or she will study their age, racial makeup, and other demographic characteristics relevant to redistricting. A demographer can work with a map drawer to draw or redraw district maps.

3. A **political scientist** will analyze a variety of election information, including election returns and voter registration rolls, to determine voting patterns among white and minority voters. The results of his or her analysis will be used to determine whether minority voters tend to support the same candidates and whether white voters tend to vote against those candidates. This information is used to determine whether minority voters have an equal opportunity to elect candidates of their choice under the current electoral system. A political scientist can also analyze non-demographic factors to help determine where communities of interest reside and have developed "an efficacious political identity."[2]

4. A **historian** will study the history of race relations in your community and state and record the history of racial segregation and discrimination in voting, education, housing, and employment. He or she could also help record the history of how your community has evolved over the years and what its residents have shared in common. Such information could be useful in developing evidence of communities of interest.

5. An **attorney** may be able to suggest the types of experts you need and provide legal advice about the specific information you will need to collect and present in preparation for the redistricting process. A lawyer may also be able to advise you on what information to submit at public hearings and to governing bodies in order to protect your rights during the redistricting process. Also, during the Section 5 administrative process (discussed in Chapter 5), you may need a lawyer to present important legal arguments on your behalf before the U.S. Department of Justice.

How can the redistricting process help minority communities?

Participation and involvement in the local redistricting process can help empower our communities from the start. There are many examples of successful community involvement in the redistricting process.

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[2] *LULAC v. Perry*, 548 U.S. 399, 435 (2006).

• ***African Americans***
Regrettably, each redistricting cycle has been marked by efforts to thwart African-American voting strength.

Resistance by officials was evident in communities that had experienced substantial African-American population growth. For example, in Georgia, officials in the city of Griffin sought to adopt a redistricting plan under which only two of the six single member districts would be majority black even though the city's black population had recently increased from 42 to almost 50 percent. In its review of the plan under Section 5 of the Voting Rights Act, DOJ requested more information about the adoption of the plan. (*See* Chapter 5 for more information on the preclearance process). However, officials were nonresponsive to the request. Instead, the city abandoned the proposed change and moved forward with efforts to hold elections using the illegal "malapportioned" districts. It was only when the local NAACP filed suit that the city agreed to a redistricting plan with three majority-minority districts. In the next election, held under a fairly drawn plan, three African-American candidates won.

Discriminatory redistricting plans at the local level were also evident. In 2003, officials in the Town of Delhi, Louisiana, adopted a plan that made a major reduction in the black voting-age population of one of the town's wards. In objecting to the plan, DOJ found that officials adopted the plan despite the availability of more favorable alternative maps that had been presented during the process. DOJ also found evidence of discriminatory intent underlying the process noting that the reduction was made in the face of steady Black population growth over the course of the preceding three decades and adopted over concerns raised by the town's own hired demographer.

Late-decade efforts to redraw boundary lines also proved problematic. For example, officials in Webster County, Georgia, adopted a new redistricting plan on the eve of the last redistricting cycle for the county board of education. The plan would have significantly reduced the black population in three of the board's five single-member districts. In blocking the plan, DOJ observed that there were serious doubts as to whether minorities would continue to have an equal opportunity to elect candidates of choice in either district. DOJ also found evidence of discriminatory purpose underlying the adoption of the plan noting that the move to adopt a new redistricting plan was initiated only after the school district elected a majority black school board for the first time in 1996. DOJ concluded that the reasons advanced by officials for adoption of the redistricting plan were merely pretexts for intentionally decreasing the opportunity of Black voters to participate in the political process.

• ***Asian Americans***
In California, the Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR) was formed in 2001 to organize the Asian American and Pacific Islander communities across California to engage in the statewide Assembly redistricting process. CAPAFR created the first-ever statewide mapping proposal on behalf of the Asian American community, working closely with other advocacy organizations such as MALDEF. CAPAFR's advocacy resulted in the 2001 Assembly lines unifying seven key communities of interest, including a core area of the San Gabriel Valley in Los Angeles County that contains several cities with majority or near-majority Asian-American populations.

In Chicago, Asian Americans did not ultimately make gains in the 2000 redistricting cycle, but there were key lessons learned in the process and a substantive increase in the general awareness about the importance of redistricting throughout the Asian-American community. Because it was a new effort to engage in the redistricting process, including the formation of the Asian American Redistricting Coalition, advocates faced significant challenges during the effort, such as being able to focus the members on one community or district level. However, the community involvement in the 2000 redistricting cycle did lead to some gains for the Asian-American community, including the development of significant relationships, both with other

ethnic organizations and with policymakers, that have had a lasting impact for the community. For example, public officials in charge of voting procedures began reaching out to the Asian American community for their input and elected officials paid increased attention to community concerns.

The experience also taught community members to get engaged earlier in the process. To that end, community leaders in Chicago are already meeting and strategizing about creating new predominantly Chinese American ward boundaries that better reflect the needs of Chinese American communities during the 2011 redistricting cycle. For example, community leaders are looking at an area south of Chinatown called Bridgeport, which is now home to more Asian Americans than Chinatown itself. The number of Asian Americans in Chinatown and Bridgeport has more that doubled since 1990[3] and community leaders hope that earlier planning and strategizing will allow their community to realize the potential of this emerging political voice when new district lines are drawn in 2011.

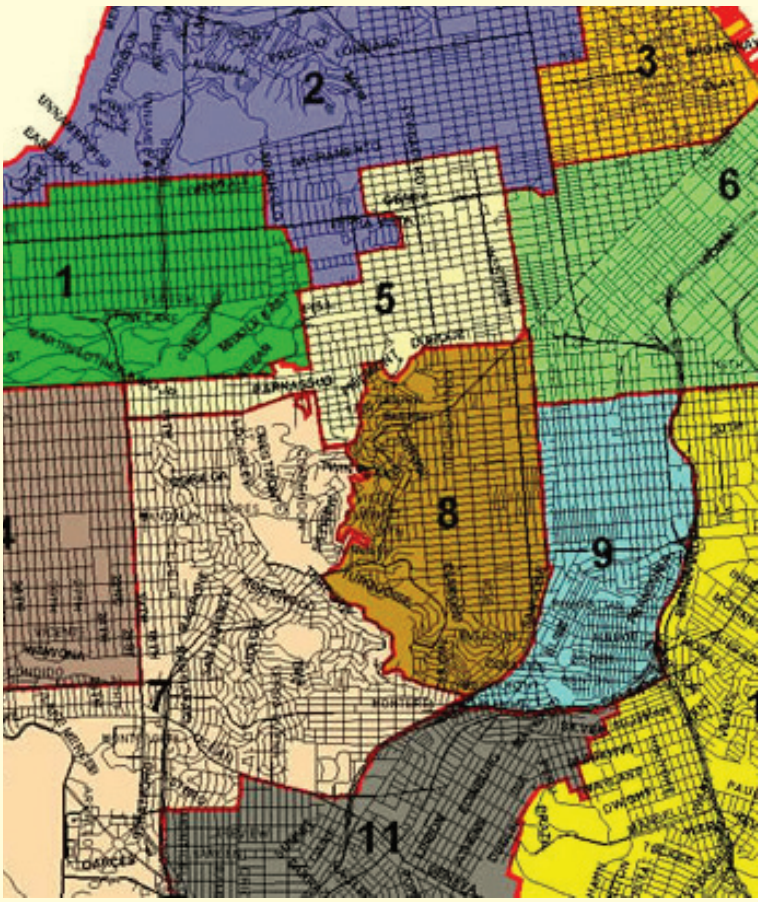
• ***Latinos***

In 1991, Chicago had a Latino population of approximately 20%. The state legislature, bogged down in partisan politics, could not agree on a redistricting plan. A coalition of Latinos called the Illinois Latino Committee for Fair Redistricting advocated strongly for the creation of a Latino majority congressional district. Eventually, Latinos were forced to sue in federal court for the adoption of a redistricting plan that was fair. After showing the court the legal necessity for a Latino majority congressional district, the Latino Committee worked together to create the 4th Congressional District, the first Latino majority district in the entire Midwest. The 4th Congressional District united the two largest Latino population areas in Chicago, one predominantly Mexican American, the other Puerto Rican. In doing so, it preserved an African-American majority district — which necessitated the unusual shape of the Latino-majority district. Although the federal court agreed that the district was necessary to remedy a Voting Rights Act claim, years later, a white resident of the district sued on Equal Protection grounds claiming that the 4th Congressional District was race-based and that Mexican Americans and Puerto Ricans were too different to be "politically cohesive." The plaintiff even hired an "expert" who explained that Mexicans and Puerto Ricans eat different types of rice and beans!

The Latino community as a whole rallied in support of the district, and, after trial, a three-judge panel upheld the district as an appropriate remedy to a Voting Rights Act violation. Eventually, the U.S. Supreme Court agreed and summarily affirmed this decision.[4]

[3]Oscar Avila & Antonio Olivo, "Chinatown's New Reach Expands its Old Borders," *Chicago Tribune*, July 18, 2004, *available at* http://www.chicagotribune.com/topic/mmx-040718-neighborhoods-chinatown,0,6904659.story.

[4]*See King v. Illinois State Bd. of Elections*, 522 U.S. 1087 (1998) (per curiam).



Chapter 4

The Role of Section 2 of the Voting Rights Act During Redistricting

The Importance of the Voting Rights Act

After the Civil War, African Americans and other minorities were denied access to the ballot box through laws such as "poll taxes," "grandfather clauses," "literacy tests," and "character reference laws." These restrictive barriers prevented minorities from exercising their most fundamental civil right, the right to vote. In 1965, Congress passed the Voting Rights Act. It was intended to make the "right to vote" for all persons a reality.

During the last several decades, the Voting Rights Act has provided important protections during redistricting efforts that happen at the local and state levels throughout the nation. Advocates, lawyers, and community groups have worked to ensure that officials observe and adhere to the requirements of the Act.

How does Section 2 of the Voting Rights Act affect redistricting?

Section 2 of the Voting Rights Act is a key provision that applies nationwide. Section 2 protects minority voters from practices and procedures that deprive them of an effective vote because of their race, color, or membership in a particular language minority group.[1] Practices that have the effect of depriving minority voters of an equal opportunity to elect a candidate of choice constitute **minority vote dilution**. During every redistricting cycle, officials must ensure that they draw plans that do not dilute minority voting strength (or deny it altogether) as they otherwise face liability under the Act.

Special attention must be paid to the Voting Rights Act whenever redistricting occurs. Section 2 requires that officials draw plans that do not unfairly dilute minority voting strength. If officials draw and enact plans that violate Section 2, such plans could be subject to legal challenge. A Section 2 lawsuit can be filed by the Attorney General of the United States, who bears primary enforcement responsibility under the Act, or by private individuals and organizations. Redistricting-related litigation can prove both costly and protracted, preventing the implementation of a final plan for several years. Thus, advocates must be vigilant in demanding adherence to, and officials should make a good-faith effort to comply with, Section 2 of the Voting

[1]Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as amended, prohibits any practice that has the intent or the result of denying a citizen of the United States the right to vote on account of race, color or status as a language minority. Section 2 states in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Rights Act during the course of redistricting and ensure that vote dilution does not occur in the first place.

How does vote dilution occur?

Vote dilution most commonly occurs when those who draw redistricting plans compress minority communities into a small number of districts (packing) or spread them thinly into a large number of districts (cracking, fracturing, or splitting). For example, packing can occur when two districts are created with 90% African-American population in both. This kind of packing might be found to violate Section 2 when three African-American majority districts could be drawn if the African-American population was spread out more evenly across three districts instead of being unnecessarily concentrated in two districts.[2] Conversely, cracking can occur if two districts are created that have 35% Latino population in each. Such splitting could be found to violate Section 2 if, for example, it were possible to place the Latino population into a single district where they would form a majority and could have a better opportunity to elect a candidate of their choice.

Both packing and cracking are illustrative of the kind of actions that can dilute the minority group's vote and deny them an equal opportunity to elect candidates of their choice. Section 2 of the Voting Rights Act can be used either to advocate for or litigate to obtain a more reasonable and fairly drawn plan that better reflects the voting strength of minority voters in a particular area.

What must plaintiffs show in court to demonstrate a violation under Section 2?

Section 2 prohibits states and local governments or jurisdictions (political bodies such as cities, towns, school districts, etc.) from adopting practices, procedures and redistricting plans that dilute minority voting strength. Whether there is a dilution of minority voting strength is governed by the legal principles set forth in the case of *Thornburg v. Gingles*.[3] There, the Supreme Court set forth three factors a minority group must prove in order to establish a violation of Section 2 of the Voting Rights Act:

1. that the minority group is sufficiently large and geographically concentrated to make up a majority in a single-member district;
2. that the minority group is politically cohesive—that is, it usually votes for the same candidates; and,
3. that, in the absence of special circumstances, the white majority votes together to defeat the minority's preferred candidate.

If the minority group can establish those three things (known as preconditions), the Supreme Court has said that the next question is whether, under "the totality of the circumstances," the minority group had less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of its choice.[4]

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[2]For a recent example, *see*, *e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006) (rejecting South Dakota's statewide redistricting plan for packing one district with 90% American Indians next door to a district with 30% American Indian population).

[3]478 U.S. 30 (1986).

[4]*See*, *e.g.*, *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 315 (D. Mass. 2004) (striking down the state's redistricting plan for reducing Black voting strength).

Are officials required to draw districts that are less than 50 percent minority?

Section 2 of the Voting Rights Act requires that redistricting officials draw new and preserve existing majority-minority districts when possible but does not require the creation of districts that are less than 50 percent minority. However, the Voting Rights Act certainly does not prevent authorities from drawing districts where minority groups may constitute less than 50 percent of a district. Indeed, creating these districts may be particularly appropriate in communities that have experienced significant growth in their minority population over the course of the last decade. Drawing these districts may fairly recognize increasing minority population that may soon be large enough to constitute a majority-minority district.

What types of electoral districts impact minority opportunities to elect a candidate of choice?

Majority-Minority Districts: A majority-minority district is one in which racial or language minorities form a majority (at least 50% or more) of the voter eligible population. The definition of eligible voter population varies by state and can include factors such as age (over 18) and U.S. citizenship.

***Minority-Coalition Districts*:** A minority-coalition district is a type of majority-minority district in which two or more minority groups combine to form a majority in a district. Thus, a district that is 25% African-American, 20% Latino and 6% Asian American is a majority-minority district, but it is not a majority African-American, majority-Latino, or majority-Asian American district. In most jurisdictions, when two or more minority groups form a coalition that collectively meets the *Thornburg v. Gingles* requirements, the coalition may be able to seek relief under Section 2 if officials fail to create a minority-coalition district.[5] The Supreme Court has not addressed this issue.[6]

Crossover Districts: A crossover district is one in which minorities do not form a numerical majority but still reliably control the outcome of the election with some non-minority voters "crossing over" to vote with the minority group. While states can and should consider creating crossover districts, the Supreme Court in 2009 held that the Voting Rights Act does not require their creation.[7]

Influence Districts: An influence district is one that includes a large number of minority voters but fewer than would allow voters from the minority group to control the result of the election when voting as a bloc. The number or proportion necessary to allow a minority group to influence or shape an election outcome is determined by a review of past elections in your particular area - there is no "magic number." In the case of influence districts, a sizable minority group can be said to be able to "influence" the outcomes of elections, but not control them.

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[5]*See*, *e.g.*, *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275 (2d Cir. 1994), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994); *Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); *Badillo v. Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990); *Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc). *See also Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) (disapproving of "multiracial coalitions" in the context of a white-minority coalition).

[6]*See Growe v. Emison*, 507 U.S. 25, 41 (1993).

[7]*See Bartlett v. Strickland,* 129 S. Ct. 1231, 1249 (2009) (plurality opinion).

Officials should proceed carefully to ensure that they are not altering a district that provides minority voters with a real opportunity to elect candidates of their choice in a way that would render it a mere influence district. Influence districts can be found to dilute minority voting strength if they are put in place to replace effective majority-minority districts.

Are states permitted to create new majority-minority districts?

States are permitted and sometimes required to create new majority-minority districts under the Voting Rights Act to avoid diluting minority voting strength during redistricting. States with significant minority population growth over the course of the last decade, for instance, may need to create new majority-minority districts to ensure that redistricting plans comply with the requirements of Section 2 of the Act. Plans that dilute minority voting strength by failing to create feasible majority-minority districts may be quickly challenged following adoption. Since Section 2 litigation can be both costly and time-consuming, officials in many states set out to draw plans that fairly reflect minority voting strength at the beginning of the redistricting process. The need to comply with Section 2 of the Voting Rights Act to avoid minority vote dilution can serve as a compelling justification for both preserving and creating new majority-minority districts, which helps protect these districts from constitutional attack.[8]

How can I make the case for the creation of new majority-minority districts in my state?

It is important that information proving the need for the creation of a particular majority-minority district is included in the legislative or redistricting record developed by map drawers, legislators, and community participants. The information can take the form of public hearing testimonials, studies, reports, articles, expert analyses or any other information acceptable to redistricting officials. This information is important in showing that unless a majority-minority district is created, the minority group in question will have less opportunity than other voters to participate in the political process and elect their candidate of choice.[9] This information could include the following:[10]

- Maps demonstrating that reasonably compact majority-minority districts can be drawn.

- An examination of whether voting is racially polarized in your community. You can evaluate racial polarization voting patterns by interviewing community members and candidates who have run for office in your area and through an analysis of election returns. To establish racially polarized voting, you must determine whether minority voters tend to vote for the same particular candidates (minority voters are cohesive) and if white voters tend to vote against the candidate whom minority voters tend to choose (white bloc voting against minority

[8]The Supreme Court and several district courts have endorsed the principle that jurisdictions have a compelling interest in complying with the Voting Rights Act during redistricting and that complying with the Act is at least a partial defense against constitutional attack. Most recently, in 2006, in *League of United Latin American Citizens v. Perry (LULAC)*, 126 S. Ct. 2594 (2006), eight Justices agreed that compliance with Section 5 of the Voting Rights Act is a compelling state interest, sufficient to satisfy the strict scrutiny that, under *Shaw v. Reno*, 509 U.S. 630 (1993) and its progeny, applies whenever race is the predominant factor motivating districting decisions. *See LULAC*, 126 S.Ct. at 2643 (Stevens, J., joined by Breyer, J., concurring in part and dissenting in part); *id.* at 2648 n.2 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); *id.* at 2667 (Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J., concurring in the judgment in part and dissenting in part). *See also King v. State Bd. of Elections*, 979 F. Supp. 619, 621-27 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087 (1998) (per curiam); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413-15 (E.D. Cal. 1994), *aff'd*, 515 U.S. 1170 (1995). Even if a district survives attack on this ground, however, it may still be vulnerable if a court finds that the plan drawers took race into account more than necessary to comply with the Voting Rights Act (in which case the district will not be "narrowly tailored" to achieve the compelling interest).

[9]See 42 U.S.C. § 1973; *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Gingles*, 478 U.S. 30.

[10]See *Gingles*, 478 U.S. at 30; Senate Report accompanying amended Section 2, S. Rep. No. 97-417, at 28-29 (1982), at 28-29, *reprinted in* 1982 U.S.C.C.A.N 177, 207. Courts have also included, in the analysis of the totality of circumstances evidence, that neutral, as opposed to racial, factors have caused the polarized voting. *See Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *United States v. Charleston County*, 365 F.3d 341, 348 (4th Cir. 2004) (distinguishing causation as relevant to the totality inquiry but not the *Gingles* preconditions).

candidates of choice). A political scientist can help you analyze the data and evidence to evaluate racially polarized voting patterns.

- An assessment of the extent to which minority candidates are excluded from nominating processes such as private meetings or caucuses or other processes for placing candidates on ballots.

- An assessment of the history of discrimination in your community and in the state related to voting, including poll taxes, literacy tests, and similar barriers. You should also include any current, ongoing barriers or limitations placed on minority voters' ability to cast ballots in your community, such as the accessibility of polling places to minority voters and the availability of language translation and other assistance at the polls.

- A list of the electoral practices that have been shown to have a discriminatory impact on the ability of minority voters to cast an effective vote and that are used in the jurisdiction, including majority-vote requirements and restrictions against single-shot voting.[11]

- An assessment of the history of discrimination in your community and in the state against minorities in areas such as education, employment, and health. You should also include any current, ongoing discrimination in these areas.

- An assessment of the social and economic disparities between minorities and non-minorities in your community and the state in areas such as education, employment, and health.

- Examples of overt or subtle appeals or references to race that have been made in relatively recent elections, such as a reference to a minority candidate's racial background or the inclusion of a photograph of a minority candidate in his/her opponent's advertising. Such examples are usually found in newspaper accounts of elections and in the candidate advertising.

- A record of the electoral successes and losses suffered by candidates of choice of minority voters and how many of these successes and losses occurred when the minority candidates ran in a majority-minority district.

- Any lack of responsiveness of the governing body being redistricted, such as the city council or county commission, to the needs of the minority community.

- An assessment of how tenuous a jurisdiction's policy reason may be for not creating majority-minority districts.

Are there any court opinions interpreting Section 2 of the Voting Rights Act that will affect redistricting in 2011?

The rules governing redistricting and the protection of minority voting rights have evolved since the last redistricting cycle. In particular, two Supreme Court cases have a particularly significant impact on the 2011 redistricting cycle.

[11]When used in connection with at-large elections, both majority vote requirements (when a candidate must receive the majority of the votes cast to win an election) and anti-single shot provisions (preventing opportunities for voters to select a single candidate in a multi-candidate race) can prevent opportunities for minorities to aggregate their votes and elect a candidate of choice.

***Bartlett v. Strickland* and Section 2:** The Supreme Court's 2009 ruling in *Bartlett v. Strickland* affects the population threshold that must be met to state a Section 2 vote dilution claim.[12] In *Bartlett*, the Court decided that Section 2 of the Voting Rights Act does not require the drawing of districts in which racial minorities would make up less than 50 percent of the voting age population of a district. The Court's ruling establishes that crossover districts are not required by Section 2.

Communities should, however, continue to advocate for districts that would provide a geographically concentrated minority population an opportunity to elect candidates of choice even when such districts might fall short of the 50 percent requirement. Such advocacy can help ensure that the final plan fairly reflects minority voting strength. Indeed, in *Bartlett,* the Court noted that officials who redraw district lines retain discretion to create crossover districts that provide minorities with an opportunity to elect a candidate of choice even if the minority population falls short of the 50 percent requirement. In addition, *Bartlett* does not address whether a Section 2 claim may be brought by two or more minority groups that are unable to meet the 50 percent threshold alone but can collectively meet the *Thornburg v. Gingles* requirements when their populations are combined; as a result, nothing prevents officials from drawing such districts.

Additionally, Section 2 continues to protect minority communities of all sizes from purposeful discrimination.[13] For example, a jurisdiction that specifically targets and dismantles crossover districts could find itself subject to a challenge that its redistricting plan was drawn with a discriminatory purpose. Redistricting plans that are infected with a discriminatory purpose can also be found to violate Section 2. Finally, some jurisdictions are subject to the special protections provided by the Section 5 preclearance provision of the Act, as described in Chapter 5. Section 5 may prevent the dismantling of districts with substantial numbers of minority voters.

***LULAC v. Perry* and Section 2:** The Supreme Court's 2006 decision in *League of United Latin American Citizens v. Perry* ("*LULAC*") clarified that partisan justifications are not acceptable explanations for minority vote dilution. In *LULAC,* the Court found that the state legislature wrongfully dismantled a Latino majority voting district to protect an incumbent when the district contained substantial numbers of politically cohesive minority voters who were growing in size and were poised to oust the incumbent. The Court emphasized the fact that it was only when Latinos had organized into a cohesive group and gained in population enough to defeat the incumbent that the state divided them.[14] The Court also rejected the state's proposed trade-off: a district that would offset the loss of the majority minority district by combining two Hispanic communities 300 miles apart elsewhere in the state. The court emphasized that this trade-off district did not offset the resulting voting dilution in the district at issue because of both the distance between the two Hispanic communities that were joined and the differences in their "needs and interests."[15]

LULAC v. Perry clarifies that state legislatures cannot resort to certain redistricting criteria, such as incumbency protection, to justify dilution of minority voting strength. Jurisdictions must vigilantly comply with the Voting Rights Act during redistricting, and officials will not be able to use most traditional districting principles as an excuse for their failure to do so.[16]

[12] 129 S. Ct. 1231 (2009).
[13] *See Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009).
[14] *See supra* note 8.
[15] *Id.* at 435.
[16] *Id.*

Chapter 5

Section 5 of the Voting Rights Act and Redistricting

The previous chapter discussed the importance of Section 2 of the Voting Rights Act to redistricting. This chapter focuses on Section 5, another very important part of the Act, which also provides critical protections for the rights of minority voters. Unlike Section 2, which applies nationwide, Section 5 of the Voting Rights Act applies only to "covered jurisdictions." "Covered jurisdictions" are states, towns, or counties with an egregious history of discrimination against minority voters. Section 5 requires that officials seek preapproval of any voting change in these jurisdictions from the Department of Justice (DOJ) or the District Court of the District of Columbia before it can be implemented, a process known as "preclearance." The Section 5 preclearance provision of the Voting Rights Act has helped eliminate barriers to political participation and provided greater levels of access to minority voters.

Section 5 will most certainly play an important role throughout the covered jurisdictions during the 2011 redistricting cycle. Those areas that are covered by Section 5 must have their redistricting plans approved by DOJ or the District Court of the District of Columbia before they can be in effect.

What does Section 5 require?

Section 5 requires covered jurisdictions to submit proposed voting changes to DOJ or the District Court of the District of Columbia for preclearance prior to their implementation. Section 5 also prohibits covered jurisdictions from adopting voting changes with a discriminatory purpose or with a retrogressive effect.[1] A change is retrogressive if it puts minorities in a worse position than if the change did not occur. For example, a redistricting plan might be deemed to worsen the position of minority voters if it contains only one majority-minority district where it previously contained two. A plan might also worsen the position of minority voters if the minority population percentage of a district is reduced to a level that will make it more difficult or impossible for minority voters to continue to elect candidates of their choice. In these cases, through the Section 5 preclearance process, these kinds of discriminatory redistricting plans may not be approved and cannot be implemented in the covered jurisdiction.

What is preclearance?

The process of seeking review for voting changes is commonly referred to as "preclearance." Preclearance can be obtained from DOJ or the United States District Court for the District of Columbia (the federal court in Washington, DC).[2] For several reasons, including cost and convenience, jurisdictions tend to seek preclearance through the administrative process conducted by DOJ rather than through litigation in the district court. If a jurisdiction fails to obtain preclearance for the change, DOJ or private individuals can bring a Section 5 enforcement action to stop the jurisdiction from implementing or enforcing the change until preclearance is obtained.[3]

What is a "covered jurisdiction?"

Places that must submit voting changes for preclearance under Section 5 are referred to as "covered jurisdictions." These covered jurisdictions are states, towns, or counties with an egregious history of discrimination against minority voters. Because of the long history and continued pattern of voting discrimination in these covered jurisdictions, Section 5 requires that the officials submitting the change prove that the submitted change is not intentionally discriminatory and will not have a discriminatory effect on minority voters.[4]

[1] *See Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320 (2000); *Richmond v. United States*, 422 U.S. 358, 378-79 (1975); *Beer v. United States*, 425 U.S. 130, 140-42 (1976); *Rome v. United States*, 446 U.S. 156, 172 (1980); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *Wilkes County v. United States*, 450 F. Supp. 1171, 1177 (D.D.C. 1978); 28 C.F.R. § 51.54.

[2] *See* 42 U.S.C. § 1973c; 28 C.F.R. § 51.1.

[3] For more information regarding Section 5 preclearance process and information on the way that communities can play a role in the process, *see* Kristen Clarke, NAACP Legal Defense and Educational Fund, Inc., *Tearing Down Obstacles to Democracy & Protecting Minority Voters (August 12, 2008)*, *available at* http://www.naacpldf.org/content/pdf/vra/Tearing_Down_Obstacles_Manual.pdf.

[4] *See Bossier II*, 528 U.S. 320; (covered jurisdiction has burden of proof under Section 5); *Georgia v. United States*, 411 U.S. 526, 538 (1973) (same); 28 C.F.R. §§ 51.52(a) (same). This is very different than Section 2, which requires voters to prove that an electoral system is discriminatory.

The following States are covered by Section 5:

- Alabama
- Alaska
- Arizona
- Georgia
- Louisiana
- Mississippi
- South Carolina
- Texas
- Virginia[5]

Only certain Counties or Towns in the following states[6] are covered under Section 5:

- California
- Florida
- Michigan
- New Hampshire
- New York
- North Carolina
- South Dakota

It must be noted, however, that even if only a part of a jurisdiction is covered by Section 5, congressional and state legislative redistricting plans for the entire state must be submitted for review.[7]

What must a covered jurisdiction do under Section 5?

Covered jurisdictions are required to submit for preclearance all voting changes such as redistricting plans, the relocation of a polling place, changes affecting voter registration, changes in language assistance for jurisdictions also covered under Section 203, and changes affecting eligibility or qualifications for voting and running for office. If DOJ or the district court determines that the changes are discriminatory, it will not approve the changes and officials must propose alternatives that are not discriminatory.

When will Section 5 apply during redistricting?

At the conclusion of the redistricting process, when legislative plans have been finalized, a covered jurisdiction must submit the plan to the federal government for review. A covered jurisdiction should also submit for review any rules or procedures related to redistricting that may have changed since the last redistricting cycle. If you learn that a covered jurisdiction has not made a required submission, you should contact one of our organizations or the DOJ immediately.

How does a jurisdiction obtain administrative preclearance for a redistricting plan or other voting change?

To begin the administrative process, a Section 5 covered jurisdiction will submit the voting change to DOJ. DOJ will then determine if the change was adopted with a discriminatory intent or will have a discriminatory effect. DOJ has 60 days to review the change and could either decide (1) that the change is not discriminatory and approve or "preclear" the change, or (2) that the jurisdiction has failed to show that the change is not discriminatory and disapprove or "object" to the change.

How can individuals and communities provide public comment and participate in the Section 5 preclearance process?

DOJ invites interested individuals and community groups to participate in the Section 5 review process. Your goal in participating in the Section 5 review process should be to assist DOJ in making a decision that will best protect your community's voting rights. This may include writing a Comment Letter encouraging DOJ to object to a proposed change that is discriminatory. Your Comment Letter to DOJ

[5]A number of jurisdictions in Virginia have successfully moved to terminate their responsibilities under Section 5 through a process called "bailout." Those jurisdictions include the Counties of Augusta, Essex, Frederick, Greene, Pulaski, Roanoke, Rockingham, Shenandoah, Warren and Botetourt and the Cities of Fairfax, Harrisonburg and Salem and Winchester.
[6]*See* Appendix 1 for the counties and towns subject to Section 5 in these states.
[7]*See Lopez v. Monterey County*, 525 U.S. 266 (1999); 28 C.F.R. §§ 51.2, 51.6.

should include your perspective regarding the facts and process leading up to the creation and adoption of the proposed redistricting plan or other voting change. Our organizations frequently work with citizens and local groups in the covered jurisdictions to prepare Comment Letters outlining concerns regarding pending voting changes. In preparing Comment Letters, your organization or community should be mindful of the following steps:

• First, inform yourself about the change by participating in and collecting detailed information about the process that led to the creation of the redistricting plan or any applicable voting change. Helpful information may be obtained by attending public hearings, by thoroughly reviewing records or minutes of the governmental body that instituted the change, by gathering information from local newspapers and other media, and by engaging in conversations with voters affected by the change.

• Second, under the Freedom of Information Act (FOIA), request a copy of the proposed submission from DOJ or the local government office seeking approval for the change (such as your local school board, board of supervisors, or county commissioners). You can submit a FOIA request to the DOJ by email at voting.section@usdoj.gov.

• Third, let DOJ know what you think by submitting a Comment Letter regarding the change. The DOJ has established a single address for the receipt of all United States Postal Service mail, including certified and express mail. All mail to the Voting Section must have the full address listed here:

Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Deliveries by overnight express services such as Airborne, DHL, Federal Express or UPS should be addressed to:

Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

You can also call DOJ with your comments at 1-800-253-3931 or arrange to meet with DOJ to discuss the proposed voting change. Finally, you may check the status of DOJ's review of the change by logging on to the Voting Section's website at www.usdoj.gov/crt/voting/.

• Fourth, after DOJ has made its determination, you should ask DOJ or local officials for a copy of DOJ's decision. If you have participated in the Section 5 process, DOJ should send you a copy of its decision.

When must the public submit its comments on a Section 5 submission?

Comment Letters concerning changes may be sent at any time. However, given the 60-day review period, it is important to share your views regarding voting changes as soon as possible and with enough time for DOJ to consider your comments before the expiration of the review period.

What information should the public provide to DOJ during the Section 5 process?

- An assessment that the proposed plan has a discriminatory effect or that the plan is retrogressive, such that minority voters are in a worse position under the new plan than under the existing plan.

- A detailed description of community support for your position. Be certain that your letter describes the views of others in your community who may share your concerns about the proposed change. For example, you could include a petition bearing signatures from individuals or local community groups. If possible, provide contact information for other members of your community who might be contacted to help further aid DOJ's analysis of the voting change.

- Direct evidence of any discriminatory purpose that may underlie the adoption of the redistricting plan. The most direct evidence of discriminatory purpose includes statements from those officials who adopted the change. Thus, it is important to thoroughly review the legislative or administrative history of the redistricting decision, including statements by the members of the governing body, minutes of their meetings and public hearings, and any testimony by the decision makers regarding their intentions in creating the redistricting plan and any assessment of the plan's potential impact on minority voters.

- If no direct evidence can be found, you may still be able to establish that a voting change was adopted with a discriminatory purpose through circumstantial evidence. You may find such evidence in the historical background of the redistricting decision, including any alternative plans proposed by the community and the redistricting body's response to those alternatives. You may also discuss the steps taken to create the proposed plan and specific examples, if any, of instances where the redistricting body altered their normal redistricting process from past practices. For example, you could include information regarding whether public or private hearings were held and if your community was given the opportunity to participate.

Can precleared redistricting plans be subject to challenge on other grounds?

A decision by DOJ to preclear a redistricting plan or other voting change is final and cannot be challenged in court. This means that a DOJ decision to preclear a voting change cannot be appealed.

However, a redistricting plan or other voting change that is precleared may be subject to a legal challenge on other grounds. For example, a redistricting plan may be precleared under Section 5 but could still be challenged under Section 2 of the Voting Rights Act if the plan dilutes minority voting strength. The reach of Section 5 is limited in that it only bars the implementation of changes that have a discriminatory purpose or changes that worsen the position of minority voters. However, other federal or state laws may provide a source of relief. Contact any of our organizations to discuss the other forms of relief that may be pursued in these instances.

Are there any changes to Section 5 of the Voting Rights Act that will affect redistricting in 2011?

In 2006, Congress voted to reauthorize the Section 5 preclearance provision. During the reauthorization, Congress made several changes to Section 5 that helped to clarify its intent regarding the kinds of voting changes deemed to worsen minority voting strength. Congress also made clear the standard for determining when minority voters have the ability to elect candidates of choice. It is important that officials be made aware of these changes to Section 5 during the 2011 redistricting cycle, if they are not already.

While redistricting involves a number of factors and requires the balance of many competing interests, the protection of minority voting rights under Section 5 is still the law and a critical component of any successful redistricting process.

Can jurisdictions terminate their Section 5 obligations?

Some covered jurisdictions may move to terminate their responsibilities under Section 5 by seeking what is referred to as a "bailout." A jurisdiction may seek a bailout by filing a legal action (declaratory judgment action) in the District Court of the District of Columbia. Jurisdictions seeking to bail out must demonstrate the absence of racial discrimination in voting by satisfying certain criteria and by receiving no objections from the DOJ to preclearance requests for ten years. For a number of decades, the ability to bail out was limited to "political subdivisions," which the Act defines as "any county or parish… [or] any other subdivision of a State which conducts registration for voting."[8] However, in June 2009, the Supreme Court ruled that political subunits, including school boards, water districts, utility districts and city councils, among others, could apply to bail out under the Act. [9]

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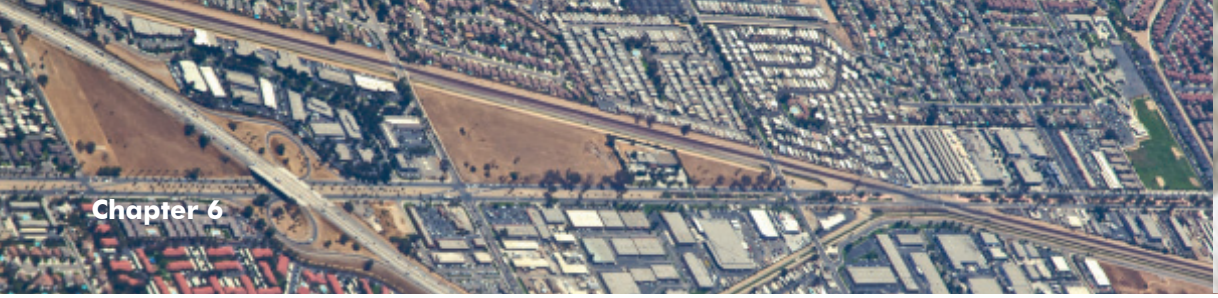
[8] 42 U.S.C. § 1973l(c)(2).
[9] *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S., 129 S. Ct. 2504 (2009).



Chapter 6

Language Assistance at the Polls and the Voting Rights Act

The right to vote is a fundamental right guaranteed to all citizens of the United States. Many citizens, however, especially those who are recently-naturalized, are not fully proficient in English and, thus, cannot effectively participate in the electoral process. Barriers to understanding voting materials, such as voter registration forms, ballots and complicated referenda issues that appear on ballots, can discourage many citizens from exercising their right to vote.

Recognizing the link between language barriers and low voter turnout, Congress enacted Section 203 of the Voting Rights Act in 1975. Section 203 requires certain counties and jurisdictions to provide bilingual voting materials in communities with language minorities and limited-English proficient residents. Congress reauthorized and strengthened Section 203 in 1992 to make bilingual assistance at the polls a reality for thousands of additional "language minority" voters and again reauthorized it recently in 2006.[1] By enacting Section 203, Congress recognized that many minority citizens were not exercising their fundamental right to vote due to high illiteracy rates and unequal educational opportunities.[2]

Another important section of the Voting Rights Act is Section 4(e), which prohibits denying the right to vote on the basis of English literacy tests for persons educated in American-flag schools where the predominant language is not English.[3] This section applies to persons including those living in American territories or the Commonwealth of Puerto Rico who are eligible to vote as U.S. citizens but were not educated in the English language. Section 4(e) prohibits persons who successfully complete the sixth grade in schools accredited by any state or territory or the Commonwealth of Puerto Rico, among others, from being denied the right to vote in local, state or federal elections because of the lack of English skills.[4]

In addition, some citizens are unable to effectively participate in the voting process because of illiteracy, disability, or blindness. Section 208 of the Voting Rights Act provides another valuable resource for voters who face these challenges, by allowing such voters to receive assistance in the voting booth from a person of the voter's choice. In addition, voters who experience difficulty with the English language and who do not have access to translated election materials can receive assistance in their primary language under Section 208.

What does Section 203 of the Voting Rights Act do?

Section 203 requires certain jurisdictions to provide language assistance to voters through the following means:

- Translations of written materials such as ballots, petitions, registration materials, and other information critical to exercising the right to vote.[5]
- Additionally, to the extent that the jurisdictions utilize technology to provide English information to voters, such as websites designed to educate voters, they must do the same for the covered languages.
- Oral assistance by bilingual employees and trained interpreters who staff poll sites and assist with voter registration.[6]

[1]The Voting Rights Act defines a "language minority group" to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish Heritage." 42 U.S.C. §1973aa-1a(e).
[2] 42 U.S.C. §1973aa-1a(a).
[3]42 U.S.C. §1973b(e).
[4]S*ee Katzenbach v. Morgan*, 384 U.S. 641 (1966).
[5]28 C.F.R. §§ 55.15, 55.19.
[6]28 C.F.R. §§ 55.18(c), 55.20.

- Outreach to local community-based organizations that work with and have a connection to the covered communities, including promoting the availability of language assistance at the polls, recruiting for bilingual poll workers, and assessing the efficacy of the jurisdiction's proposed language assistance plan.

- Publicity regarding the availability of bilingual assistance through notices at voter registration and polling sites, announcements in language minority radio, television and newspapers, and direct contact with language minority community organizations.[7]

When is a jurisdiction required to comply with Section 203 of the Voting Rights Act?

In 1992, after extensive national advocacy by a broad coalition of civil rights groups, Congress reauthorized Section 203 for a period of fifteen years and made several helpful amendments. Under the amendments, communities may qualify for language assistance by (1) meeting a numerical benchmark of 10,000 or 5% of the citizen voting age population, (2) demonstrating the requisite level of limited English proficiency, and (3) establishing that the language group in the jurisdiction has a higher illiteracy rate than the national average.[8] This amendment has made it possible for Asian Americans, American Indians, Alaskan Natives, and additional Latino voters to receive the benefits of Section 203.

In 2006, Congress renewed Section 203 for another twenty-five years (until 2032) based on evidence of continued discrimination. This development ensures continued access to the ballot box for many of this country's non-English speaking minority citizens.

Currently, which jurisdictions are obligated to provide language assistance under Section 203?

There are 296 jurisdictions that are required to provide language assistance under Section 203 of the Voting Rights Act.[9] Language assistance may have to be provided in Spanish, American Indian, Alaskan Native, and several Asian languages depending on the needs of the community.[10]

Some jurisdictions have provided language assistance voluntarily with the encouragement of civil rights and advocacy organizations, even though they are not legally required to do so. For example, the advocacy efforts of the Asian Pacific American Legal Center (APALC), an affiliate of the Asian American Justice Center (AAJC), led Los Angeles County to provide language assistance in Korean in the 1990s, prior to its coverage.

Even with the language assistance provisions of the VRA, a recent U.S. Government Accountability Office (GAO) report determined that election officials continue to face challenges in providing language assistance in voting. These challenges include difficulties in recruiting and ensuring quality performance by bilingual poll workers, targeting bilingual voting assistance in the appropriate precincts, designing and translating materials, and allocating sufficient resources to provide bilingual assistance.[11]

What rights do voters have to bring someone into the voting booth to help them read their ballot?

Section 208 of the Voting Rights Act was added in 1982 to ensure that voters get the assistance they may need in order to cast a ballot. Section 208 protects those voters who need assistance because of "blindness, disability, or inability to read or write."[12] This provision allows these voters to take a person

[7] 28 C.F.R. § 55.20.
[8] 42 U.S.C. § 1973aa-1a(b). This demographic information shall be based on the American Community Survey data.
[9] U.S. Government Accountability Office, Bilingual Voting Assistance: Selected Jurisdictions' Strategies for Identifying Needs and Providing Assistance, January 2008. http://www.gao.gov/new.items/d08182.pdf.
[10] *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 144 (July 26, 2002), available at, http://www.justice.gov/crt/voting/sec_203/203_notice.pdf.
[11] *See supra* note 9.
[12] 42 U.S.C.A. § 1973aa-6.

of their choice into the voting booth to assist with the voting process. Section 208 has been applied to language minorities and has been an effective tool for groups that are not covered by Section 203.

Section 208 was recently used in Florida during the 2000 presidential election when poll workers in Florida denied Haitian American voters the opportunity to receive voting assistance from persons who were bilingual in Creole and English. As a result of a successful legal challenge brought under Section 208, the county retrained poll workers, launched a voter education campaign, and sent bilingual poll workers to targeted precincts where Creole language assistance was required.[13]

How is Section 2 of the Voting Rights Act used to assist language minorities?

Section 2 of the Voting Rights Act can also be used to enforce minority language rights when a jurisdiction's failure to provide language assistance results in the denial or abridgement of the right to vote on account of membership in a language minority group resulting in denying them an equal opportunity to participate in the political process and to elect representatives of their choice. For example, in 2005, the DOJ filed a legal action against the City of Boston for using election practices that discriminated against Latino, Chinese and Vietnamese citizens and that denied their right to vote, in violation of the Voting Rights Act (Section 203 for Latino voters and Section 2 for Chinese and Vietnamese voters). The City of Boston had, among other violations, failed to make available bilingual personnel to assist language minority voters, failed to provide provisional ballots, and refused requests by language minority voters to use individuals of their choice to assist them by translating the ballot. This lawsuit was successfully resolved when the parties reached an agreement that included requiring the City to consult with relevant community groups regarding translation of election materials and procedures and providing for the appointment of federal examiners to monitor the elections.

[13] *United States v. Miami-Dade County*, No. 02-21698, (S.D. Fla. June 17, 2002) (Consent Order).

Do Latino and Asian American voters benefit from language assistance at the polls?

Yes. Asian American and Latino voters have indicated that the provision of language voting assistance makes them more likely to participate in the electoral process.

In APALC's Los Angeles exit polls in 2008, 56% of Korean voters, 26% of Chinese voters, 28% of Filipino voters, and 53% of Vietnamese voters used language assistance.[14] In an Asian American Legal Defense Fund (AALDEF) sponsored exit poll in New York, New Jersey, Massachusetts, Rhode Island, Michigan, Illinois, Pennsylvania, and Virginia in 2004, 41% of Asian Americans expressed that they were limited-English proficient, while 14% identified English as their native language. Almost a third (38%) of all respondents who needed some form of language assistance to vote were first-time voters.[15]

The need for bilingual voting assistance can also be reflected in the number of requests received by county registrars when there is adequate outreach and publicity of the availability of language assistance. For example, Los Angeles County received over 6,000 requests for assistance in Chinese, Japanese, Tagalog and Vietnamese for the 1993 elections. By the November 2008 elections, the number of requests had increased to over 195,000 in Chinese, Japanese, Tagalog, Vietnamese, Korean and Spanish, increasing to almost 200,000 by September 2009.[16]

Inadequate language assistance at polling places continues to also be a problem for Spanish speaking voters. According to the

[14] Asian Pacific American Legal Center et al., *Los Angeles County's Asian American And Pacific Islander Vote, 2008 Presidential Election Preliminary Findings From The 2008 Southern California Voter Survey*, (November 2008), *available at* http://demographics.apalc.org/wp-content/uploads/2008/11/2008-11-06-pr-voter-survey-prelim-full.pdf.

[15] Asian American Legal Defense Fund, *The Asian American Vote: A Report on the AALDEF Multilingual Exit Poll in the 2004 Presidential Election*, at 4, 5, 7 (2005) *available at* http://www.aaldef.org/docs/AALDEF-Exit-Poll-2004.pdf

[16] Los Angeles County Registrar-Recorder Multilingual Voter Requests (on File from 1993-September 2009), *available at* the Office of the Elections Program Coordinator, Los Angeles County, California.

results of a 2006 national election hotline for Spanish language voters sponsored by the National Association of Latino Elected and Appointed Officials Educational Fund, almost 25% of all documented complaints resulted from a lack of Spanish language assistance at polling places.[17] Without the language assistance provisions of the Voting Rights Act many jurisdictions would not provide language assistance to voters.

Aside from Sections 203 and 208 of the Voting Rights Act, are there state laws that provide assistance to language minority voters?

Yes. Several states, including California, Colorado and Florida, have enacted laws that provide additional protections for language minority voters.[18] For example, California law requires all polling sites to include Spanish translations of the ballot, ballot measures and ballot instructions, unless the jurisdiction must already provide this information under Section 203 of the Voting Rights Act.[19] California law also allows for translation of these materials into other languages if there is "a significant and substantial need."[20] In both California and Colorado, where 3% of the voting age citizens are limited-English proficient, local jurisdictions must provide language assistance in the form of translated election materials or bilingual staff.[21]

Is providing language assistance materials expensive?

No. The costs of compliance are modest, to the extent that costs are incurred. In 2005, a majority of covered jurisdictions incurred no additional costs for written or oral language assistance. As for jurisdictions that did incur additional costs as a result of providing language assistance, the costs were minimal overall, comprising less than 1.5% of total election costs for oral assistance and less than 3% of total election costs for written assistance.[22]

Why do we need language assistance in voting? Aren't all United States citizens, even naturalized citizens, expected to be proficient in English?

Voting is a fundamental right, and no citizen should be denied the right to vote because they do not understand English perfectly. Although the citizenship exam requires individuals to demonstrate a certain level of English proficiency, it may not be enough to enable voters to decipher complex referenda or voter initiatives. Furthermore, certain persons are exempt from English literacy requirements when applying for citizenship, including older applicants who have resided in the United States for a long period of time and persons who are physically or developmentally disabled. Even native speakers of English are often confused by the legal language contained in referenda and initiatives. Translating these materials into another language greatly aids those who may speak English well but are unable to accurately understand what is stated in voting materials.

How does the government monitor compliance with Sections 203 and 208?

The Civil Rights Division of DOJ enforces compliance with Sections 203 and 208. When jurisdictions fail to comply with Sections 203 or 208, DOJ may bring a civil action to enforce compliance. DOJ may also enter into a settlement agreement that outlines the steps a jurisdiction must take to comply with the law. These agreements may include details such as the

[17] *See* NALEO Educational Fund, "Latino Voters Face Significant Challenges at Polls During Elections 2006," available at *www.calvec.org/atf/cf/%7BOB971047-D03E-4C61-845A-E9A2BE44A3D1%7D/VOCESNOV06_LATINOELECTIONDAY_RPRTFIN.PDF.*

[18] Jocelyn Friedrichs Benson, *Towards Full Participation: Solutions for Improvements to the Federal Language Assistance Laws*, 2 Advance J. Am. Const. Soc'y L. & Pol'y 123 (Spring 2008), *available at http://www.acslaw.org/Advance%20Spring%2008/Benson_Towards%20Full%20Participation.pdf.*

[19] Cal. Elec. Code § 14201(a)(1).

[20] *Id.*

[21] Cal. Elec. Code § 14201(c); Col. Rev. Stat. Ann. § 1-2-202(4).

[22] *See* Dr. James Thomas Tucker & Dr. Rodolfo Espino, *Minority Language Assistance Practices in Public Elections* at 80 (2006), *available at* http://www.ucdc.edu/faculty/Voting_Rights/Papers/16%20%20Tucker%20&%20Espino%20(Partial).pdf

number of bilingual poll workers required and where they should be placed. Finally, in Section 5 jurisdictions, DOJ will also analyze changes concerning minority language assistance to determine whether the proposed voting change has a retrogressive effect. (*See* Chapter 5 to learn more about Section 5 of the Voting Rights Act.)

Civil rights groups such as MALDEF, AAJC, and LDF have also monitored compliance with Section 203 and Section 208 and brought problems to DOJ's attention. For example, in recent years, AAJC and its affiliates have prepared reports and updates on how the following jurisdictions are complying with Section 203: Cook County, IL; Harris County, TX; King County, WA; Los Angeles County, CA; Orange County, CA; San Diego County, CA; San Mateo County, CA; and Santa Clara County, CA.

In addition, community members can report deficiencies in providing language assistance directly to DOJ and request an investigation. Collected data can also support a claim of vote denial under Section 2 of the Voting Rights Act. (*See* Chapter 4 to learn more about Section 2 of the Voting Rights Act.)

Moreover, the Help America Vote Act of 2002 (HAVA) established the U.S. Election Assistance Commission (EAC) to serve as a national clearinghouse for resources to administer federal elections, including tools for assisting limited-English proficient voters.[23] HAVA also requires the EAC to periodically study access to voting for non-English speaking voters and provides federal funds to assist states in complying with the provision on language assistance.

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[23]For example, the EAC has translated the national voter registration form into Spanish and other Asian languages. The National Voter Registration Act ("NVRA") requires that states accept the national voter registration form. The form is available at http://www.eac.gov/voter_resources/register_to_vote.aspx.

Chapter 7

The Impact of Census Data and Policies on Redistricting

The connection between redistricting and the census goes back to the founding of this nation and is grounded in the Constitution. In fact, the census was created to determine the number of people living in each state in order to apportion the seats in the United States House of Representatives among the various states according to their population. Apportionment will occur again in 2010.

Early in 2011, the U.S. Census Bureau will release population data reflecting race/ethnic origin and voting age as collected during the 2010 Census. This data is called the Public Law 94-171 data and is sometimes referred to as the "PL data." Additional census data is provided through the American Community Survey, discussed below. Jurisdictions will use census data to draw new district lines, and the Department of Justice will use the same data to help to evaluate whether a redistricting plan discriminates against minorities during its Section 5 review process. (*See* Chapter 5 for more information on how census data is used in the Section 5 review process.) The same data will be used to help determine whether a Section 2 violation exists. (*See* Chapter 4 for more information on Section 2.)

This chapter reviews several key census issues that will affect the 2011 redistricting cycle, including the new American Community Survey and how and where prisoners are counted during the census.

What is the decennial census?

The decennial census is a count of the entire U.S. population that occurs once every ten years. During this time, the Census Bureau sends out survey forms to all households and uses the results of data from these forms to determine the official population count of the United States. Through the census, the Census Bureau is also able to collect basic population information, such as age, gender, race, and Hispanic origin, for the different states and counties.

The data obtained through the decennial census is specifically collected for the purpose of apportionment and redistricting. It is used to determine the number of seats each state will receive in the U.S. House of Representatives for a ten year period, whether the population is equally divided among districts, and whether districts comply with the Voting Rights Act.

Does the decennial census include the long form?

In the past, the Census Bureau distributed a short form to all households nationwide and a long form to a random sample of one in six households. After the 2000 Census, the Census Bureau discontinued the use of the long form and replaced it with the American Community Survey ("ACS"). While 100 percent of households receives the short form, only a small subset of the population receives the ACS.

What is the American Community Survey?

The ACS is part of the Census program but does not serve the same purpose as the census. Unlike the census, which takes a snapshot of the entire population once every ten years, the ACS is designed to provide a continuous update on population data over a ten-year period and is designed to provide an estimate of the characteristics of a geographic area after the decennial census is taken. ACS forms are sent to a sampling of households (approximately 3 million housing unit addresses annually), with surveys being mailed out on a monthly basis.

Are the data sets provided by the ACS and the long form different?

ACS data are not exactly the same as data once collected by the long form. First, the ACS intends to provide data *over* ten years as compared to the census data gathered from the long form, which used to be collected only at the beginning of each decade. More specifically, the ACS is designed to provide period estimates, which describe the average characteristics of a geographic area over the entire period of data collection. One-year, three-year, and five-year estimates are available through the ACS.

What information does the ACS collect?

The ACS asks detailed questions regarding specific characteristics of the American population and will provide data on the following subjects:

Table 1. Subjects Included in the American Community Survey

Demographic Characteristics
- Age
- Sex
- Hispanic Origin
- Race
- Relationship to Householder (e.g., spouse)

Economic Characteristics
- Income
- Food Stamps Benefit
- Labor Force Status
- Industry, Occupation, and Class of Worker
- Place of Work and Journey to Work
- Work Status Last Year
- Vehicles Available
- Health Insurance Coverage*

Social Characteristics
- Marital Status and Marital History*
- Fertility
- Grandparents as Caregivers
- Ancestry
- Place of Birth, Citizenship, and Year of Entry
- Language Spoken at Home
- Educational Attainment and School Enrollment
- Residence One Year Ago
- Veteran Status, Period of Military Service, and VA Service-Connected Disability Rating*
- Disability

Housing Characteristics
- Year Structure Built
- Units in Structure
- Year Moved Into Unit
- Rooms
- Bedrooms
- Kitchen Facilities
- Plumbing Facilities
- House Heating Fuel
- Telephone Service Available
- Farm Residence

Financial Characteristics
- Tenure (Owner/Renter)
- Housing Value
- Rent
- Selected Monthly Owner Costs

*Marital History, VA Service-Connected Disability Rating, and Health Insurance Coverage are new for 2008.
Source: U.S. Census Bureau.

What should be considered if using ACS data for redistricting purposes?

ACS data provides valuable characteristics about the communities that we live in.[1] Specifically, ACS provide socio-economic data of communities, such as poverty, education level, income, language ability, and citizenship.

A number of states will likely rely upon ACS data for redistricting purposes. There are some considerations that should be taken into account when using ACS data for redistricting.

- ACS data may be able to support the argument that a particular community shares common characteristics. This may be helpful in advocating that officials preserve a "community of interest" when redistricting occurs. (For further discussion about communities of interest, *see* Chapter 2.)

- When comparing ACS data with decennial census data, officials and experts will need to consider the statistical methodology before drawing conclusions about the characteristics of the actual population count.

[1]ACS data is not the same as the population count, which is taken from the decennial census.

- ACS data that is provided on a one-year estimate is done so for geographic areas that have a population of at least 65,000. A three-year estimate is available for geographic areas that have a population of at least 20,000 people. Demographic information, including housing, social, and economic characteristics, is only available at the block group level when the ACS data delivers a five-year estimate. 2010 is the first year that the ACS will deliver a five-year estimate.

- It is important to note that the Census Bureau advises that ACS estimates should only be compared to those of the same duration. That is, one-year estimates should only be compared to other one-year estimates, three-year estimates to three-year estimates, and five-year estimates to five-year estimates.

PRISONERS & THE CENSUS COUNT

A major issue with respect to the census and redistricting has been how and, more importantly, where prisoners are counted during the decennial census. Under residence rules that govern where people are counted in the decennial census, prisoners are counted at their places of incarceration on Census Day, not at their home addresses. This becomes a significant problem in the context of redistricting because prisoners are not usually incarcerated in the same community as where they actually reside. This residence rule skews the balance of political power by inflating the population counts of communities where prisons are located by including the non-voting prison populations in these districts during the redistricting process.

Over the last several decades, the percentage of Americans incarcerated in prisons has increased four-fold.[2] Incarcerated persons are often held in areas that are geographically and demographically far removed from their home communities. For instance, although non-metropolitan counties contain only 20% of the national population, they host 60% of new prisons.[3]

In addition, because Latinos and African Americans are incarcerated at three to seven times the rate of Whites,[4] where incarcerated people are counted has tremendous implications for how African-American and Latino populations are reflected in the census, and, consequently, how these communities are impacted through redistricting.

New York provides a stark example of how the census miscount of prisoners can distort political representation in the

redistricting process. In New York, most of the state's prisoners come from New York City (66%) but virtually all of them are incarcerated upstate (91%), in a more rural and less populated region. When electoral districts are drawn, the prison population is included in the total population of the districts in which these prisons are located. Yet, in these districts, which host a large prison population, non-incarcerated residents do not share the prisoners' concerns or interests. In addition, prisoners do not establish ties to these communities while they are incarcerated, and it is unlikely that ex-prisoners will remain in the community upon their release. Hence, the practice of including non-voting prisoners in the population of electoral districts where prisons are located provides distorted data of the actual residents who benefit from and are affected by the policies and programs in these districts.

New York also demonstrates how the census miscount creates a clear imbalance of political power between the rural communities (which tend to be white) and the communities from which prisoners actually originate (which tend to be disproportionately minority). For example, without the prison populations, seven of New York's upstate State Senate districts would not meet minimum one-person, one-vote requirements under federal law and would have to be redrawn, changing district lines across the state.[5]

[2]Peter Wagner, Eric Lotke & Andrew Beveridge, Prison Policy Initiative, *Why The Census Bureau Can And Must Start Collecting the Home Addresses of Incarcerated People*, at 1 (Feb. 10, 2006), *available at* http://www.prisonpolicy.org/homeaddresses/CollectingHomeAddresses.pdf.
[3]*Id*. at 3.
[4]*Id.*

[5]Prison Policy Initiative, *Gerrymandering in New York State*, *available at:* http://www.prisonersofthecensus.org/nygerrymander.html.

A growing number of advocacy organizations, including the Prison Policy Initiative, Brennan Center for Justice at NYU School of Law, Dēmos, NAACP Legal Defense and Educational Fund, National Coalition on Black Civic Participation, NAACP, National Urban League, and Unity Diaspora Coalition, advocated for a change in the prisoner residence rule during the 2010 Census. The advocates argued that the frequent placement of prisons in rural counties with otherwise small populations artificially inflates political representation for these areas.

Several state legislatures, including New York's, are now considering proposals to correct the misuse of prison populations in state redistricting plans.[6] In 2010, Maryland became the first state to adopt a bill to count incarcerated persons at their home for redistricting purposes.

To help address these concerns, in February 2010, the Census Bureau agreed to release block-level information on the location of group quarters facilities, such as prisons, by May 2011, which would allow state and local legislatures to redraw district lines without including inmates.[7] This agreement, reached between U.S. Census Director Robert Groves and the Chairman of the House Subcommittee on Information Policy, Census and National Archives, Congressman Lacy Clay, will allow interested legislatures to consider the data in the redistricting process.

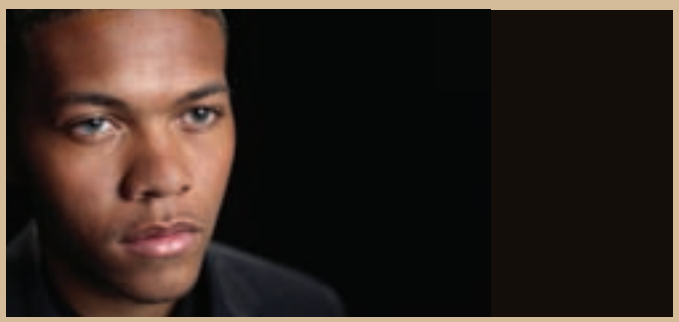
This is an important first step by the Census Bureau toward improving its practices on counting incarcerated persons. However, advocates are engaged in a long-term campaign to encourage the Bureau to implement a more permanent solution under which the decennial census would identify the home communities of incarcerated persons and count them at their home locations. Steps should be taken during the 2010 Census and through the upcoming decade to make this a reality by the 2020 Census.

[6]Prison Policy Initiative, *Legislation*, *available at* http://www.prisonersofthecensus.org/legislation.html.
[7]Prison Policy Initiative, *Advocates Commend Census Bureau for Enhancing States' Access to Data on Prison Populations in 2010 Census*, Feb. 10, 2010, *available at* http://www.prisonersofthecensus.org/news/2010/02/10/newdata/

Chapter 8

Non-Citizens and Political Representation

Redistricting is based on the premise that there is equal representation for equal numbers of people. The redistricting process is not intended solely to protect the voting power of citizens. Non-citizens, as well as citizens, should count for purposes of apportionment.



Do non-citizens get political representation too?

Yes, non-citizens get political representation even if they are not eligible to vote. Non-citizens are "persons" under the Constitution and are entitled to protection under our laws. Despite this constitutional promise, immigrants have been the target of increasing anti-immigrant rhetoric and laws in our nation. When Congress failed to pass comprehensive immigration reform in 2006, some states and local governments passed laws targeting immigrants. Some of those laws required proof of legal status to rent housing or prohibited laborers from gathering on streets to solicit work. Members of Congress also attempted to pass legislation that would exclude non-citizens from being counted in the re-apportionment process.

How many non-citizens live in America currently?

The Department of Homeland Security (DHS) provides the most current statistics on the number of immigrants living in the United States. According to the DHS, as of January 1, 2008, the number of non-citizens equaled approximately 31.3 million (19.7 million legal residents and approximately 11.6 million unauthorized immigrants).[1] Most legal permanent residents are eligible for naturalization after a minimum of five years of residence or three years if they are married to a U.S. citizen. Immigrants who are allowed to live in the United States but are not given permanent residence include individuals authorized to work or temporary visitors. All people working in the United States, regardless of immigration status, are obligated to pay taxes.

Do states have to use total population data to draw districts? Can states just use data on citizens since they are the ones eligible to vote?

As a preliminary matter, if a state decides to exclude non-citizens from the redistricting base while including other non-voters, such actions could be deemed discriminatory

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[1]Michael Hoefer, Nancy Rytina, & Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008*, Department of Homeland Security, Office of Immigration Statistics, Population Estimates, at 4 (Feb. 2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf

or unconstitutional.[2] It also amounts to "taxation without representation."

Depending on the region of the U.S., states have the option to use either the total population or the citizen population in apportioning districts.[3] In certain jurisdictions, including those within the Ninth Circuit, all persons must be counted for determining the size of political districts.[4] However, not all jurisdictions have adopted this standard. Those jurisdictions within the Fifth Circuit have the option of counting all persons or those who are eligible to vote.[5]

Why should non-citizens be considered in redistricting?

Non-citizens are "persons" under the Constitution and are entitled to protection under our laws.

Non-citizens have many opportunities for civic participation, even though they cannot vote in most jurisdictions. They can participate in public hearings and government meetings and meet with their elected representatives. A number of jurisdictions around the country allow non-citizens to vote in local elections. Non-citizens are allowed to vote for local school boards in Chicago and they have been allowed to vote in Takoma Park, Maryland in local elections since 1992. Other small communities in Maryland allow non-citizen voting as well. In City Heights, California all residents are allowed to vote for members of the Planning Committee.[6] In New York, non-citizens were allowed to vote in community school board elections for more than three decades before Mayor Bloomberg dismantled the school board in 2003. In 2010, non-citizen parents were allowed to vote in an election to determine what organizations would run low-performing schools in the Los Angeles Unified School District. Moreover, elected officials have a duty to represent everyone in their district, not just the people who voted for them, not just the people who are old enough to vote, and not just the people who are citizens.

[2] *See* Carl E. Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 Yale L.J. 1441, 1454 (1995) (arguing that discriminatory exclusion of only non-citizens will trigger strict scrutiny based on alienage and requires a compelling justification); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment is not limited to the protection of citizens).

[3] Compare *Garza v. Los Angeles County*, 918 F.2d 763 (9th Cir. 1990) *with Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). *See also Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) (addressing redistricting based on voting age population).

[4] *Garza,* 918 F.2d at 774-75. The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands.

[5] *Chen*, 206 F.3d 502. The Fifth Circuit includes Louisiana, Mississippi and Texas.

[6] Stanley Renshon, Center for Immigration Studies, *The Debate Over Non-Citizen Voting: A Primer* (April 2008) *available at* http://www.cis.org/noncitizen_voting_primer.html.

Chapter 9

Redistricting Reform Measures

With so much at stake, any effort to reform the way that redistricting is carried out must ensure that protections afforded by the Voting Rights Act (VRA) are observed and safeguards to threats against minority voting rights are included. Moreover, reforms should address existing and measurable barriers to full representation of minority communities. Reforms that seek to address the effect of the miscount of prisoners provide a good starting point.

In this Chapter, we identify and discuss some (though certainly not all) of the various redistricting reform proposals that have surfaced in recent years, including redistricting commissions and correcting the census miscount of prisoners.

What do modern redistricting reform measures attempt to address?

Current redistricting reform measures are generally offered as a response to legislative gridlock and highly partisan viewpoints. As a result, most of the current redistricting reform measures focus on eliminating political gerrymandering—manipulating the redistricting process for a particular political or partisan outcome—and preventing incumbents from manipulating the redistricting process to retain their elected position.

The focus of modern redistricting reform measures, however, can have the same effect as the current process when partisan or political ideals conflict with the full protection of minority voting rights. In fact, just like the current process, some redistricting reform measures attempt to create a particular partisan outcome to the greatest extent possible and minority voters face the same risks without adequate protection embedded in the redistricting reform proposals.

True redistricting reform, therefore, will do more than shift the focus from partisan domination and incumbency protection to an arguable alternative partisan ideal. Modern redistricting reform measures must carefully approach redistricting reform and ensure that no proposed partisan or political ideal occurs at the expense of minority voting rights principles. At the same time, modern redistricting reform measures must address two of the long-standing barriers to the full inclusion of minority voters—felon disfranchisement laws and the census miscount, which have the continued impact of limiting the ability of all citizens to fully participate in the political process.

Is there more than one type of redistricting commission reform measure?

Most states charge members of the state legislature with the responsibility of redistricting. One redistricting reform measure that has surfaced in several states calls for the creation of Independent Redistricting Commissions (IRCs). These proposals aim to take responsibility for redistricting away from elected officials and transfer that responsibility to an appointed body.

While some redistricting commission reform measures have the goal of increasing transparency and opportunities for public input, other redistricting commission reform proposals have called for the adoption of stringent criteria that the legislature or a politically appointed commission must follow in the process of redrawing district lines.

Which states have adopted Independent Redistricting Commissions?

Arizona and California have commissions which completely exclude elected officials from the redistricting decision-making process. However, in California, the legislature continues to be responsible for drawing Congressional lines. Many other states have some type of "commission" that participates in the redistricting process.[1] These commissions have varying forms. Some commissions include selected members of the state legislature, while other commissions play an advisory role to help guide the legislature during the course of redistricting. Other commissions are only activated to break a stalemate when the legislature cannot agree on a final plan. Several states, including Iowa, Idaho, Montana, and Washington, have a commission that involves elected officials at some point during the redistricting decision-making process by giving elected officials the opportunity to veto a plan or appoint partisan representatives to the commission.

How do the changes proposed by redistricting commission reform measures impact minority voters?

The opportunity for minority communities to elect candidates of their choice can be, and often is, dramatically affected by the drawing of district lines. Therefore, it is very important to closely analyze whether proposed reforms would place minority voters in a more vulnerable position for a particular partisan outcome. Unfortunately, proposals calling for the creation of redistricting commissions may be focused on a potential cure to perceived partisan or incumbency problems at the expense of providing adequate safeguards to prevent the dilution of minority voting strength during the redistricting process. Indeed, during the 2000 redistricting cycle, the legislative redistricting plan adopted by the Arizona IRC resulted in an objection under Section 5 of the VRA.[2]

Would minority voters benefit if a redistricting commission curtailed partisan gerrymandering?

While adopting an IRC reform measure may change redistricting, there is little evidence that an IRC is the best way to curtail partisanship or eliminate political gerrymandering. Moreover, our nation's long history of discrimination in the electoral process requires that we carefully examine and assess all proposals to reform the redistricting process, no matter how

[1]For more information regarding this measure of reform, see NAACP Legal Defense and Educational Fund, Inc., *Independent Redistricting Commissions: Reforming Redistricting Without Reversing Progress Toward Racial Equality* (June 9, 2010), *available at* http://www.naacpldf.org/content/pdf/barriers_to_voting/IRC_Report.pdf.

[2]*See* Letter from Ralph F. Boyd, Jr., Assistant Attorney General, U.S. Department of Justice to Lisa T. Hauser, Esq. and José de Jesús Rivera, Esq., Phoenix, Arizona (May 20, 2002), *available at http://www.justice.gov/crt/voting/sec_5/ltr/l_052002.php.*

neutral they may appear. Each redistricting cycle, unfortunately, has been followed by long and protracted litigation under the VRA. Given this history and the ongoing struggle to protect minority voting rights, those redistricting proposals that aim largely to address issues of partisanship and incumbency protection must be carefully reviewed. In fact, all proposals that seek to alter the way in which redistricting is carried out should adhere to the requirements of the VRA and be guided by principles consistent with it.

At the same time, any process that transfers redistricting authority from elected officials to an appointed commission must be carefully monitored and assessed to ensure that the interests of minority communities are adequately represented. Commissions should take into account principles of diversity and accountability; otherwise they run the risk of rolling back progress toward racial equality in the redistricting decision-making process. In our view, diversity among line-drawers and the unequivocal commitment to protecting the interests of minority voters are two issues of paramount importance in the context of any redistricting effort and should be of particular concern during any effort to reform the process. With over 40 years of enforcement of the VRA at stake, IRC proposals must not lead to a process that places minority voting rights in a more vulnerable position.

Will strict criteria in an IRC proposal improve redistricting if it requires application of the Voting Rights Act?

All redistricting proposals must comply with the VRA because it is federal law. While a redistricting reform proposal that requires compliance with the VRA reiterates the status quo, it must also ensure that the process created by the proposed criteria does not create tension with the VRA. A proposal can create tension with the VRA if it prevents or otherwise limits opportunities for minorities to elect a candidate of choice. The adoption of all criteria, therefore, must require that they are applied with flexibility so the map produced under a redistricting reform proposal does not discriminate against minority voters.

How does the census miscount of prisoners and felon disfranchisement laws affect redistricting reform measures?

Although rarely discussed in the context of redistricting, both the census miscount of prisoners and felon disfranchisement laws have a significant impact on minority communities. While much of the redistricting reform debate has focused on partisanship and IRCs, these proposals have failed to address two very significant problems faced by minority communities during the redistricting process.

The census miscount

As explained more fully in Chapter 7, the Census Bureau miscounts prisoners—a population disproportionately comprised of racial minorities in the United States—as residents of the prison where they are located, despite the fact that they have no ties to the surrounding community and, in most states, are prohibited from voting by felon disfranchisement laws. This practice *artificially inflates* the population of the districts where prisons and jails are located. In many states, these artificially inflated population counts are used to create districts that are significantly padded by prisoners.[3] This "prison gerrymandering" phenomenon distorts the "one person, one vote" principle, which requires that election districts hold roughly the same number of constituents. At the same time, the population of the districts where prisoners lived prior to their incarceration is *artificially deflated*. Moreover, incarcerated individuals almost always return to their home communities upon release (the average length of incarceration in state prison is less than three years); but the census count, that artificially deflates the population of these communities by not counting residents who are incarcerated elsewhere, remains in effect for an entire decade.

[3]For more information on the prison-based gerrymandering crisis, *see* NAACP Legal Defense and Educational Fund, Inc., *Captive Constitutents* (June 1, 2010), *available at* http://www.naacpldf.org/content/pdf/felon/captive_constituents.pdf.

Felon disfranchisement laws

Felon disfranchisement laws prevent millions of Americans from voting because of a prior felony conviction.[4] Because America's fractured criminal justice system and disproportionate policing and imprisonment repeatedly align along the lines of race and class, felon disfranchisement laws result in the exclusion of vastly disproportionate percentages of racial minorities from the electorate as compared to non-minorities. Legislatures of many states intended this result when they adopted felon disfranchisement laws after the Civil War as a reaction to the inclusion of Blacks as voters.

The felon disfranchisement phenomenon diminishes the voting strength of entire minority communities, which are disproportionately plagued with concentrated poverty, sub-standard housing, limited access to healthcare and sub-standard education. Nationally, more than 5.3 million Americans are denied access to the right that is preservative of all other civil rights because of felony convictions.

According to data released by the Census Bureau in 2006, of the estimated 2 million people living in prisons, roughly 60% are African-American and Latino.

The disproportionate imprisonment of minorities directly interacts with felon disfranchisement laws to exclude minority citizens from the political process. In fact, a staggering 13% of all African-American men in this country are disfranchised, and in some states up to *one-third* of the entire African-American male population is denied the right to vote. Given current rates of incarceration, approximately one in three of the next generation of Black men will be disfranchised at some point during their lifetime.

In sum, the census miscount of prisoners and felon disfranchisement laws dilute minority voting strength. In order to prevent the dilution of minority voting strength, therefore, all redistricting reform efforts, including calls for the creation of IRCs, must include corrective action to address the erroneous designation by the Census Bureau of prisoners' residences. Correcting the census miscount of prisoners can only be fully corrected by allowing prisoners to vote, either absentee or on a machine, with the voters in their home district.

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[4]For more information about the impact felon disfranchisement laws have on communities of color nationwide, *see Free the Vote: Unlocking Democracy in the Cells and on the Streets* (April 21, 2010), *available at* http://www.naacpldf.org/content/pdf/felon_free/Free_the_Vote.pdf.

Conclusion

Redistricting is one of the most important events in our democracy as it determines the allocation of political power. Participating in this process is vital. Providing input ensures that our interests are being heard and represented by our elected officials.

We are hopeful that this handbook has enabled you to gain the tools necessary to have an effective voice in redistricting. If you find that you may need some special assistance or advice on technical matters, please contact any of our three organizations. Individuals in these organizations may be able to provide guidance or refer you to other organizations or public entities that can assist your efforts.

APPENDIX 1:
List of Jurisdictions Covered Under Section 5 of the Voting Rights Act

Alabama

Alaska

Arizona

California:

- Kings County
- Merced County
- Monterey County
- Yuba County

Florida:

- Collier County
- Hardee County
- Hendry County
- Hillsborough County
- Monroe County

Georgia

Louisiana

Michigan:

- Allegan County:
  - Clyde Township
- Saginaw County:
  - Buena Vista Township

Mississippi

New Hampshire:

- Cheshire County:
  - Rindge Town
- Coos County:
  - Millsfield Township
- Pinkhams Grant
- Stewartstown Town
- Stratsford Town
- Grafton County:
  - Benton Town
- Hillsborough County:
  - Antrim Town
- Merrimack County:
  - Boscawen Town
- Rockingham County:
  - Newington Town
- Sullivan County:
  - Unity Town

New York:

- Bronx County
- Kings County
- New York County

North Carolina:

- Anson County
- Beaufort County
- Bertie County
- Bladen County
- Camden County
- Caswell County
- Chowan County
- Cleveland County
- Craven County
- Cumberland County
- Edgecombe County
- Franklin County
- Gaston County
- Gates County
- Granville County
- Greene County
- Guilford County
- Halifax County
- Harnett County
- Hertford County
- Hoke County
- Jackson County
- Lee County
- Lenoir County
- Martin County
- Nash County
- Northampton County
- Onslow County
- Pasquotank County
- Perquimans County
- Person County
- Pitt County
- Roberson County
- Rockingham County
- Scotland County
- Union County
- Vance County
- Washington County
- Wayne County
- Wilson County

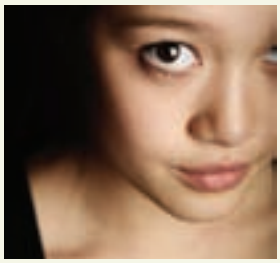
South Carolina

South Dakota:

- Shannon County
- Todd County

Texas

Virginia[1]



[1]Fifteen political subdivisions in Virginia (Augusta, Botetourt, Essex, Frederick, Greene, Middlesex, Pulaski, Roanoke, Rockingham, Shenandoah, and Warren Counties and the Cities of Fairfax, Harrisonburg, Salem, and Winchester) have "bailed out" from coverage pursuant to Section 4 of the Voting Rights Act. The United States consented to the declaratory judgment in each of those cases.

APPENDIX 2:
Redistricting In Your State

Please check your state's website. Information contained in this Appendix may have changed since publication.

ALABAMA

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	1 representative per district. Ala. Code § 17-20-2 (2010).	Constitution forbids dividing any county between more than one district and allows for additional representation in the event new counties are created. Ala. Const. art. IX, § 200.
Description of current districts	Ala. Code § 17-20-1 (2010).	Ala. Code §§ 29-1-1.2, 29-1-2.3 (2010).
Number of districts	Present: 7 2010 (est.): 7	Senate: 35 House: 105 Multimember: No House districts nested within Senate districts? Yes
Districting responsibility	State legislature is responsible for redistricting. Ala. Const. art. IX, §§ 198-200. The legislature creates a bipartisan legislative committee on reapportionment. The committee prepares and develops redistricting plans which are adopted by the legislature. Ala. Code §§ 29-2-50 to 29-2-52.	State legislature is responsible for redistricting. Ala. Const. art. IX, §§ 198-200. The legislature creates a bipartisan legislative committee on reapportionment. The committee prepares and develops redistricting plans which are adopted by the legislature. Ala. Code §§ 29-2-50 to 29-2-52.
May Governor veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	None	First legislative session following the decennial census. Ala. Const. art. IX, §§ 199--200.

ALASKA

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	None	House district s shall be contiguous and compact, containing as nearly as practicable a relatively integrated socio-economic area. Each senate district shall be composed as near as practicable of two contiguous house districts. Alaska Const. art. VI, § 6.
Description of current districts	Alaska comprises one at-large Congressional District.	Alaska Division of Elections, Statewide District Descriptions, 2002 Amended Redistricting Plan, *available at* http://www.elections.alaska.gov/distdes.php.
Number of districts	Present:1 2010 (est.): 1	Senate: 20 House: 40 Multimember Districts: No House districts nested within Senate districts? Yes
Districting responsibility	N/A	Redistricting Board: 2 members appointed by the governor, 1 by the presiding officer of the Senate, 1 by the presiding officer of the House, and 1 by the Chief Justice of the Supreme Court. At least one board member must be a resident of each judicial district that existed on January 1, 1999. No public employees or officials may be board members. Alaska Const. art. VI, §8.
May Governor veto?	N/A	No
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	N/A	"No later than ninety days after board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting." Alaska Const. art. VI, § 10.

ARIZONA

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	Arizona's constitution requires compliance with the federal Voting Rights Act and the U.S. Constitution. Districts must also comply with specific criteria enunciated in the State Constitution. Ariz. Const. art. IV, Part 2, §1(14). Ariz. Rev. Stat. § 16-1103 (2010).	Arizona's constitution requires compliance with the federal Voting Rights Act and the U.S. Constitution. Districts must also comply with specific criteria enunciated in the State Constitution. Ariz. Const. art. IV, Part 2, §1(14). Ariz. Rev. Stat. § 16-1103 (2010).
Description of current districts	Arizona Independent Redistricting Commission, Final Congressional District Map, Certification List, *available at* http://www.azredistricting.org/?page=finalcong	Ariz. Rev. Stat. § 16-1102 (2010).
Number of districts	Present: 8 2010 (est.): 9	Senate: 30 House: 60 Multimember Districts: Yes House districts nested within Senate districts? Yes
Districting responsibility	Arizona Independent Redistricting Commission composed of 5 members. The Speaker of the House, minority leader in the House, the Senate President, and the minority leader of the Senate each appoints 1 member to the Commission. The fifth member, who shall act as chair, is selected by the other four members, and must not belong to any party already represented on the commission. If the four deadlock when selecting the fifth member, commission on appellate appointees shall make such appointment. Ariz. Const. art. IV, Part 2, §1.	Arizona Independent Redistricting Commission composed of 5 members. The Speaker of the House, minority leader in the House, the Senate President, and the minority leader of the Senate each appoints 1 member to the Commission. The fifth member, who shall act as chair, is selected by the other four members, and must not belong to any party already represented on the commission. If the four deadlock, commission on appellate appointees shall make such appointment. Ariz. Const. art. IV, Part 2, §1.
May Governor veto?	No	No
Covered under §5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	None	None

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	Congressional districts shall be of substantially equal population in order to comply with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Ark. Code. Ann. § 7-2-101 (2009).	Senate districts must consist of contiguous territory, with no county dividedin the formation of such districts. Ark. Const. art. VIII, §3.
Description of current districts	Ark. Code. Ann. §§ 7-2-Note to 7-2-105 (2009).	None
Number of districts	Present: 4 2010 (est.): 4	Senate: 35 House: 100 Multimember Districts: No House districts nested within Senate districts? Yes
Districting responsibility		Board of Apportionment consisting of the Governor (Chair), Secretary of State and State Attorney General. Ark. Const. Art. VIII, § 1.
May Governor veto?	Yes	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed state deadlines and enforcement	None	February 1 of the year following the decennial census. Ark. Const. art. VIII, §4.

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	Cal. Const. art. XXI, §1 Each member of Congress shall be elected from a single-member district. The population for each district shall be reasonably equal. In adjusting boundary lines, the Legislature must apply criteria listed in Article XXI, §2(d)(2)-(5) and shall issue a report explaining basis for maps and compliance with criteria.	Single-member districts; reasonably equal population; comply with federal Voting Rights Act; contiguous and compact. Cal. Const. art. XXI, §§2(d)(1)-(6), 2(e).
Description of current districts	Congressional districts - Cal. Elec. Code §§ 21400-21453 (2009).	Senate districts - Cal. Elec. Code § 21100-21140 (2009). Assembly districts - Cal. Elec. Code § 21200-21280 (2009).
Number of districts	Present: 53 2010 (est.): 53	Senate: 40 House: 80 Multimember: No
Districting responsibility	Legislature is responsible for drawing Congressional districts. Cal. Const. art. XXI, §1.	14-member Citizen's Redistricting Commission composed of 5 registered with largest political party, 5 registered with second largest political party, and 4 not registered with either of the two largest political parties. Commission members must have voted in two of the last three statewide general elections and must not have changed political party affiliation within the last five years. Cal. Const. art. XXI, §§2(c)(2), (3).
May Governor veto?	Yes	No
Covered under § 5 of the Voting Rights Act?	Yes, selected counties (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	The year following every decennial census. Cal. Const. art. XXI, §1.	Sept. 15, 2011 - Commission shall issue reports with maps explaining basis for maps and compliance with criteria. Cal. Const. art. XXI, §§2(g).

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	"The general assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to [the] state by the congress of the United States for the election of one representative to congress for each district…." Colo. Const. art. V, § 44.	"Each district shall be compact in area as possible and the aggregate linear distance of all district boundaries shall be as short as possible. Each district shall consist of contiguous whole general election precints. Districts of the same house shall not overlap….communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors, shall be preserved within a single district." Colo. Const. art. V, § 47.
Description of current districts	Colo. Rev. Stat. §2-1-101 (2009).	Senatorial Districts: Colo. Rev. Stat. § 2-2-102 (2009). Representative Districts: Colo. Rev. Stat. § 2-2-202 (2009).
Number of districts	Present: 7 2010 (est.): 7	Senate: 35 House: 65 Multimember districts? No House districts nested within Senate districts? No
Districting responsibility	General Assembly. Colo. Const. art. V, § 44.	Reapportionment Commission. Colo. Const. art. V, § 48.
May Governor veto?	Yes	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed state deadlines and enforcement	None	See Colo. Const. art. V, § 48(e).

DELAWARE

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory Restrictions	None	The representative and senatorial districts shall be contiguous, nearly equal in population, and bounded by major roads, streams or other natural boundaries. Districts shall not be created as to unduly favor a person or party. Del. Code Ann. Tit. 29, § 804 (2010).
Description of Current Districts	Delaware comprises one at-large congressional district.	House of Representatives –Del. Code Ann. tit. 29, § 821 (2010). Senate – Del. Code. Ann. tit. 29, § 831 (2010).
Number of Districts	Present: 1 2010 (est.): 1	Senate: 21 House: 41 Multimember districts: 0
Districting Responsibility	N/A	The legislature. The leadership in both houses is responsible for drawing separate plans for their respective houses.
May Governor Veto?	N/A	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	N/A	Legislature must adopt a plan by June 30, 2011. Del. Code. Ann. tit. 29, § 805 (2010).

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	Fla. Const. art.X, § 8(a); Fla. Stat. tit. II, ch. 8.	Senate and representative Districts must be of either contiguous, overlapping or identical territory. Fla. Const. art. III, § 16.
Description of current districts	Fla. Stat. § 8.0002 (2009).	Fla. Stat. §§ 10.000020, 10.00003 (2009).
Number of districts	Present: 25 2010 (est.): 26	Senate: 40 House: 120 Multimember Districts: No House districts nested within Senate districts? No
Districting responsibility	State legislature	State legislature. Fla. Const. art. III, § 16.
May Governor veto?	Yes	No
Covered under § 5 of the Voting Rights Act?	Yes, selected counties (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	N/A	During the regular session in the second year following the decennial census (e.g. 2012). If the joint resolution does not pass within that time, the governor must reconvene the Legislature for a special apportionment session not to exceed 30 days during which reapportionment will be mandatory. Fla. Const. art. III, § 16(a)-(e). If the legislature fails to adopt a resolution of apportionment or should the apportionment be invalid, the supreme court shall, not later than 60 days after receiving the petition of the attorney general, file an order making such apportionment. Fla. Const. art. III, § 16(b), (f).

[1] In 2010, Florida voters will adopt or reject amendements to the state constitution requiring that the legislature follow redistricting criteria.

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	None	The general assembly must compose the Senate and House districts from contiguous territory. Ga. Const. art. III, § 2, para. 2.
Description of current districts	Ga. Code Ann. § 21-1-2.	Ga. L. 2006, p. 12, § 1/HB 1137.
Number of districts	Present: 13 2010 (est.): 14	Senate: 56 House: 180 Multimember Districts: No House districts nested within Senate districts? No
Districting responsibility	State legislature	State legislature
May Governor veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	None	None

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	Haw. Const. art. IV, § 4-6.	Haw. Const. art. IV, § 4-6.
Description of current districts	None	None
Number of districts	Present: 2 2010 (est.): 2	Senate: 25 House: 51 Multimember Districts: No House districts nested within Senate districts? Yes
Districting responsibility	Reapportionment commission may be required at times to redraw congressional district lines. Haw. Const. art. IV, § 9. Reapportionment Commission. Nine members: Two selected by president of the Senate; two selected by speaker; 2 by the minority party of each house; one member selected by the other 8 members. Haw. Const. art. IV, § 2.	Reapportionment Commission. Nine members: Two selected by president of the Senate; two selected by speaker; 2 by the minority party of each house; one member selected by the other 8 members. Haw. Const. art. IV, § 2.
May Governor veto?	No	No
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	150 days form the date the members of the commission are certified.	150 days form the date the members of the commission are certified.

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	Districts must be equal in population and comply with federal laws. Idaho Const. art. III, § 5. In addition, districts must comply with specific criteria. Idaho Code Ann. § 72-1506 (2009).	Districts must be equal in population and comply with federal laws. Idaho Const. art. III, § 5. In addition, districts must comply with specific criteria. Idaho Code Ann. § 72-1506 (2009).
Description of current districts	Idaho Code Ann. § 34-1902 - 34-1903 (2009).	Idaho Code Ann. § 67-202 (2008). *repealed by* S.L. 2009, ch. 52, § 1.
Number of districts	Present: 2 2010 (est.): 2	Senate: 35 House: 70 Multimember Districts: Yes House districts nested within Senate districts? Yes
Districting responsibility	A 6-member commission for reapportionment. The leaders of the two largest political parties in the House and in the Senate shall appoint one member each. State chairmen of the two largest political parties, determined by the vote cast for governor in the last gubernatorial election, shall each designate one member. Members may not be elected or appointed officials. Idaho Const. art. III, § 2(2).	A 6-member commission for reapportionment. The leaders of the two largest political parties in the House and in the Senate shall appoint one member each. State chairmen of the two largest political parties, determined by the vote cast for governor in the last gubernatorial election, shall each designate one member. Members may not be elected or appointed officials. Idaho Const. art. III, § 2(2).
May Governor veto?	No	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed state deadlines and enforcement	Committee must file a proposed plan within 90 days of the commission being formed or the census data becomes available that details apportioning the senate and house of representatives of the legislature and congressional districts. Must be approved by 2/3 of the commission. Idaho Const. art. III, § 2 (4).	Committee must file a proposed plan within 90 days of the commission being formed or the census data becomes available that details apportioning the senate and house of representatives of the legislature and congressional districts. Must be approved by 2/3 of the commission. Idaho Const. art. III, § 2 (4).

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	None	Legislative Districts shall be compact, contiguous, and substantially equal in population. Ill. Const. art. 4, § 3.
Description of current districts	Board of Elections, Congressional Maps and Descriptions, http://www.elections.il.gov./VotingInformation	Board of Elections, Congressional Maps and Descriptions, *available at* http://www.elections.il.gov./VotingInformation
Number of districts	Present: 19 2010 (est.): 18	Senate: 59 House: 118 Multimember districts? No House districts nested within Senate districts? Yes
Districting responsibility	The General Assembly	The General Assembly
May Governor veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed state deadlines and enforcement	None	If the Legislature fails to redistrict by June 30th of the year following the decennial census, an eight-member Legislative Redistricting Commission shall be constituted by July 10th. If the Commission has not filed a plan by August 10th, the Secretary of State shall appoint a ninth member to the Commission and a plan shall be filed by October 5th. Ill. Const. art. 4, § 3(b).

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	Congressional Districts	**State Legislative Districts**
Selected state Constitutional & Statutory Restrictions	None	Ind. Const. art. 4, § 5. Each territory should be contiguous.
Description of Current Districts	Since the General Assembly failed to establish Congressional Districts at the end of its First Regular Session following the 2000 decennial census, a Redistricting Commission was formed. The Commission submitted a Congressional Redistricting Plan to the governor. Executive Order 01-11, signed by Governor Frank O'Bannon on May 16, 2001, established the Congressional Districts for Indiana's members in the U.S. House of Representatives.	Senate – Ind. Code Ann. §§ 2-1-11-1 to 2-1-11-50 (2010). House - Ind. Code Ann. §§ 2-1-10-1 to 2-1-10-100 (2010). Any area not described therein or any area described as belonging to more than one district shall be governed by Ind. Code Ann. § 2-1-9-7.
Number of Districts	Present: 9 2010 (est.): 9	Senate: 50 House: 100 Multimember districts? No
Districting Responsibility	Legislature. If legislature adjourns without establishing congressional districts or if any part of the plan is declared unconstitutional, redistricting commission is established. Commission consists of five members: House speaker, Senate president pro tem, redistricting committtee chairpersons from each chamber. Governor appoints final member (legislator). Ind. Code Ann. §§ 3-3-2-2 and 3-3-3-4 (2010).	Legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	The congressional deadline is April 29, 2011 (end of first regular session following the decennial census). If that date is not met, the Redistricting Commission adopts redistricting plan. Ind. Code Ann. §§ 3-3-2-1 (2010).	The Legislative plan must be adopted by April 29, 2011. Failure to meet that date can result in a special session of the General Assembly if called by the governor.

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	Congressional Districts	**Legislative Districts**
Selected state constitutional & statutory restrictions	None	Each district should be reapportioned as equally as practicable based on the population count from the decennial census. La. Const. art. III, § 6(A).
Description of current districts	La. Rev. Stat. 18 § 1276 (2010).	Senate Districts - La. Rev. Stat. 24 § 35.1 (2010). House Districts - La. Rev. Stat. 24 § 35.5 (2010).
Number of districts	Present: 7 2010 (est.): 6	Senate: 39 House: 105 Multimember districts: No House districts nested within Senate districts? No
Districting responsibility	Legislature	Legislature
May Governor veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed state deadlines and enforcement	April 29, 2011. *See* La. Rev. Stat. 18 § 1942 (2010).	Legislature must reapportion by the end of the year following the year in which the census report is given to the U.S. President (December 31, 2011). If the Legislature fails to meet the deadline, the state supreme court reapportions. La. Const. art. III, § 6(A)-(B).

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	Md. Ann. Code art. EL, § 8-701 (2010).	"Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions." Md. Const. art. III, §4; *see also* Md. Const. art. II, §§ 3 & 5.
Description of Current Districts	Md. Ann. Code art. EL, § 8-702-709 (2010).	Md. Code Ann., State Gov't § 2-202 (2010).
Number of Districts	Present: 8 2010 (est.): 8	Senate: 47 House of Delegates: 141 Multimember districts? Yes House districts nested within Senate districts? Yes
Districting Responsibility	Constitution and statutes are silent for congressional plans. Congressional plan is usually introduced as regular bill in General Assembly to be passed by both houses and signed by governor who has veto power.	Governor is responsible for creating legislative plan. The legislature must adopt or amend the governor's plan, or adopt their own plan. Md. Const. art. III, §5.
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	None	Governor submits plan to legislature on first day of regular session in second year following census. Legislature has 45 days to amend and adopt plan or adopt one of their own. Md. Const. art. III, § 5.

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	None	Legislative ditricts shall be of contiguous territory and formed "without uniting two counties or parts of two or more counties… into one district. Such districts shall also be so formed that no town containing less than twenty-five hundred inhabitants…shall be divided." Mass. Const. art. 101, §§ 1 & 2.
Description of Current Districts	Mass. Gen. Laws ch. 57, § 1 (2010).	Mass. Gen. Laws ch. 57, §§ 3-4 (2010).
Number of Districts	Present: 10 2010 (est.): 9	Senate: 40 House: 160 Multimember districts? No House districts nested within Senate districts? No
Districting Responsibility	State legislature	State legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	None	First regular session after the year in which the census is taken. Mass. Const. art. 101.

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	Congressional Districts	State Legislative Districts
State Constitutional & Statutory Restrictions	Mich. Comp. Laws §§3.54, 3.63 (2010).	Mich. Const. art. IV, §§ 2-5. House and Senate districts shall be "areas of convenient territory contiguous by land" and "shall not violate section 2…of the voting rights act of 1965…." Mich. Comp. Laws §§ 4.261, 4.261a.
Description of Current Districts	Mich. Comp. Laws § 3.51 (2010).	House Districts - Mich. Comp. Laws § 4.2001 (2010). Senate Districts - Mich. Comp. Laws § 4.2002 (2010).
Number of Districts	Present: 15 2010 (est.): 14	Senate: 38 House: 110 Multimember districts? No
Districting Responsibility	Legislature	Legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed State Deadlines and Enforcement	November 1, 2011. Mich. Comp. Laws §3.62 (2010).	November 1, 2011. Mich. Comp. Laws §4.261 (2010).

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	Redistricting plan must encompass all the territory of the state; no territory must be omitted or duplicated; all districts must consist of convenient contiguous territory substantially equal in population; and political subdividions must not be divided more than necessary to meet constitutional requirements. Minn. Stat. § 2.91 (2009).	Members of both houses shall be apportioned equally throughout the different sections of the state in proportion to the population; senators are chosen by single districts of convenient contiguous territory; no representative district shall be divided to form a senate district. Minn. Const. art. IV, §§ 2, 3. Redistricting plan must encompass all the territory of the state; no territory must be omitted or duplicated; all districts must consist of convenient contiguous territory substantially equal in population; and political subdividions must not be divided more than necessary to meet constitutional requirements. Minn. Stat. § 2.91 (2009).
Description of Current Districts	*Zachman v. Kiffmeyer*, No. CO-01-160 (Minn. Spec. Redis. Panel Mar. 19, 2002) (final order adopting a Legislative Redistricting Plan).	*Zachman v. Kiffmeyer*, No. CO-01-160 (Minn. Spec. Redis. Panel Mar. 19, 2002) (final order adopting a Legislative Redistricting Plan); Minn. Stat. §§ 2.444, 2.484 (2009).
Number of Districts	Present: 8 2010 (est.): 7 or 8	Senate: 67 House: 134 Multimember districts? No House districts nested within Senate districts? Yes
Districting Responsibility	Legislature	Legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	25 weeks before the state primary election in the year ending in two (March 20, 2012).	25 weeks before the state primary election in the year ending in two (March 20, 2012).

MISSISSIPPI

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	None	The legislature divides the state into senatorial and representative districts of contiguous territory. Miss. Const. art. 13, § 254.
Description of Current Districts	Miss. Code Ann. § 23-15-1037 (2010).	Miss. Code Ann. § 5-1-1 (2010); 2002 Miss. Laws 761(House districts); Miss. Code Ann. § 5-1-3 (2010); 2002 Miss. Laws 762 (Senate districts).
Number of Districts	Present: 4 2010 (est.): 4	Senate: 52 House: 122 Multimember districts? No House districts nested within Senate districts? No
Districting Responsibility	State legislature: Standing Joint Congressional Redistricting Committee. Miss. Code Ann. § 5-3-121 (2010).	State legislature: Standing Joint Legislative Committee on Reapportionment. Miss. Code Ann. § 5-3-91 (2010). If legislature fails to adopt a joint resolution of reapportionment, 5-member Commission composed of the Chief Justice of State Supreme Court (Chair), the State Attorney General, the Secretary of State, the Speaker of the House, and the President *pro tempore* of the Senate shall apportion the Legislature. Miss. Const. art. 13, § 254.
May Governor Veto?	No	No
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed State Deadlines and Enforcement	30 days before 1st regular legislature after census. Miss. Code Ann. § 5-3-123 (2010).	Must redistrict at regular session the second year following the 2010 census. If not, a five-member commission consisting of the Chief Justice of the Supreme Court as Chairman, the Attorney General, the Secretary of State, the Speaker of the House of Representatives and the President *pro tempore* of the Senate must draw plan. Miss. Const. art. 13, § 254.

MISSOURI

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	Congressional Districts	State Legislative Districts
State Constitutional & Statutory Restrictions	Congressional districts "shall be composed of contiguous territory as compact and as nearly equal in population as may be." Mo. Const. art. 3, § 45.	Senate districts shall be "convenient districts of contiguous territory, as compact and nearly equal in population as may be," Mo. Const. art. 3, § 5. House districts "shall be composed of contiguous territory as compact as may be." Mo. Const. art. 3, § 2.
Description of Current Districts	Mo. Rev. Stat. §§128.400 to 125.440 (2010).	Senate Apportionment Plan, Missouri Appellate Apportionment Commission, *available at* http://www.sos.mo.gov/elections/maps/senate/pdf/Senate%20Apportionment%20Plan.pdf House Apportionment Plan, Missouri Appellate Apportionment Commission, *available at* http://www.sos.mo.gov/elections/maps/house/pdf/House%20Apportionment%20Plan.pdf
Number of Districts	Present: 9 2010 (est.): 9	Senate: 34 House: 163 Multimember districts? No
Districting Responsibility	Legislature. Mo. Const. art. 3, § 45.	Senate Redistricting Committee, composed of 10 members appointed by the Governor, 5 from each list submitted by the two political parties that cast the highest vote for governor in the last election -Mo. Const. art. 3, § 7. House Redistricting Committee appointed by the Governor from lists provided by the congressional district committee of each of the two political parties that cast the highest vote for governor in the last election - Mo. Const. art. 3, § 2. In the event no reapportionment plan is filed by the Senate or House Redistricting Committee, a commission composed of 6 Missouri appellate court judges appointed by the Missouri Supreme Court shall apportion the legislative districts. Mo. Const. art. 3, §§2, 7.
May Governor Veto?	Yes	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	None	Six months after the formation of the Senate or House Redistricting Committee. Mo. Const. art. 3, §§2, 7.

NEVADA

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	None	"Representation shall be apportioned according to population." Nev. Const. art. I, § 13.
Description of Current Districts	Nev. Rev. Stat. §§ 304.060, 304.100, 304.110, 304.120 (2009).	Nev. Rev. Stat. §§ 218.0571 - 218.05797, 218.058 - 218.0796 (2009).
Number of Districts	Present: 3 2010 (est.): 4	Senate: 21 House: 42 Multimember districts? Yes
Districting Responsibility	Legislature	Legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	None	Legislature must apportion itself at first legislative session following decennial census (June 6, 2011).

NEW JERSEY

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	Congressional districts must conform to the requirements of the Constitution and laws of the United States. N.J. Const. art. II, § 2.	"Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties." N.J. Const. art. IV, § 2, para. 1. House districts shall be contiguous, compact, and equal in the number of inhabitants as possible. N.J. Const. art. IV, § 2, para. 3.
Description of Current Districts	None	None
Number of Districts	Present: 13 2010 (est.): 12	Senate: 40 Assembly: 80 Multimember districts? Yes House districts nested within Senate districts? Yes
Districting Responsibility	Redistricting Commission: 13 members with 2 appointed by the President of the Senate, 2 by the Speaker of the General Assembly, 2 by the Minority Leader of the Senate, 2 by the Minority Leader of the General Assembly, 2 by the chair of the party which received the most votes in the most recent gubernatorial election, 2 by the chair of the party with the next largest number of votes in the most recent gubernatorial election and 1 chosen by at least 7 of the previously appointed commission members.	Apportionment Commission: 10 members, with 5 each appointed by the 2 chairs of the parties with the most votes in the most recent gubernatorial election.
May Governor Veto?	No	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	On or before the third Tuesday of each year ending in two, or within three months after receipt of the official statement regarding the number of House of Representatives apportioned to the state by the Governor, whichever date is later.	One month after the Governor's receipt of the official decennial census data, or on or before February 1 of the year following the year the census is taken, whichever date is later.

NEW MEXICO

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	None	House districts must be "countiguous and…as compact as is practical and possible."N.M. Stat. Ann. §§ 2-7C-3(2009). Senate districts must be "contiguous and…as compact as is practical." N.M. Stat. Ann. § 2-8D-2 (2009).
Description of Current Districts	N.M. Stat. Ann. § 1-15-15.1 (2009).	N.M. Stat. Ann. §§ 2-7D-1, 2-8D-7– 2-8D-48 (2009).
Number of Districts	Present: 3 2010 (est.): 3	Senate: 42 House: 70 Multimember districts? No House districts nested within Senate districts? No
Districting Responsibility	Legislature	Legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	None	None

NEW YORK

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	N.Y. Elec. § 12-300 (Consol. 2010); N.Y. Ge. Mun. § 716 (Consol. 2010); N.Y. Legis. § 83-m (Consol. 2010).	Senate districts must be in "as compact form as practical" and "consist of contiguous territory" and Assembly districts shall be formed from "convenient and contiguous territory in as compact form as practicable." N.Y. Const. art. III, §§ 4, 5.
Description of Current Districts	N.Y. State Law § 111 (Consol. 2010).	N.Y. State Law §§ 121, 124 (Consol. 2010).
Number of Districts	Present: 29 2010 (est.): 28	Senate: 62 House: 150 Multimember districts? No House districts nested within Senate districts? No
Districting Responsibility	Legislature. Joint Legislative Task Force on Demographic Research and Reapportionment: 6 members appointed by the majority and minority leaders in the legislature.	Legislature. Joint Legislative Task Force on Demographic Research and Reapportionment: 6 members appointed by the majority and minority leaders in the legislature.
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes, selected counties (*See* Appendix 1)	
Self-imposed State Deadlines and Enforcement	Before next election cycle (2012).	Before next election cycle (2012).

NORTH CAROLINA

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	Precincts not divided unless plan rejected, then, only minimum number necessary. N.C. Gen. Stat. § 163-201.2 (2010).	Districts shall be contiguous; no county shall be divided in the formation of a district, N.C. Const. art II, §§ 3, 5. Dividing precincts in Senate and House apportionment acts restricted. N.C. Gen. Stat. § 120-2.2 (2010).
Description of Current Districts	N.C. Gen. Stat. § 163-201 (2010).	N.C. Gen. Stat. §§ 120-1, 120.2 (2010).
Number of Districts	Present: 13 2010 (est.): 13	Senate: 50 House: 120 Multimember districts? Yes House districts nested within Senate districts? No
Districting Responsibility	State legislature	State legislature
May Governor Veto?	No	No
Covered under § 5 of the Voting Rights Act?	Yes, selected counties (*See* Appendix 1)	
Self-imposed State Deadlines and Enforcement	First regular session after return of decennial census and in time for preclearance before filing opens first Monday in January 2012.	First regular session after return of decennial census and in time for preclearance before filing opens first Monday in January 2012.

OHIO

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	Congressional Districts	**State Legislative Districts**
Selected State Constitutional & Statutory Restrictions	None	House districts shall be "compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. To the extent [possible], the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties." Ohio Const., art. XI § 7. "Senate districts shall be composed of three contiguous house of representatives districts." Ohio Const., art. XI, § 11.
Description of Current Districts	Ohio Rev. Code Ann. § 3521.01 (2010).	Final Reapportionment Plan Legal Description as Amended on October 4, 2001, *available at* http://www.sos.state.oh.us/SOS/upload/elections/maps/OEapportionment100401.pdf
Number of Districts	Present: 18 2010 (est.): 16	Senate: 33 House: 99 Multimember districts? No
Districting Responsibility	Legislature	5-member Apportionment Board: "The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly." Ohio Const. art. XI
May Governor Veto?	Yes	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement		Apportionment plan should be published no later than October 5, 2011. Ohio Const., art. XI § 1.

PENNSYLVANIA

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	Congressional Districts	**State Legislative Districts**
State Constitutional & Statutory Restrictions	25 Pa. Stat. §§ 2706 and 3595.303(2009).	Senate and representative districts shall be "composed of compact and contiguous territory as nearly equal in population as practicable….Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming a…district." Pa. Const. art. 2, § 16.
Description of Current Districts	25 Pa. § 3595.301 (2009).	*House of Representatives Legislative Districts,2001 Final Reapportionment Plan*, The Pennsylvania Manual, *available at* http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_71279_0_0_18/ *Senate Legislative Districts,2001 Final Reapportionment Plan*, The Pennsylvania Manual, *available at* http://www.portal.state.pa.us/portal/server.pt/gateway/PTARGS_0_71187_0_0_18/ Supreme Court of Pennsylvania found the Final Reapportionment Plan "in compliance with the mandates of the Pennsylvania Constitution and the United States Constitution" and ordered that it be "used in all [state legislative] elections." *Albert v. 2001 Legislative Reapportionment Comm'n*, 567 Pa. 670, 688 (Pa. 2002).
Number of Districts	Present: 19 2010 (est.): 18	Senate: 50 House: 203 Multimember districts? 0
Districting Responsibility	Legislature	Legislative Reapportionment Commission. Pa. Const. art 2, § 17.
May Governor Veto?	Yes	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	None	30 days after the filing of the plan or after the last public exception filed, "the commission's plan shall be final and have the force of law.". If the state Supreme Court finds the plan contrary to law, the commission must adopt another plan. Pa. Const. art 2, § 17.

SOUTH CAROLINA

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	"The General Assembly may at any time arrange the various Counties into … Congressional Districts…as it may deem wise and proper…." S.C. Const. art. VII, § 13.	The state legislature apportions the districts among the counties according to the number of inhabitants contained in each, but each county must have at least one district. S.C. Const. art. III, §§ 3, 6.
Description of Current Districts	S.C. Code Ann. §7-19-40 (2009).	S.C. Code Ann. §§ 2-1-45, 2-1-75 (2009).
Number of Districts	Present: 6 2010 (est.): 7	Senate: 46 House: 124 Multimember districts? No House districts nested within Senate districts? No
Districting Responsibility	Legislature	Legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed State Deadlines and Enforcement	None	None

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	Congressional districts may not be changed between apportionments. Tenn. Code Ann. § 2-16-102 (2010).	The state legislature must apportion districts substantially according to population, each county must touch another in its district, and no county shall be divided in forming a district. Geography and political subdivisions may be used as factors. Tenn. Const. art. II, §§ 4, 5, 6.
Description of Current Districts	Tenn. Code Ann. § 2-16-103 (2010).	Tenn. Code Ann. §§ 3-1-101 - 103 (2010).
Number of Districts	Present: 9 2010 (est.): 9	Senate: 33 House: 99 Multimember districts? No House districts nested within Senate districts? No
Districting Responsibility	Legislature	Legislature
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	None	None

TEXAS

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	None	Districts shall be contiguous. Tex. Const. art. III, § 25, 26.
Description of Current Districts	Partially court drawn plan. *See League of United Latin American Citizens v. Perry*, 457 F. Supp. 2d 716 (E.D. Tex. 2006).	Partially court drawn plan. *See Balderas v. Texas*, No. 6:01-CV-158, 2001 U.S. Dist. LEXIS 25006 (E.D. Tex. Nov. 28, 2001).
Number of Districts	Present: 32 2010 (est.): 35 or 36	Senate: 31 House: 150 Multimember districts? No House districts nested within Senate districts? No
Districting Responsibility	Legislature	Legislature. If the Legislature fails to apportion the senatorial and representative seats, the Legislative Redistricting Board of Texas will do so. The board has 5 members: the Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts, and Commissioner of the General Land Office.
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed State Deadlines and Enforcement	None	First regular session following release of census figures. If not, the Legislative Redistricting Board of Texas has 90 days to convene and must adopt a plan 60 days after its formation.

VIRGINIA

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	The state legislature must compose each district of contiguous and compact territory, constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. Va. Const. art. II, § 6.	The state legislature must compose each district of contiguous and compact territory, constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. Va. Const. art. II, § 6.
Description of Current Districts	Va. Code Ann. § 24.2-302.1 (2010).	Va. Code Ann. §§ 24.2-303.1 - 303.2, 24.2-304.01 - 304.02 (2010).
Number of Districts	Present: 11 2010 (est.): 11	Senate: 40 House: 100 Multimember districts? No. House districts nested within Senate districts? No
Districting Responsibility	Legislature's 8-member Joint Reapportionment Committee, consisting of five members of the Committee on Privileges and Elections of the House of Delegates and three members of the Committee on Privileges and Elections of the Senate, appointed by the respective chairmen of the two committees. Va. Code Ann. § 30-263 (2010).	Legislature's 8-member Joint Reapportionment Committee, consisting of five members of the Committee on Privileges and Elections of the House of Delegates and three members of the Committee on Privileges and Elections of the Senate, appointed by the respective chairmen of the two committees. Va. Code Ann. § 30-263 (2010).
May Governor Veto?	Yes	Yes
Covered under § 5 of the Voting Rights Act?	Yes (*See* Appendix 1)	
Self-imposed State Deadlines and Enforcement	Prior to House and Senate elections that are scheduled for November 2011.	Prior to House and Senate elections that are scheduled for November 2011.

WASHINGTON

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	Congressional Districts	**State Legislative Districts**
Selected state constitutional & statutory restrictions	Districts shall have nearly equal population; should be convenient, contiguous (share a common land border or transportation route), and compact. District lines should coincide with local political subdivisions (such as city and county lines) and "communities of interest." District divisions should encourage electoral competition. Wash. Rev. Code § 44.05.090 (2009).	Districts shall have nearly equal population; should be convenient, contiguous (share a common land border or transportation route), and compact. District lines should coincide with local political subdivisions (such as city and county lines) and "communities of interest". District divisions should encourage electoral competition. Wash. Rev. Code § 44.05.090 (2009).
Description of Current Districts	Wash. Rev. Code § 29A.76A (2009).	Wash. Rev. Code § 44.07D (2009).
Number of Districts	Present: 9 2010 (est.): 10	Senate: 49 House: 98 Multimember districts? Yes House districts nested within Senate districts? Yes
Districting Responsibility	Redistricting Commission: 5 members. The legislative leaders of the two largest parties in the House and Senate appoint one member each. The fifth member is the Chairperson, and does not vote. The plan must have the support of 3 of the 4 voting members in order to pass.	Redistricting Commission: 5 members. The legislative leaders of the two largest parties in the House and Senate appoint one member each. The fifth member is the Chairperson, and does not vote. The plan must have the support of 3 of the 4 voting members in order to pass.
May Governor Veto?	No	No
Covered under § 5 of the Voting Rights Act?	No	
Self-imposed State Deadlines and Enforcement	January 1, 2012	January 1, 2012

The projected number of Congressional Districts in 2010 that were provided in this Appendix are based on projections made by Election Data Services and POLIDATA. Please note that these are projections only and that the actual number of Congressional seats allotted to each state will not be known until the release of 2010 Census data. For more information, *see* Election Data Services, New Population Estimates Show Additional Changes For 2009 Congressional Apportionment, With Many States Sitting Close to the Edge for 2010, Table A (Dec. 23, 2009), *available at* http://www.electiondataservices.com/images/File/NR_Appor09wTables.pdf and POLIDATA, Congressional Apportionment: 2010 Projections Based Upon State Estimates as of July 1, 2009, *available at* http://www.polidata.org/news.htm#20091223.



APPENDIX 3: Glossary of Redistricting Terms

Apportionment
Following each census, the 435 seats in the United States House of Representatives are apportioned to each state based on state population. The larger the state population, the more congressional representatives the state will be apportioned. Apportionment, unlike redistricting, does not involve map drawing.

At-large election system
An at-large election system is one in which all voters can vote for all candidates running for open seats in the jurisdiction. In an at-large election system candidates run in an entire jurisdiction rather than from districts or wards within the area. For example, a city with three open city council positions where all candidates for the three seats run against each other and the top three receiving the most votes citywide are elected is an at-large election system. In at-large election systems, 50% of the voters control 100% of the seats. At-large election systems can have discriminatory effects on minorities where minority and majority voters consistently prefer different candidates and the majority will regularly defeat the choices of minority voters because of their numerical superiority.

Census block
The smallest level of census geography used by the Census Bureau to collect census data. Census blocks are formed by streets, roads, bodies of water, other physical features and legal boundaries shown on Census Bureau maps. Redistricting is based on census block level data.

Census tract
A level of census geography larger than a census block or census block group that usually corresponds to neighborhood boundaries and is composed of census blocks.

Community of interest
A community of interest is a neighborhood or community that would benefit from being maintained in a single district because of shared interests, views or characteristics.

Compactness
A term used to describe the appearance of a district. Compactness refers to the overall shape of the district.

Contiguous
A term used to describe the appearance of a district. A geographically contiguous district is one in which all parts of the district are attached to each other.

Cracking
A form of dilution occurring when districts are drawn so as to divide a geographically compact minority community into two or more districts. If the minority community is politically cohesive and could elect a preferred candidate if placed in one district but, due to cracking, the minority population is divided into two or more districts where it no longer has any electoral control or influence, the voting strength of the minority population is diluted.

Crossover Districts
A crossover district is one in which minorities do not form a numerical majority but still reliably control the outcome of the election with some non-minority voters crossing over to vote with the minority group.

Deviation
The deviation is any amount of population that is less than or greater than the ideal population of a district. The law allows for some deviation in state and local redistricting plans. However, Congressional districts must not deviate too far from the ideal population. See below for definition of "ideal population."

Gerrymandering
The drawing of electoral districts to give one group or party an unfair advantage over another.

***Gingles* Factors**
The *Gingles* factors are three preconditions set forth by the U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that a minority group must prove to establish a violation of Section 2 of the Voting Rights Act. These preconditions are the following: 1) a minority group must be sufficiently large and geographically compact to comprise a majority of the district; 2) the minority group must be politically cohesive (it must demonstrate a pattern of voting for the same candidates); and, 3) white voters vote sufficiently as a bloc usually to defeat the minority group's preferred candidate.

Ideal population
The ideal population is the number of persons required for each district to have equal population. The ideal population for each district is obtained by taking the total population of the jurisdiction and dividing it by the total number of districts in the jurisdiction. For example, if a county's population is 10,000 and there are five electoral districts, the ideal population for each district is 2,000.

Influence district
An influence district is one that includes a large number of minority voters but fewer than would allow the minority voters to control the election results when voting as a bloc. Minority voters are sufficient in number in "influence districts" to influence the outcome of the election.

Minority-coalition district
A minority-coalition district is a type of majority-minority district in which two or more minority groups combine to form a majority in a district. In most jurisdictions, minority-coalition districts are protected under Section 2 of the Voting Rights Act if the requirements set forth in *Thornburg v. Gingles* are satisfied.

Majority-minority district
A majority-minority district is one in which racial or ethnic minorities comprise a majority (50% plus 1 or more) of the population. A majority-minority district can contain more than one minority group. Thus, a district that is 40% Hispanic and 11% African American is a majority-minority district, but it is not a majority Hispanic district. This is also referred to as a minority coalition district. See definition of minority-coalition district.

Minority opportunity district
A minority opportunity district is one that provides minority voters with an equal opportunity to elect a candidate of their choice regardless of the racial composition of the district.

Minority vote dilution
Minority vote dilution occurs when minority voters are deprived of an equal opportunity to elect a candidate of choice. It is prohibited under the Voting Rights Act of 1965. Examples of minority vote dilution include cracking, packing and the discriminatory effects of at-large election systems.

Multimember district
A district that elects two or more members to office.

One-person, one-vote
A constitutional requirement that requires each district to be substantially equal in total population.

Packing
A form of vote dilution prohibited under the Voting Rights Act where a minority group is overconcentrated in a small number of districts. For example, packing can occur when the African American population is concentrated into one district where it makes up 90% of the district, instead of two districts where it could be 50% of each district.

PL 94-171
The federal law that requires the United States Census Bureau to provide states with data for use in redistricting and mandates that states define the census blocks to be used for collecting data.

Political subdivision
A division of a state, such as a county, city or town.

Precinct
An area created by election officials to group voters for assignment to a designated polling place so that an election can be conducted. Precinct boundaries may change several times over the course of a decade.

Preclearance
Preclearance applies to jurisdictions that are covered under Section 5 of the Voting Rights Act. Preclearance refers to the process of seeking review and approval from either the United States Department of Justice or the federal court in the District of Columbia for any voting changes to a Section 5 covered jurisdiction. Redistricting plans in Section 5 covered jurisdictions must also receive preclearance. See Appendix 1 for a complete list of the Section 5 covered jurisdictions.

Racially polarized voting or racial bloc voting
Racially polarized voting is a pattern of voting along racial lines where voters of the same race support the same candidate who is different from the candidate supported by voters of a different race.

Reapportionment
Same as apportionment.

Redistricting
Redistricting refers to the process by which census data is used to redraw the lines and boundaries of electoral districts within a state to ensure that districts are substantially equal in population. This process affects districts at all levels of government – from local school boards, wards, and city councils to state legislatures and the U.S. House of Representatives.

Retrogression
A voting change to a Section 5 covered jurisdiction that puts minorities in a worse position under the new scheme than under the existing one.

Section 2 (of the Voting Rights Act)
A key provision of the Voting Rights Act that that protects minority voters from practices and procedures that deprive them of an effective vote because of their race, color or membership in a particular language minority group.

Section 5 (of the Voting Rights Act)
A key provision of the Voting Rights Act that prohibits jurisdictions covered by Section 5 from adopting voting changes, including redistricting plans, that worsen the position of minority voters or changes adopted with a discriminatory purpose. See preclearance.

Single-shot voting
Single-shot voting can be described as follows: "Consider a town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting." U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-207 (1975).

Traditional redistricting principles
Traditional redistricting criteria applied by a state such as compactness, contiguity, respect for political subdivisions, respect for communities of interest, and protection of incumbents.

Undercount
The number of Americans missed in the census.

Partner Organization

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

LDF
DEFEND EDUCATE EMPOWER

LDF is America's legal counsel on issues of race and the nation's oldest non-profit civil rights firm. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on issues of education, economic justice, criminal justice, and political participation.

From the early white primary cases to the present day, the quest for the unfettered political participation of African Americans has been an integral part of LDF's mission. LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights over many decades, including litigating the cases that led to the abolition of white primaries, creating the first majority African-American congressional and state legislative districts in several states, and removing barriers to black voter participation and office-holding.

LDF has also been involved in every major legislative and administrative advocacy issue impacting minority political participation, including helping to craft the Voting Rights Act of 1965, the 1982 amendments to the Voting Rights Act, the National Voter Registration Act of 1993, and the Fannie Lou Hamer, Rosa Parks, Coretta Scott King, Cesar E. Chavez Voting Rights Act Reauthorization and Amendments Act of 2006.

Most recently, LDF has successfully litigated cases challenging discriminatory felon disfranchisement laws and successfully defended the 2006 Voting Rights Act Reauthorization and Amendments before the United States Supreme Court.

In keeping with our commitment to political empowerment and equal opportunity for the disenfranchised, LDF also advocates for the full inclusion of people of color in the political process. In 2010 LDF launched *Count on Change*—an historic public education campaign about the civil and voting rights implications of the 2010 Census and encouraging Black participation. LDF also continues to advocate for the correction of the census miscount—the counting or prisoners at their place of incarceration—and prison-based gerrymandering. In 2008, LDF launched Prepared to Vote, a public education campaign designed to educate voters about the voter registration process and potential barriers before Election Day.

In addition, LDF recently produced several publications concerning minority voting rights and the role race continues to play in the political process. "*Post-Racial" America? Not Yet: Why the Fight for Voting Rights Continues After the Election of President Barack Obama,* examines the continued saliency of race in the political process; *Tearing Down Obstacles to Democracy and Protecting Minority Voters: Section 5 of the Voting Rights Act,* educates the public about the operation of the Voting Rights Act's Section 5 administrative enforcement process; and *Independent Redistricting Commissions: Reforming Redistricting Without Reversing Progress Toward Racial Equality,* educates the public of the need to carefully evaluate redistricting reform measures to guard against unraveling the rights of minority voters.

LDF's recent and historic work protecting and advocating for the right to vote demonstrates why LDF's commitment to this essential work remains undiminished. LDF is poised to enforce legal protections against racial discrimination and secure the constitutional and civil rights of African Americans. In 2011, LDF will help ensure that redistricting is fair and open to everyone.

LDF's national office is in New York, and its regional office is in Washington, D.C.

For more information, visit www.naacpldf.org.

Partner Organization

ASIAN AMERICAN JUSTICE CENTER

Founded in 1991, the Asian American Justice Center's (AAJC) mission is to advance civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. AAJC is a national expert on issues of importance to the Asian American community including adult English language learning, affirmative action, anti-Asian violence prevention and race relations, census, health care, immigration and immigrant rights, media diversity and voting rights. AAJC works closely with its three affiliates, the Asian Pacific American Legal Center (APALC) in Los Angeles, the Asian Law Caucus (ALC) in San Francisco and the Asian American Institute (AAI) in Chicago, as well as its Community Partners Network, consisting of nearly 100 community-based organizations in 44 cities in 24 states and the District of Columbia.

Together with its affiliates, AAJC has worked to ensure compliance with voting rights laws by collecting data on voting participation and patterns, monitoring policies which affect the ability of Asian Americans to vote, providing community education on voting rights and political empowerment and participating in the redistricting process during the last redistricting cycle. AAJC and its affiliates have compiled reports on compliance with Section 203 of the Voting Rights Act, submitted amicus briefs on voting rights issues, including defending majority-minority districts drawn under the Voting Rights Act, fought against intimidation of Asian American voters, advocated against legislation that would prohibit campaign contributions by legal immigrants, and produced reports on exit polls conducted by the affiliates.

During the last redistricting cycle, AAJC provided support and national-level coordination for its affiliates' local redistricting processes through the AAJC Redistricting Project. In addition to the development and distribution of the previous Redistricting Handbook, used by the affiliates and Community Partners to conduct trainings and to participate in local redistricting efforts, AAJC provided both financial and technical support to the affiliates for local redistricting efforts. APALC spearheaded the organization of Asian American and Pacific Islander (AAPI) communities in nine California regions under a single network, the Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR). This was the first time AAPI communities organized statewide to actively engage in the Assembly redistricting process; the first time a statewide redistricting map proposal was presented reflecting AAPI communities of interest; and—working in collaboration with groups such as MALDEF—the first time that cross racial cooperation resulted in the presentation of a unity map representing the shared interests of the African American, Asian American Pacific Islander and Latino communities' interests. In Chicago, AAI carried out an education and advocacy campaign around redistricting in Illinois, facilitating the opportunity for many first-of-its-kind activities to be carried out in the Asian American community in Chicago, including conducting an exit poll, and testifying before state and city committees on redistricting. As one of the fastest-growing populations in Illinois, it was critical that the Asian American voice be heard during the redistricting process.

AAJC has worked with the Department of Justice regarding policies and enforcement of the related provisions of the Voting Rights Act. AAJC and its affiliates are recognized as experts on Section 203 of the Voting Rights Act, which provides for language assistance and bilingual voting materials to communities which meet the specific threshold requirements. AAJC played a key role in pushing the Department of Justice and the Census Bureau to release the most recent Section 203 determinations in time for the 2002 elections and worked with local organizations to provide them with the tools and resources needed to work with their local election officials to ensure compliance with Section 203. AAJC also provided tools and resources to these organizations to conduct poll monitoring and connected the Department of Justice with the local groups to investigate noncompliance, such as in San Diego, where the first Section 203 case was brought on behalf of Filipino Americans. More broadly, AAJC has fought against policies that would intimidate voters or add unnecessary hurdles aimed at newly naturalized voters.

For more information visit www.advancingequality.org and www.aapiaction.org. Our affiliates will continue to work on redistricting efforts in California and Chicago.

Partner Organization

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

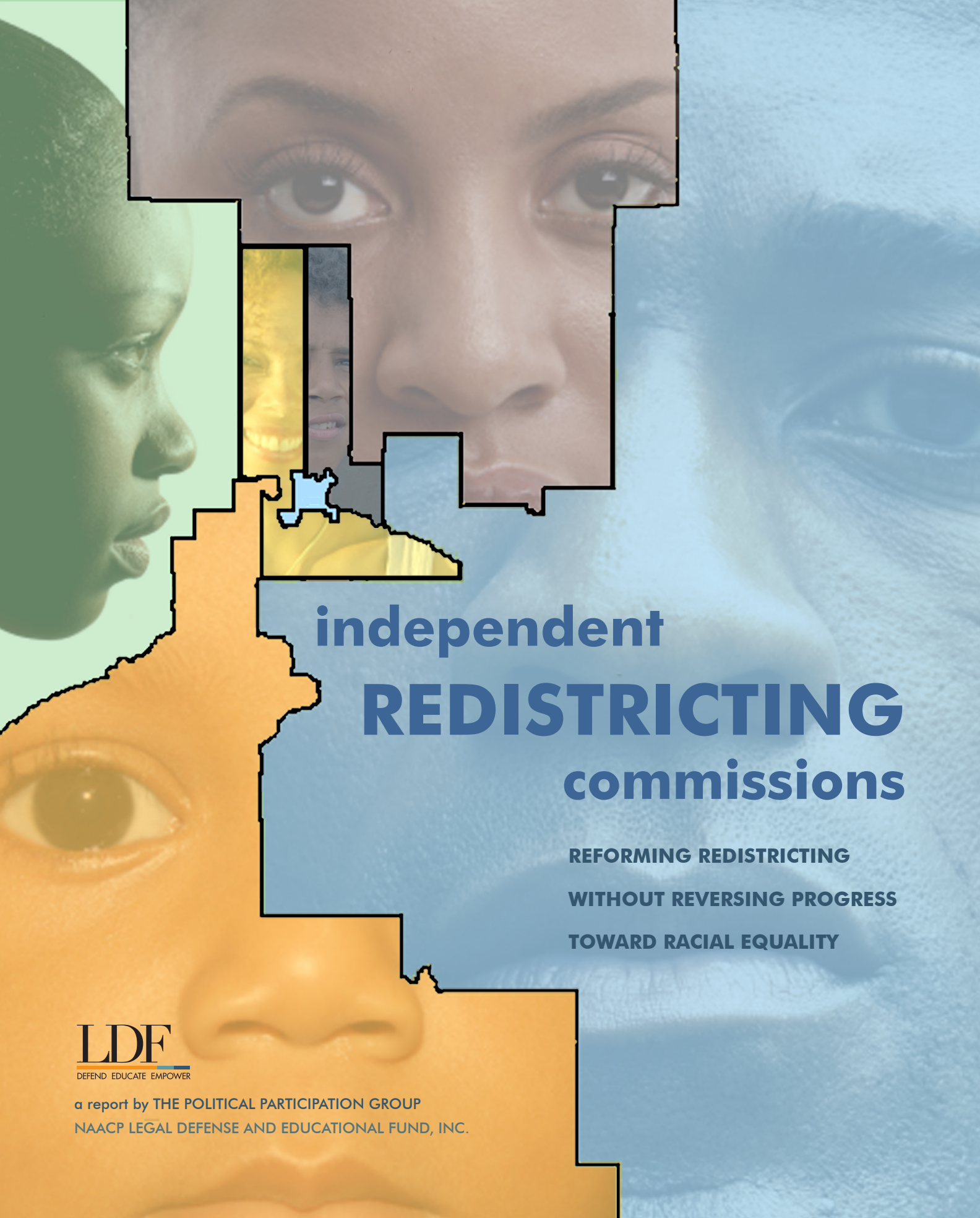
MALDEF has played a leadership role in local and statewide redistricting planning, mapping, advocacy and litigation efforts for four decades and will continue to do so in 2011 and 2012. MALDEF's active participation and oversight of the redistricting process in the states with significant Latino population is one of its most important policy and litigation roles. Through its redistricting work, MALDEF is able to increase the Latino community's influence over policy-making at the federal, state and local level. By creating districts where Latinos have the ability to elect candidates of their choice, MALDEF empowers Latinos and ensures effective representation.

MALDEF has been the leading advocate for Latinos in the redistricting process for forty years and was instrumental in creating fair redistricting plans for Latinos through litigation in the 1970, 1980, 1990 and 2000 rounds of redistricting in Texas, California, Arizona and Illinois. It remains a top priority to be the leading voice for Latinos in the redistricting process in this next redistricting cycle.

MALDEF has expertise in voting rights and redistricting and is uniquely positioned to defend and challenge redistricting maps in court. In the last round of redistricting, MALDEF participated in 14 lawsuits in Texas, California, Arizona and Illinois involving statewide and local redistricting plans to defend Latino majority districts and to challenge plans that diluted the Latino vote. In Texas, MALDEF challenged the statewide redistricting plans in federal and state court alleging that the plans diluted the Latino vote and won an order increasing the number of Latino-majority state representative districts. MALDEF challenged the Texas mid-decade congressional redistricting plan in 2003 after the legislature drastically revised its configuration of Latino majority districts. In this case- League of United Latin American Citizens v. Perry, --MALDEF won the first Supreme Court ruling on the merits of a Section 2 case in favor of Latino plaintiffs. The New York Times called it "the most important voting rights case of the decade" (June 28, 2006). In California, MALDEF challenged three districts in the statewide plan that failed to consolidate adjacent Latino neighborhoods in Cano v. Davis. In Arizona, MALDEF successfully intervened to defend a Latino majority congressional district against litigants who sought to dismantle it in state court. In Illinois, MALDEF participated in seven redistricting lawsuits including challenges to local redistricting in Chicago and Aurora.

Over the last several years, MALDEF has actively advocated in support of minority voting rights. In 2005 and 2006, MALDEF testified before Congress in support of the reauthorization of the Voting Rights Act. MALDEF represents the lead plaintiffs in a 2006 challenge to Arizona's recent law requiring documentary proof of citizenship for voter registration. In the spring of 2008, MALDEF filed an amicus brief with the United States Supreme Court in Bartlett v. Strickland, a redistricting case where the high court's decision changed the standard to apply in creating minority districts in the upcoming redistricting. Recently, MALDEF played a lead role in California to oppose Proposition 11, a redistricting initiative that removes redistricting authority from the state legislature and places it in the hands of a citizen commission. MALDEF also represented Latino residents of a utility district in Texas in a Supreme Court case that refused to overturn Section 5 of the Voting Rights Act, Northwest Austin Municipal Utility District Number One v. Holder.

MALDEF has a history of collaborating in redistricting with other groups that are protected under the Voting Rights Act. It has existing relationships in all of its regional offices with organizations that represent African Americans and Asian American/Pacific Islanders. Through its census outreach work, MALDEF has established new relationships with organizations that can play a key role in collaborating in the redistricting process. Further, it is important to emphasize that MALDEF's policy in redistricting is to not draw a district at the expense of another group protected under the Voting Rights Act. This policy has allowed us to develop very strong relationships with the African American and Asian American/Pacific Islander communities during the redistricting cycle. MALDEF will continue to work with other community-based organizations and civil rights groups, both Latino and non-Latino, to ensure that previous gains are not undone and to bring about greater equality and access among communities of color.

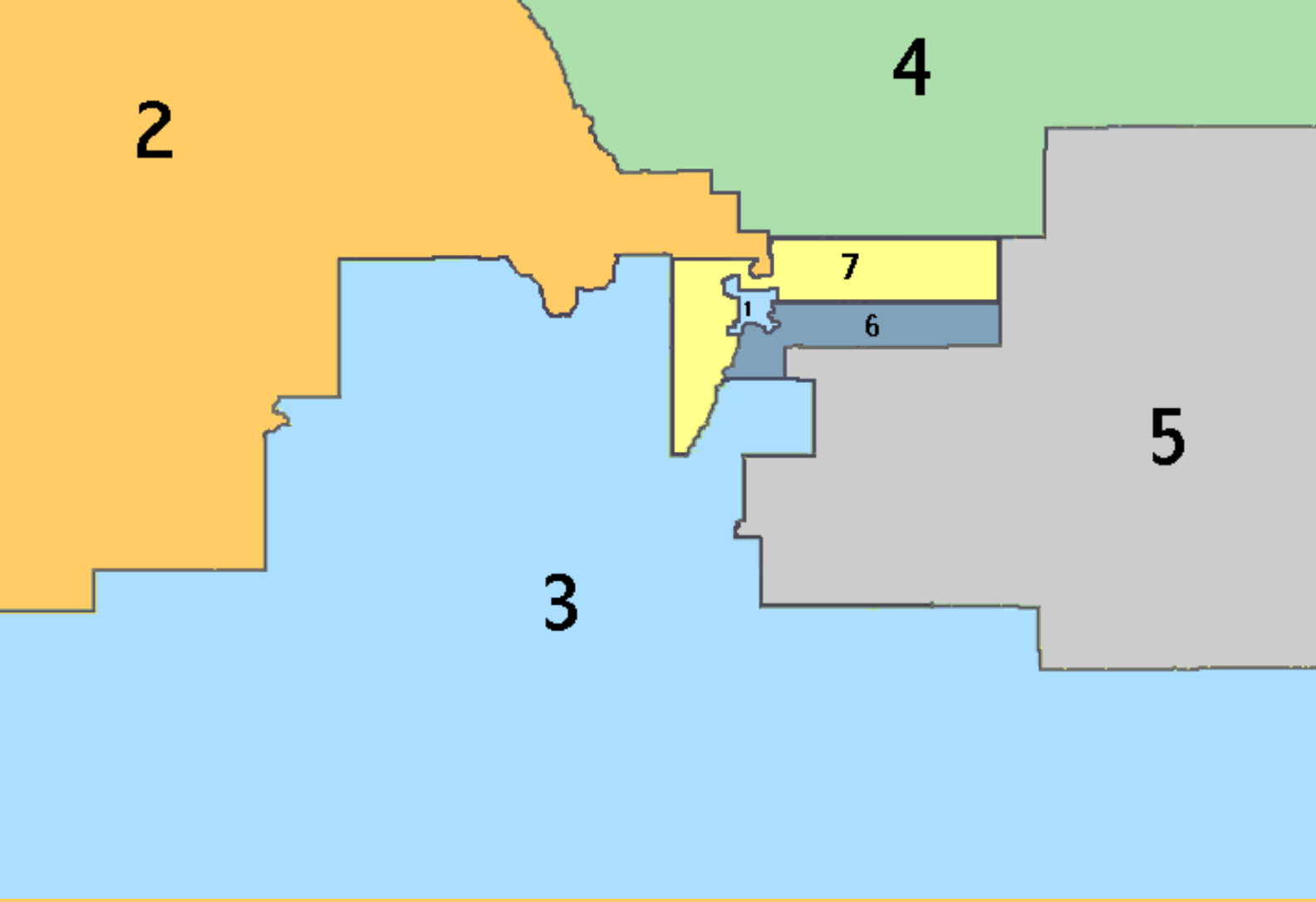


independent REDISTRICTING commissions

REFORMING REDISTRICTING WITHOUT REVERSING PROGRESS TOWARD RACIAL EQUALITY

LDF
DEFEND EDUCATE EMPOWER

a report by THE POLITICAL PARTICIPATION GROUP
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.



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LDF's POLITICAL PARTICIPATION GROUP

The Political Participation Group's mission is to use legal, legislative, public education, and advocacy strategies to promote the full, equal, and active participation of African Americans in America's democracy.

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Introduction

Shortly after the 2010 Census, states throughout the country will redraw the lines that determine how to divide the population of each state into electoral districts—a process called redistricting. The composition of a district affects election outcomes and determines representation at the federal, state, and local levels.

In most states, redistricting is carried out by members of the legislature. But on the eve of the quickly approaching 2010 redistricting cycle, voters and elected officials in a number of states across the country are considering a range of proposals that aim to alter the redistricting process. One such proposal is to create **Independent Redistricting Commissions (IRCs)**. An IRC is a committee composed of appointed officials who assume responsibility for redistricting within a state.

Proponents of IRCs argue that transferring responsibility for redistricting from elected officials to appointed commission members will ensure that political motivations and self-interest do not influence the redistricting process. Thus, proponents argue, IRCs will help eliminate political and partisan objectives as a dominant factor in determining district lines.

However, our nation's unfortunate history of persistent and adaptive discrimination in the electoral process—including redistricting reform efforts that have suppressed minority voting rights, ultimately leading to the enactment of the Voting Rights Act of 1965 (VRA)—requires a careful examination of all redistricting reform proposals. LDF's long experience of enforcing the VRA reveals that creating a commission free of dominant political influence should not be the only concern when considering proposals for redistricting reform. IRCs should adhere to and be guided by principles consistent with the VRA.

LDF proposes the following principles to better ensure compliance with the mandates of the VRA and to direct the creation of, and work carried out by, Independent Redistricting Commissions:

Principle 1: Include language that protects minority voting rights principles in redistricting criteria;

Principle 2: Reject redistricting criteria that will hinder the protection of minority voting rights principles;

Principle 3: Require the creation of districts where minorities can combine with other groups to have an opportunity to elect candidates of their choice when feasible;

Principle 4: Establish a process structured to yield a diverse commission;

Principle 5: Include minority perspectives at the planning stage; and

Principle 6: Eliminate fairness barriers that dilute minority voting strength.

Adhering to these guiding principles will help safeguard against racial discrimination in the creation of IRCs and provide minority groups the opportunity to elect candidates of their choice. Ultimately, these guiding principles will be instrumental in fully realizing the letter and spirit of the Voting Rights Act.

What is Redistricting?

Redistricting is rooted in our system of government and representation. The United States Constitution requires that each state is represented by two U.S. Senators and that seats in the U.S. House of Representatives be divided among the states. Each state receives a number of seats in the House of Representatives proportionate to its population as recorded

by the Census conducted. After each Census, the number of seats in the House of Representatives for each state is adjusted depending on whether its population increased or decreased in comparison to other states. States with more people are given more representation in the House of Representatives. This process—called "reapportionment"—occurs once every ten years, based on the results of the Census.

After reapportionment, each state is divided into districts for the election of federal representatives. If the Census results for a particular state show that the number of representatives previously allotted to such state should change or that the population within existing electoral districts should be adjusted, the electoral districts must be redrawn. The process of redrawing the lines of an electoral district after reapportionment is called redistricting.

Although the reallocation of congressional seats only occurs at the federal level, redistricting occurs at almost every level of government. Local units of government, such as city councils, county commissions and school boards, also redistrict once every ten years to reflect population changes after the Census.

The Redistricting Process, Minority Voting Rights and the Voting Rights Act

How does redistricting affect minority voting rights?
Each decade, some redistricting plans "dilute" or weaken the ability of minority racial groups to elect candidates of their choice.

Redistricting techniques historically employed to dilute minority voting rights include:

> ***"Cracking"*** – fragmenting concentrations of minority population and dispersing them among other districts to prevent minority opportunities to elect candidates of their choice.
>
> ***"Stacking"*** – combining concentrations of minority population with greater concentrations of white population to prevent minority opportunities to elect candidates of their choice.
>
> ***"Packing"*** – over-concentrating minorities in as few districts as possible to minimize the number of districts in which minorities constitute a numerical majority (referred to as "majority-minority districts").

These techniques result in the dilution of minority voting strength, since minorities are not able to elect as many candidates to office as they could if the districts were drawn in a fair way.

How does the Voting Rights Act prevent minority vote dilution?
The Voting Rights Act has two important provisions which prohibit weakening voting strength: Section 2 and Section 5.

Section 2 prohibits practices that intend to or result in the denial or abridgement of the right to vote on account of race, color, or status as a language minority. A violation of Section 2 is established if, based on the totality of circumstances, it is shown that voting practices are not equally open to participation by minorities. Hence, voting practices that limit the chance of minority voters to elect the candidates of their choice violates Section 2.

Section 5 requires all or part of 16 "covered jurisdictions" with a history of discrimination in voting practices to submit changes to voting laws, rules, or procedures to the federal government for "preclearance," a review process designed to make sure that proposed voting changes in these jurisdictions are not racially discriminatory. Voting practices that violate Section 5 are prevented from being enforced in the covered jurisdictions.

Independent Redistricting Commissions (IRCs)

How common are IRCs?
Almost half of states throughout the country have an IRC participating in the redistricting process. IRCs have varying forms – some are a subset of the legislature; some serve as a fail-safe alternative if the legislature cannot agree; and others advise the legislature in its redistricting process. However, only Arizona and California have IRCs that completely exclude elected officials from the process. Other states, such as Iowa, Idaho, Montana, and Washington, have a commission that involves elected officials at some point during the redistricting decision-making process.

Does the creation of an IRC guarantee the protection of minority voting rights?
Unfortunately, IRCs do not guarantee a process or final redistricting plan that will protect minority voting rights. Indeed, during the 2000 redistricting cycle, the redistricting plan adopted by an IRC in Arizona resulted in an objection under Section 5 of the Voting Rights Act.

The opportunity for minority communities to elect candidates of their choice can be, and often is, dramatically affected by the drawing of district lines. Hence, while redistricting proposals calling for the creation of IRCs may be meant to cure the perceived partisan or incumbency problems with the existing composition of redistricting bodies (by replacing elected officials with appointed ones), they merely shift the focus from districts designed to aid the election of a particular party or candidate to districts that do not favor a particular party or candidate. If an IRC proposal does not adequately safeguard minority voiting rights, redistricting criteria can harm minority voters. In fact, some IRC proposals have included stringent criteria that frustrate the application of Voting Rights Act principles.

Proposed IRC Guiding Principles to Prevent Minority Vote Dilution

IRCs must not only consider eliminating partisan influences when drawing district lines but also (1) guarantee that districts are drawn in compliance with Section 2 and Section 5 of the Voting Rights Act and (2) contain guidelines consistent with the Voting Rights Act.

LDF proposes the following principles to assist IRCs in carrying out their redistricting responsibility in compliance with the Voting Rights Act.

Principle 1: Include Languate That Protects Minority Voting Rights Principles in Redistricting Criteria
Some IRC proposals provide criteria designed to limit political gerrymandering. To that end, these proposals require that IRCs attempt to create districts that are "fair," "competitive," "balanced," or drawn "without favoring one party or an incumbent." But this guideline often results in the overreliance on stringent criteria to restrict the creation

of maps in which one political party dominates specific legislative districts or to insure that incumbents do not have to face competition. Overreliance on stringent criteria, however, can directly impact the ability of a minority group to elect a candidate of their choice. An IRC would not create meaningful redistricting reform if the resulting districts would not preserve or ensure the equal opportunity of minority voters to elect the candidate of their choice.

It is critical, therefore, that the principles of Sections 2 and 5 of the Voting Rights Act are properly reflected by including language that reflects both the letter and the spirit of the Act. At the same time, partisan dominance or neutrality should not be an overriding goal of an IRC proposal or those drawing redistricting plans.

Principle 2: Reject Redistricting Criteria That Will Hinder the Protection of Minority Voting Rights Principles

IRC proposals that require strict compliance with mandatory criteria could harm minority voters. In theory, mandatory criteria are intended to prevent the creation of gerrymandered districts. In practice, however, even districts that do not appear gerrymandered may produce grossly distorted results. Indeed, a redistricting plan that rigidly complies with criteria designed to appear less partisan may actually be fundamentally unfair to the voters living in the area.

To combat this result, IRC proposals must allow the flexible application of redistricting criteria and exclude criteria that would hinder compliance with Voting Rights Act principles. Flexibility will help protect minority voting rights by reinforcing the need to carefully balance attempts to eliminate the political aspects of redistricting with the importance of ensuring that minority voting rights are protected. It can also protect against a process overly-focused on partisan or incumbency gerrymandering, which could turn a purported measure of reform into a measure of regression.

Principle 3: Require the Creation of Districts Where Minorities Can Combine with Other Groups to Have an Opportunity to Elect Candidates of Their Choice When Feasible

Even when a group of racial minorities do not constitute a majority of a district, district lines can be drawn to allow multiple groups – such as African Americans and Latinos – to aggregate their votes and elect their desired representative. Redistricting officials should protect the political power of all minority voters by creating districts that allow cohesive groups, regardless of their individual racial background, to be joined together. An independent redistricting commission proposal that encourages such functional coalition opportunities for minorities to elect a candidate of their choice can help create a more inclusive democratic process.

Principle 4: Establish a Process Structured to Yield a Diverse Commission

One rarely discussed benefit of leaving the redistricting process in the hands of elected officials is that, to the extent that they are fairly constituted and representative bodies, they were elected by communities identified during the previous redistricting cycle. During the 2000 redistricting cycle, elected minority officials played a significant role in the redistricting decision-making process for the first time.

Given that minority participation in the redistricting process is a relatively recent phenomenon, jurisdictions should proceed cautiously before adopting IRCs that would remove responsibility for redistricting entirely away from duly elected representatives (and, as a result, the minority groups whose interests they represent) and place it into the hands of a few individuals who are not subject to public accountability for their actions.

Thus, it is important that an IRC be diverse and representative, fairly created, and responsive to minority interests.

Principle 5: Include Minority Perspectives at the Planning Stage

It is difficult to shoehorn minority voting rights principles into an IRC framework when substantial input and involvement from individuals and organizations that have historically advocated for minority voters' interests are not included when preliminary decisions are made. When redistricting commissions are first being considered, reformers must meet with minority voting rights advocates to resolve and address issues that may arise in the establishment of a commission and to ensure the maintenance of long-standing traditional redistricting criteria aimed at protecting minority voting rights. In this way, protection of minority rights can be incorporated into all aspects of the proposal at the ground level.

Principle 6: Eliminate Fairness Barriers That Dilute Minority Voting Strength

Most recent IRC proposals have failed to address two recognizable fairness barriers for minority voters: (1) the census miscount of prisoners, and (2) felon disfranchisement laws. Although rarely discussed in the context of redistricting, these two barriers significantly reduce the voting strength of minority communities during the redistricting process. Correcting both of these problems is an important step in creating a redistricting process that is fair to all voters.

Miscounting prisoners as residents of municipalities where they are confined – and not as members of their pre-incarceration communities – must be addressed in any redistricting proposal that strives to reform the redistricting process. Because prisoners are counted as residents of the districts where they are incarcerated, Census data artificially inflate the population of districts in which prisons and jails are located, and artificially deflate the population of districts prisoners lived in prior to their incarceration. Since many prisoners reside in low-income, urban communities with high concentrations of racial minorities before entering the criminal justice system, this method of counting results in improperly low population counts of communities of color, which in turn can decrease the number of government representatives allotted to such communities during the redistricting process.

This distorts the "one person, one vote" principle, dilutes the voting strength of prisoners' home communities and, consequently, weakens the voting strength of communities of color. In order to prevent the dilution of minority voting strength, IRCs and other proposed redistricting reform measures must include corrective action to address the erroneous designation by the Census of prisoners' residences.

Felon disfranchisement laws work hand in hand with the miscount of prisoners to dilute the voting strength of minority voters even further. Today, 5.3 million Americans cannot vote because of a felony conviction. Because America's fractured criminal justice system and disproportionate policing and imprisonment repeatedly align along the lines of race and class, felon disfranchisement laws result in the exclusion of vastly disproportionate percentages of racial minorities from the electorate. Legislatures of many states intended this result when they adopted felon disfranchisement laws after the Civil War as a reaction to the inclusion of Blacks as voters. Correcting the census miscount of prisoners can only be fully corrected by allowing prisoners to vote, either absentee or on a machine, with voters in their home district. IRCs attempting to redraw district boundaries should correct this disparity.

Conclusion

Future redistricting cycles must be fair. With so much at stake, redistricting reform efforts, including calls for IRCs, must ensure that protections afforded by the Voting Rights Act are respected and minority voting rights are safeguarded. Minority voting rights must not become a casualty of efforts to create districts with a hypothetical increase in partisan "neutrality," "fairness," or "competiveness."

All redistricting proposals must (1) ensure that commissions are diverse (in reality, not just aspiration); (2) include lanaguage requiring full compliance with both the letter and the spirit of the Voting Rights Act; and (3) establish and promote the protection of minority voting rights as state law.

The NAACP Legal Defense and Educational Fund is America's legal counsel on issues of race.

Through advocacy and litigation, LDF focuses on issues of education, voter protection, economic justice and criminal justice.

We encourage students to embark on careers in the public interest through scholarship and internship programs.

LDF pursues racial justice to move our nation toward a society that fulfills the promise of equality for all Americans.

Reforming Redistricting Without Reversing Progress Toward Racial Equality

GLOSSARY

Alternative Population Base—A population count other than the official census data that is used for redistricting.

Apportionment—The process of assigning seats in a legislative body among established districts.

At-large—When one or several candidates run for an office, and they are elected by the whole area of a local political subdivision, they are being elected at-large.

Census—Enumeration of the population as mandated by the U.S. Constitution.

Census blocks—the smallest geographic area defined for decennial census tabulations. States have input into the boundaries through the first phase of the Redistricting Data Program—the Block Boundary Suggestion Project. The Census Bureau provides redistricting data at the block level, which is the lowest level of census geography.

Census block group—A cluster of census blocks having the same first digit of their 4 digit code within a census tract. Data are tabulated by block groups, which are usually locally defined.

Census tract—Small, geographic statistical subdivision within counties usually defined by local participants for data collection and analysis.

Commission—A statutory or constitutional body charged with researching or implementing policy. Redistricting commissions have been used to draw districts for legislatures and Congress.

Communities of interest—Geographical areas, such as neighborhoods of a city or regions of a state, where the residents have common political interests that do not necessarily coincide with the boundaries of a political subdivision, such as a city or county.

Compactness—Having the minimum distance between all the parts of a constituency (a circle, square or a hexagon is the most compact district).

Contiguity—All parts of a district being connected at some point with the rest of the district.

Cracking—A term used when the electoral strength of a particular group is divided by a redistricting plan.

Deviation—The measure of how much a district or plan varies from the ideal.

District—The boundaries that define the constituency of an elected official.

Gerrymander—A district intentionally drawn to advantage one group or party over another, especially a district with a bizarre shape.

GIS—Geographic Information System. Computer software used for creating and analyzing maps and data.

Ideal population—The total state population divided by the number of seats in a legislative body.

Majority-minority districts—Term used by courts for seats where a racial or language minority constitutes a majority of the population.

Metes and bounds—A detailed description of district boundaries using specific geographic features.

Multimember district—A district that elects two or more members to a legislative body.

Natural boundaries—District boundaries that are natural geographic features, such as bodies of water.

One person, one vote—Constitutional standard established by the U.S. Supreme Court that all legislative districts should be approximately equal in population.

Overall range—The difference in population between the largest and smallest districts in a districting plan in either absolute or percentage terms.

Packing—A term used when one group is consolidated as a super-majority in a small number of districts, thus reducing its electoral influence in surrounding districts.

Partisan gerrymandering—The deliberate drawing of district boundaries to secure an advantage for one political party.

PL 94-171—Federal law enacted in 1975 requiring the U. S. Census Bureau to provide the states with data for use in redistricting as well as mandating the program where the states define the blocks for collecting data.

Plurality—A winning total in an election involving more than two candidates, where the winner received less than a majority of the votes cast.

Racial Gerrymandering—The deliberate drawing of district boundaries to secure an advantage for one race.

Reapportionment—The allocation of seats in a legislative body (such as Congress) among established districts (such as states), where the district boundaries do not change but the number of members per district does.

Redistricting—The drawing of new political district boundaries.

Sampling—Technique or method that measures part of a population to determine the full number.

Section 2 of the Voting Rights Act—Part of the federal law that protects racial and language minorities from discrimination by a state, or other political subdivision, in voting practices.

Section 5 of the Voting Rights Act—Part of the federal law that requires certain states and localities to pre-clear all election law changes with the U.S. Department of Justice or the federal district court for the District of Columbia before those laws take effect.

Single-member district—District electing only one representative.

Standard deviation—A statistical formula measuring variance from a norm.

Tabulation—The totaling and reporting of the census data.

TIGER—Topologically Integrated Geographic Encoding and Referencing. The system and digital database developed at the U.S. Census Bureau to support computer maps used by the census.

VAP—Voting Age Population. The number of people over 18 years of age.

VTD—Voting Tabulation District. Census term for geographic area, such as an election precinct, where election information is collected.

BEYOND THE BELTWAY

Redistricting Redux

By Andy Leonatti

With state legislatures' spring sessions in full swing, redistricting legislation is again on the docket in a handful of states, but chances of wholesale reform appear dim.

The stakes are raised for legislatures in this fall's midterm, because in most states, to the winner go the spoils — most importantly the ability to protect incumbents. In the event a state is in line to lose a congressional district, the party in power can force members of the minority party to fight for one district.

For congressional districts, the legislatures in 36 states play the primary role in redrawing and approving the map. In two states, Iowa and Maine, independent commissions play a part in drawing district lines, but the legislature has final approval. Only five states, Hawaii, Arizona, Idaho, New Jersey and Washington, have redistricting done by an independent or bipartisan commission — the other seven have only one at-large district.

In Richmond, Va., last week, Democratic state Sen. Creigh Deeds, his party's 2009 gubernatorial nominee, was thwarted for the seventh straight year in attempting to inject bipartisanship into the process.

"These guys want to run without competition in their districts with 12 percent turnout," Deeds told the *Richmond Times-Dispatch*. "That's the bottom line."

His bill, which would have created a seven-member — three Republicans, three Democrats, one joint appointee — panel to prepare redistricting legislation, would have still been subject to approval in the Senate and House of Delegates. The bill was tabled by a 4-2 party-line vote by the House Elections Subcommittee.

In last year's campaign, Deeds and the eventual winner, Republican Bob McDonnell, both supported the idea of taking the map-drawing power out of the Legislature's hands. McDonnell told *Times-Dispatch* reporters and editors last week the process should be more open, but he said there would be biases even on an independent panel.

With the bill tabled, the only chance of passing redistricting language would be as emergency legislation in next year's spring session, which appears unlikely, given its failure to move before.

"It's going to be ugly," Deeds said of next year's map-drawing process.

The League of Women Voters is heavily pushing redistricting reform and is supporting efforts and raising awareness in several states, including Virginia, but the group runs into suspicion for their efforts wherever they go.

Democratic Assemblyman Bill Parment of New York was one of those expressing skepticism, when he told the *Jamestown Post-Journal* last week — after attending a February forum on redistricting put on by the league and the Nelson A. Rockefeller Institute of Government — that the Legislature is "suspect, because we have an interest in the outcome."

"Quite often they voice it as nonpartisan," Parment added. "For those of us who have been involved, I think we're not convinced that it would ever be independent or nonpartisan, for one, because it is very difficult to find people who are knowledgeable about the topic who are in fact dispassionate about it or have no interest in the outcome."

In Ohio, the league worked with Democratic Secretary of State and Senate candidate Jennifer Brunner to run a contest last year allowing citizens to submit redistricting plans.

GOP state Sen. Jon Husted has submitted a plan that would turn over congressional district mapping to the state Apportionment Board. The Democratic House and the GOP-controlled Senate, however, have failed to come together on a plan and the clock is ticking on getting a proposal onto November's ballot for citizens to vote on.

Perhaps the task might be the hardest, however, in Illinois, which sports one of the most gerrymandered district maps in the country.

In the wake of former Democratic Gov. Rod Blagojevich being removed from office in a corruption scandal in early 2009, Democratic Gov. Pat Quinn created an ethics commission to propose ideas to clean up state government. One of the top ideas was redistricting reform.

The head of the commission, former assistant U.S. Attorney Patrick Collins, who put former GOP Gov. George Ryan behind bars, calls the Legislature's redistricting the "Incumbent Protection Act."

Attempting to show that they are listening to citizens' concerns, state Senate Democrats unveiled their redistricting plans on Feb. 25. The plan would still leave the responsibility of drawing the map to the Legislature. In the event a plan could not be agreed on, a bipartisan panel would attempt to find a solution, with the final option being a judicially appointed master taking charge.

Minority Senate Republicans floated their own plan to cut straight to the commission.

And the League of Women Voters has teamed with good government groups to attempt to place the question of creating an independent redistricting commission similar to the Senate GOP proposal on November's ballot.

But even if the group can get enough signatures to get on the ballot, Democratic House Speaker Michael Madigan will be ready to dispatch his army, which is very skilled at challenging petition signatures. And even if the League's referendum were to succeed, it would only apply to state legislative districts, not congressional seats.

Redistricting Timeline

Charter amendment passes

Develop budget for redistricting (fill in components, including translation/interpretation services for meetings)

Work with City's website services to develop structure for posting redistricting information on the City's website.

Obtain assistance from City offices including City Attorney and Elections to develop documents setting out requirements and timelines and federal requirements. This information is needed for the orientation meeting.

Charter Commission/Committee begins work on Advisory Group job description and application form following requirements in Charter and the principles.

Charter Commission/Committee develops lists of those organizations and individuals interested in redistricting and use email information to notify them of meetings and materials on an ongoing basis.

Citywide meeting to review proposed job description and application form.

Charter Commission/Committee reviews citizen input from citywide meeting and finalizes job description and application form.

If Committee used, Charter Commission approves job description and application form.

Post job description and application form on City's website and email to identified groups/persons. This begins the 45 day application period.

Charter Commission/Committee reviews applications, identifies those eligible and recommends a final list to the Charter Commission.

Charter Commission appoints Advisory Committee

Orientation meeting for Redistricting Group including presentation by City Attorney

Hold two citywide meetings in different parts of the city to explain and discuss the redistricting process.

Redistricting Group develops draft process and rules for redistricting.

Redistricting Group holds public meeting to review draft rules and process.

Redistricting Group reviews public comments and finalizes rules and process.

Minnesota Legislature completes its reapportionment process.

Charter Commission hires nonpartisan staff to use software to draw maps.

Staff prepare first draft of Ward map for Redistricting Group.

Redistricting Group approves first draft Ward map.

Redistricting Group holds at least two citywide meetings to discuss first draft Ward map.

Redistricting Group reviews citizen input on Ward map and develops revised Ward map.

Redistricting Group publishes revised Ward map at least seven days in advance of citywide meetings.

Redistricting Group hosts at least three citywide meetings, soliciting citizen and Neighborhood organization input.

Redistricting Group reviews new testimony and revises Ward map.

Charter Commission votes on final Ward map and if approved, the map is filed with the Minneapolis City Clerk. If not approved, the map is returned to the Redistricting Group.

If the approved map is returned by the District Court, the Redistricting Group shall immediately revise the Ward map and re-submit it to the Charter Commission. If approved, the Ward map will be submitted to the City Clerk.

Staff prepare first draft of the Park District map for Redistricting Group.

Redistricting Group approves first draft Park District map. Redistricting Group informs the Minneapolis Park and Recreation Board of the map.

Redistricting Group holds at least two citywide meetings to discuss first draft Park District map.

Redistricting Group reviews citizen input on Park District map and develops revised Park District map.

Redistricting Group publishes revised Park District map at least seven days in advance of citywide meetings. Redistricting Group informs the Minneapolis Park and Recreation Board of the map.

Redistricting Group hosts at least three citywide meetings, soliciting citizen and Neighborhood organization input.

Redistricting Group reviews new testimony and revises Park District map.

Charter Commission votes on final Park District map and if approved, the map is filed with the Minneapolis Park and Recreation Board. If not approved, the map is returned to the Redistricting Group.

If the approved map is returned by the District Court, the Redistricting Group shall immediately revise the Park District map and re-submit it to the Charter Commission. If approved, the Park District map will be submitted to the Minneapolis Park and Recreation Board.

How to Draw Redistricting Plans

That Will Stand Up in Court

Peter S. Wattson
Senate Counsel
State of Minnesota

NATIONAL CONFERENCE OF STATE LEGISLATURES

NATIONAL REDISTRICTING SEMINAR

Providence, Rhode Island
September 26, 2010

Contents

I. Introduction

The purpose of this paper is to acquaint you with the major federal cases that will govern the way you draw your legislative and congressional redistricting plans following the 2010 census so that you may learn how to draw redistricting plans that will stand up in court.

Before I get into the cases, I'd like to clarify some terms I will be using and explain how the redistricting process works.

A. Reapportionment and Redistricting

"Reapportionment" is the process of reassigning a given number of seats in a legislative body to established districts, usually in accordance with an established plan or formula. The number and boundaries of the districts do not change, but the number of members per district does.

"Redistricting" is the process of changing the district boundaries. The number of members per district does not change, but the districts' boundaries do.

The relationship between reapportionment and redistricting can most easily be seen by examining the U.S. House of Representatives. Every ten years the 435 seats in the House of Representatives are reapportioned among the 50 states in accordance with the latest federal census. As the population of some states grows faster than that of others, congressional seats move from the slow-growing states to the fast-growing ones. Then, within each of the states that is entitled to more than one representative, the boundaries of the congressional districts are redrawn to make their populations equal. The state is redistricted to accommodate its reapportionment of congressmen.

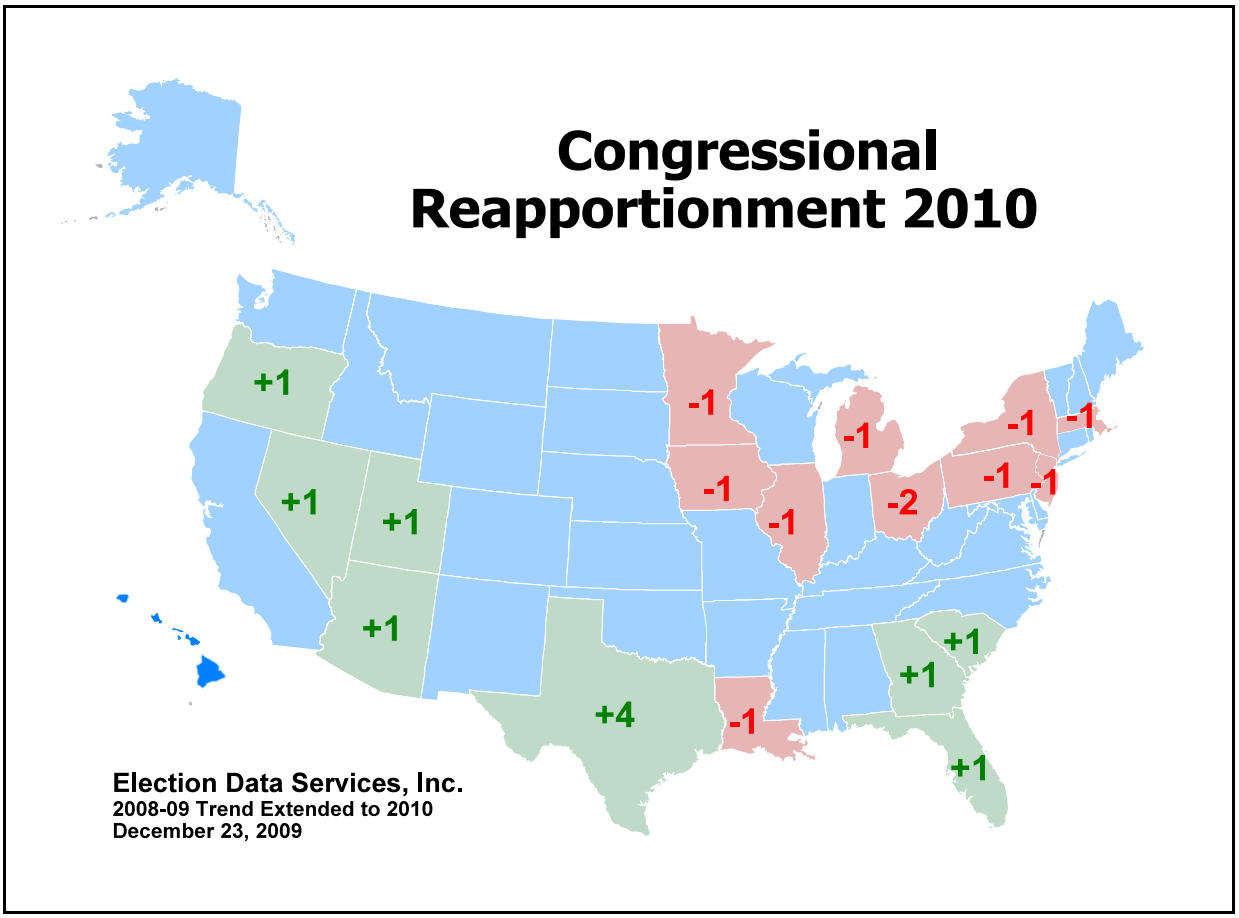
Reapportionment, in the narrow sense in which I will be using it here, is not a partisan political process. It is a mathematical one. The decennial reapportionment of the U.S. House of Representatives is carried out in accordance with a statutory formula, called the "method of equal proportions," established in 1941. 2 U.S.C. Sections 2a and 2b. It is not subject to partisan manipulation, except in determining who gets counted in the census. The decision of Congress to use this particular formula, rather than another, has been upheld by the Supreme Court. *Dept. of Commerce v. Montana*, 503 U.S. 442 (1992).

Redistricting, on the other hand, is highly partisan. This is because, in redrawing district boundaries, the drafter has such wide discretion in deciding where the boundaries will run. Creative drafting can give one party a significant advantage in elections.

B. Why Redistrict?

1. Reapportionment of Congressional Seats

Why do we redistrict? The first reason is because of population shifts that cause congressional seats to move from state to state.



This map shows one prediction of how congressional seats will move from state to state as a result of the 2010 census. It is based on estimates from the Census Bureau of the population of each state as of July 2009 and then projecting forward to Census Day, April 1, 2010, based on the rate of population growth from 2008 to 2009. There are various other projections that have been made, under which these numbers change by one or two here and there. All show the continued shift of population from the North and East to the South and West, as captured by each of the last several censuses.

This map shows the shifts, but it doesn't show the why. Why is Texas likely to gain four times as many seats as most states?

It also doesn't show how close each state is to gaining or losing a seat, or to whom. According to the Minnesota State Demographer's latest estimate, Minnesota is currently on track to lose a seat by only 1,000 persons. The seat will go to Missouri, allowing it just barely to retain all its seats.

It also doesn't show what has happened since July 2009. With the Great Recession, people who want to leave Minnesota can't sell their houses, and people who want to move to Texas can't get a mortgage.

In each of the States that gains or loses a seat, the congressional districts will have to be redrawn to accommodate the new number of districts

2. Population Shifts within a State

The second reason we must redistrict is population shifts within a state.

Even if the number of districts has not changed, if the population growth has not been uniform throughout a jurisdiction, the districts will tend to have grown out of population balance. There are exceptions, of course. In preparation for the 1990 round of redistricting, the City of St. Paul purchased the necessary hardware and software, appointed a redistricting commission, and prepared to draw new city council districts. But when the population counts arrived, the city discovered that its population growth had been so uniform that no district was far enough out of population balance to require redistricting. They disbanded the commission and continued to use the old districts for another decade. Others have not been so lucky.

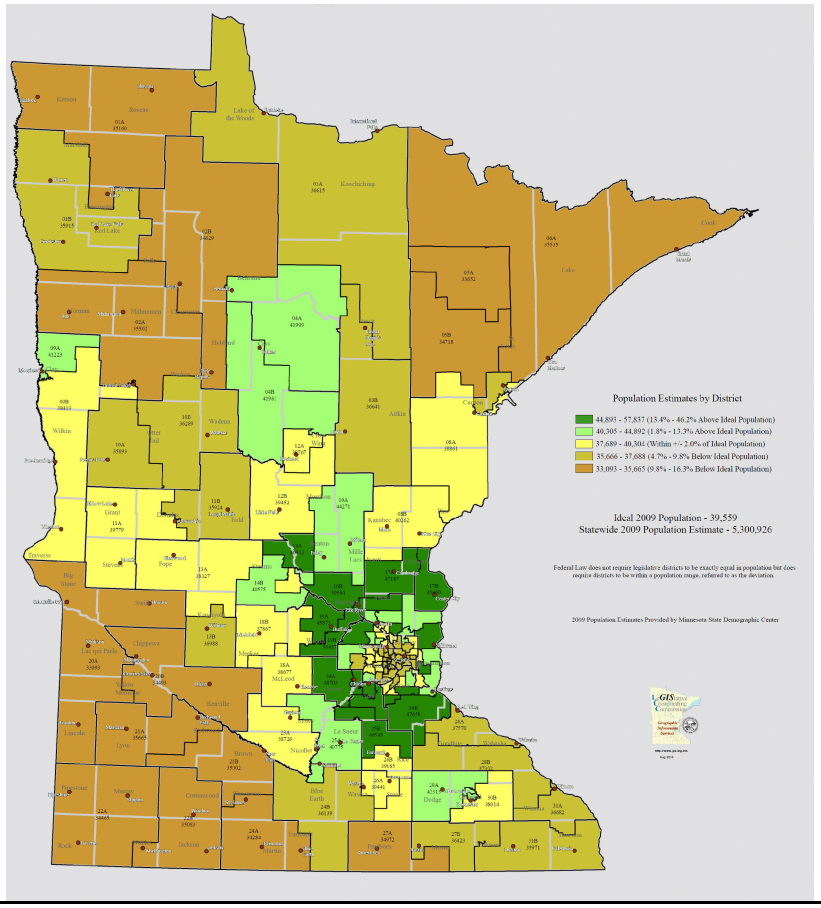
C. The Facts of Life

1. Equal Population

It is a fact of life in redistricting that absolute numbers are less important than relative numbers. Getting the numbers right is important, but once you have them your concern is not their absolute value but rather how they relate to each other.

Even if all areas of a state are growing, what is important for each region, or each district, is whether it has grown faster or slower than average. Districts that have grown slower than average will have to grow in area. Districts that have grown faster than average will have to shrink in area.

Minnesota House Districts by 2009 Population Estimates



This map shows the State of Minnesota's estimated population by House District as of 2009, and whether its population is larger or smaller than average, that is, larger or smaller than the ideal. The districts in yellow, toward the center of the state, are within 2.5 percent of the ideal district size, plus or minus. Those in olive, in the north central and southeast, are 2.5 percent to 23 percent below the ideal. Those in brown, in the northeast, northwest, and southwest, are more than 23 percent below the ideal. Those in light green, in the central and east central part of the state, are 2.5 percent to 23 percent above the ideal, and those in dark green, ringing the Twin Cities metropolitan area, are more than 23 percent above the ideal. The brown and olive districts will have to grow in area, and the green districts will have to shrink in area in order to meet equal population requirements.

You might think that the yellow districts have nothing to worry about, since their populations are close to ideal. But if the brown and olive districts must grow in area, where will they get their new population from? The yellow districts, which will then need to replace that lost population by taking from their neighboring yellow, brown, olive, or green districts. It's a ripple effect that can put quite a strain on relationships between neighbors that used to be friends.

2. Gerrymandering

It is a fact of life in redistricting that the district lines are always going to be drawn by the majority in power, and that the majority will always be tempted to draw the lines in such a way as to enhance their prospects for victory at the next election. The term "gerrymandering" is often used to describe any technique by which a political party attempts to give itself an unfair advantage in redistricting.

Used in its narrow sense, to refer only to the practice of drawing districts with odd shapes that look like monsters, there are basically just two techniques—packing and fracturing. How do they work?

a. Packing

"Packing" is drawing district boundary lines so that the members of the minority are concentrated, or "packed," into as few districts as possible. They become a supermajority in the packed districts—70, 80, or 90 percent. They can elect representatives from those districts, but their votes in excess of a simple majority are "wasted." They are not available to help elect representatives in other districts, so they cannot elect representatives in proportion to their numbers in the state as a whole.

b. Fracturing

"Fracturing" is drawing district lines so that the minority population is broken up. Members of the minority are spread among as many districts as possible, keeping them a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts.

c. Creating a Gerrymander

If the supporters of the minority party were distributed evenly throughout the state, there would be no need to gerrymander. In a state where the minority party had 49 percent of the vote, they would lose every seat.

But political minorities tend not to be evenly distributed. In fact, they tend to cluster, just as majorities do. So the persons drawing the redistricting plan try to determine where they are, and draw their districts accordingly: first packing as many of the minority into as few districts as possible and then, where they can't be packed, fracturing them into as many districts as possible.

It is this process of drawing the district lines to first pack and then fracture the minority that creates the dragon-like districts called gerrymanders.

In drawing districts after the 2010 census, you may find there is less need to gerrymander than in the past. Both Republicans and Democrats have been packing themselves. A recent analysis of housing trends over the last three decades shows that Americans have been choosing more and

more to live among those whose political views are just like theirs, causing more and more counties to become "landslide counties" that consistently vote overwhelmingly for one party or the other. Bill Bishop, *The Big Sort: Why the Clustering of America is Tearing Us Apart* (2008).

D. The Need for Limits

To counter the temptation of plan drafters to give their party an unfair advantage in redistricting, constitutions, courts, and citizens have imposed various limits: limits on who will draw the plans, on the data that may be used, on the procedures they must follow, and on the districts that result. *See* National Conference of State Legislatures, "Limits on Gerrymanders" (visited Oct. 18, 2009) <www.senate.mn/departments/scr/redist/Red2010/limits_on_gerrymanders.htm>.

1. Who Draws the Plans

In some states, responsibility for redistricting has been taken away from incumbent legislators and given to a commission. Depending on the state, the commission may include no legislators, no appointees of a legislator, no public officials, or even no politicians. *See* "Limits on Gerrymanders;" National Conference of State Legislatures, *Redistricting Law 2010*, appendix C, "Redistricting Commissions: Legislative Plans," <www.senate.mn/departments/scr/redist/Red2010/appx_C_legislative.htm>, and appendix D, "Redistricting Commissions: Congressional Plans," <www.senate.mn/departments/scr/redist/Red2010/appx_D_congressional.htm>. Denver, Colo.: NCSL, 2009. The commission may be required to include members of the minority party, or be equally balanced between members of the majority and minority parties. *Id.* A commission that is equally balanced may include a tie-breaker chosen by its members, or appointed by a neutral, such as the state Supreme Court. *Id.*

2. Data that May be Used

A state's constitution, laws, or policies, may limit the data that may be used in redistricting. The limits may prohibit the use of data on party registration, election results, or socio-economic data, other than Census Bureau population counts. *See* "Limits on Gerrymanders;" *Redistricting Law 2010*, table 8, and appendix E, "Districting Principles for 2000s Plans," <www.senate.leg.state.mn.us/departments/scr/redist/red2010/appx_principles.htm>. Plan drafters may be prohibited from using data on where incumbent members reside. *Id.*

3. Review by Others

A state's constitution, laws, or policies may require that a redistricting plan be reviewed by people other than the plan drafters before it may take effect. The plan drafters may be required to hold at least one public hearing before adopting a plan, they may be required to issue a preliminary plan for public inspection before adopting their final plan, or the state Supreme Court may be required to review the plan before it may take effect. *Id.*

4. Districts that Result

In addition to these state limits on the procedures used to adopt a plan, federal as well as state law imposes limits on the districts that result. Federal law requires districts to have equal populations and to allow racial and language minorities a fair opportunity to elect representatives of their choice. Under certain circumstances, federal law may require the districts to follow "traditional districting principles." In a given state, the law may require that the districts consist of contiguous territory, that they be compact, that house districts be nested within senate districts, that the districts not divide political subdivisions or communities of interest, or that the districts be politically competitive. *Id.*

All these limits are intended to restrain the majority from taking unfair advantage of their position when drawing district lines.

II. Draw Districts of Equal Population

A. Use Official Census Bureau Population Counts

1. Alternative Population Counts

The first requirement for any redistricting plan to stand up in court is to provide districts of substantially equal population. But how do you know the population? The obvious way is to use official Census Bureau population counts from the 2010 census.

It is true that some legislatures have chosen to use data other than the Census Bureau's population counts to draw their districts and have had their plans upheld by federal courts. For example, back in 1966, Hawaii used the number of registered voters, rather than the census of population, to draw its legislative districts, and had its plan upheld by the U.S. Supreme Court in the case of *Burns v. Richardson*, 384 U.S. 73. But there the Court found that the results based on registered voters were not substantially different from the results based on the total population count.

A state may conduct its own census on which to base its redistricting plans. For example, a 1979 Kansas legislative redistricting plan based on the state's 1978 agricultural census was upheld by a federal district court in the case of *Bacon v. Carlin*, 575 F. Supp. 763 (D. Kan. 1983), *aff'd* 466 U.S. 966 (1984). And in 1986, a Massachusetts legislative redistricting plan based on a state census was upheld by a federal district court in the case of *McGovern v. Connolly*, 637 F. Supp. 111 (D. Mass 1986).

Late in the decade, a federal court may find that local government estimates are a more accurate reflection of current population than old census counts and thus are an acceptable basis for developing redistricting plans before the next census. *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.1990).

But generally, the federal courts will not simply accept an alternative basis used by the states. Rather, they will first check to see whether the districts are of substantially equal population based on Census Bureau figures. If they are not, the courts will strike them down.

So, if you want your plans to stand up in court, the easiest way is use official Census Bureau population counts.

2. Use of Sampling to Eliminate Undercount

In the 1990s, the main political fight over how to count the population concerned how to compensate for the historic undercounting of racial and ethnic minorities. In response to a suit by the City of New York and other plaintiffs that sought to compel the Census Bureau to make a statistical adjustment to the population data to account for people the Bureau failed to count, the Bureau agreed to make a fresh determination of whether there should be a statistical adjustment for an undercount or overcount in the 1990 census. The Bureau agreed to conduct a post enumeration survey of at least 150,000 households to use as the basis for the adjustment. The Bureau agreed that, by July 15, 1991, it would either publish adjusted population data or would publish its reasons for not making the adjustment. Any population data published before then, such as the state totals published December 31, 1990, and the block totals published April 1, 1991, would contain a warning that they were subject to correction by July 15. The Bureau ultimately decided not to make a statistical adjustment to correct for the undercount, and the Supreme Court found that its decision was reasonable and within the discretion of the Secretary of Commerce, in whose Department the Census Bureau is located. *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

For the 2000 census, the fight was over whether to use scientific sampling techniques to conduct the census from the beginning, rather than adjusting the population counts after they had been issued. The Census Bureau proposed that, in order to obtain information on at least 90 percent of the households in each census tract, it would use statistical sampling techniques to estimate the characteristics of the households that did not respond to the first two mailings of a census questionnaire. In each census tract, the fewer households that responded initially, the larger would be the size of the sample enumerators would contact directly as part of their follow-up. The addresses that would be included in the sample would be scientifically chosen at random to insure they were statistically representative of all nonresponding housing units in that census tract.

Congress attempted to stop the use of sampling by enacting Pub. L. No. 105-119, § 209 (j), 111 Stat. 2480 (1997), which required that all data releases for the 2000 census show "the number of persons enumerated without using statistical methods." It also authorized lawsuits to determine whether the Bureau's plan to use sampling for apportioning seats in Congress was constitutional.

In *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999), the Supreme Court ruled that the Census Act prohibits the use of sampling for purposes of apportioning representatives in Congress among the states. It did not rule on the constitutionality of using sampling to determine the distribution of population within each state for purposes of redistricting its apportionment of congressional seats or the seats in its state legislature.

Having used statistical techniques to adjust the population counts for undercounts and overcounts, the Census Bureau, shortly before the release of the official census counts in 2001, decided not to release the adjusted counts, saying it was not confident they were correct. The federal courts upheld the decision of the Bureau not to release the adjusted counts. *Carter v. U.S. Department of Commerce*, No. 02-35161, 307 F.3d 1084 (9th Cir. 2002).

The Census Bureau has not proposed any statistical adjustment to the census for 2010.

3. Exclusion of Undocumented Aliens

The census is not limited to citizens. It is not even limited to permanent residents. The constitution says to count "persons," Art. I, § 2, as amended by the Fourteenth Amendment, so even homeless people are counted where they usually sleep.

Pennsylvania and other states have sought without success to require the Census Bureau to exclude undocumented aliens from the population counts used to apportion the members of Congress among the states. *See Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989); *Federation for American Immigration Reform (FAIR) v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980, *appeal dismissed*, 447 U.S. 916 (1980).

4. Inclusion of Overseas Military Personnel

In 1990, the Department of Defense conducted a survey of its overseas military and civilian employees and their dependents to determine their "address of record." These overseas military personnel were allocated to the states according to their address of record for purposes of apportioning the House of Representatives, but were not included in the April 1, 1991, block counts given to the states for use in redistricting. Allocating overseas military personnel to the states caused one congressional seat to be shifted from Massachusetts to Washington State. Massachusetts sued the Secretary of Commerce, but the Supreme Court upheld the allocation. *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

B. Measuring Population Equality

How does a court measure the degree of population equality in a redistricting plan? Let me give you an example. Let's say we have a state with a population of one million, and that it is entitled to elect ten representatives in Congress. (That is not a realistic number, but it is easier to work with.) The average, or "ideal," district population would be 100,000. Let's say the legislature draws a redistricting plan that has five districts with a population of 90,000 and five districts with a population of 110,000. The "deviations" of the districts would be 10,000 minus and 10,000 plus, or minus ten percent and plus ten percent. The "average deviation" from the ideal would be 10,000 or ten percent. And the "overall range" would be 20,000, or 20 percent. Most courts have used what statisticians call the "overall range" to measure the population equality of a redistricting plan, though they have usually referred to it by other names, such as "maximum deviation," "total deviation," or "overall deviation."

C. Congressional Plans

1. "As Nearly Equal in Population As Practicable"

Once you know the population, and you know how to measure the degree of population equality in a plan, how equal do the districts have to be? First, you must understand that the federal courts use two different standards for judging redistricting plans — one for congressional plans and a different one for legislative plans.

The standard for congressional plans is based on Article I, § 2, of the U.S. Constitution, which says:

> Representatives . . . shall be apportioned among the several States . . . according to their respective numbers . . . .

The standard for congressional plans is strict equality. In the 1964 case of *Wesberry v. Sanders*, 376 U.S. 1, the U.S. Supreme Court articulated that standard as "as nearly equal in population as practicable."

Notice the choice of words. The Court did not say "as nearly equal as *practical*." The *American Heritage Dictionary* defines "practicable" as "capable of being . . . done . . . ." It notes that something "practical" is not only capable of being done, but "also sensible and worthwhile." It illustrates the difference between the two by pointing out that "It might be *practicable* to transport children to school by balloon, but it would not be *practical*."

In 1983, in *Karcher v. Daggett*, 462 U.S. 725, the U.S. Supreme Court struck down a congressional redistricting plan drawn by the New Jersey Legislature that had an overall range of less than one percent. To be precise, .6984 percent, or 3,674 people. The plaintiffs showed that at least one other plan before the Legislature had an overall range less than the plan enacted by the Legislature, thus carrying their burden of proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population.

In the 1980s, three-judge federal courts drawing their own redistricting plans achieved near mathematical equality. For example, in Minnesota the court-drawn plan had an overall range of 46 people (.0145 percent), *LaComb v. Growe*, 541 F. Supp. 145 (D. Minn. 1982) *aff'd mem. sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982) (Appendix A, unpublished) (In its opinion, the Court tells only the *sum* of all the deviations, 76 people, and refers to it as the "total population deviation"), and in Colorado the court-drawn plan had an overall range of *ten* people (.0020 percent), *Carstens v. Lamm*, 543 F. Supp. 68, 99 (D. Colo. 1982).

With the improvements in the census and in the computer technology used to draw redistricting plans after the 1990 census, the degree of population equality that was "practicable" was even greater than that achieved in the 1980s.

In the 2000s, 17 states drew congressional plans with an overall range of either zero or one person, and 12 more drew plans with an overall range of two to ten persons. *See Redistricting Law 2010*, table 3, "Population Equality of 2000s Districts," <www.senate.leg.state.mn.us/departments/scr/redist/red2010/table_3.htm>.

If you can't draw congressional districts that are mathematically equal in population, don't assume that others can't. Assume that you risk having your plan challenged in court and replaced by another with a lower overall range.

2. Unless Necessary to Achieve "Some Legitimate State Objective"

Even if a challenger is able to draw a congressional plan with a lower overall range than yours, you may still be able to save your plan if you can show that each significant deviation from the ideal was necessary to achieve "some legitimate state objective." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). As Justice Brennan, writing for the 5-4 majority in *Karcher v. Daggett*, said:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives . . . . The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions . . . . By necessity, whether deviations are justified requires case-by-case attention to these factors.

462 U.S. at 740-41.

If you intend to rely on these "legitimate state objectives" to justify *any* degree of population inequality in a congressional plan, you would be well advised to articulate those objectives in advance, follow them consistently, and be prepared to show that you could not have achieved those objectives *in each district* with districts that had a smaller deviation from the ideal.

In the 1990s, Arkansas, Maryland, and West Virginia were all able to meet that burden when congressional plans drawn by the legislature were challenged in court. *See Turner v. Arkansas*, 784 F. Supp. 585 (E.D. Ark. 1991); *Anne Arundel County Republican Cent. Committee v. State Administrative Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991); *Stone v. Hechler*, 782 F. Supp. 1116 (W.D. W.Va. 1992).

In the 2000s, Georgia, Kansas, and West Virginia withstood equal-population challenges to their congressional plans, *see Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), aff'd, 542 U.S.947 (2004) (No. 03-1413) (mem.); *Graham v. Thornburgh*, No. 02-4087-JAR (D. Kan. 2002); *Deem v. Manchin*, 188 F. Supp.2d 651 (N.D. W. Va. 2001), *aff'd sub nom. Unger v. Manchin*, 536 U.S. 935 (2002) (mem.); while 22 states drew congressional plans with a deviation of more than one person that were not challenged. *See Redistricting Law 2010*, table 3, "Population Equality of 2000s Districts," <www.senate.leg.state.mn.us/departments/scr/redist/red2010/table_3.htm>, and National Conference

of State Legislatures, "Action on Redistricting Plans, 2001-07 (visited Oct. 18, 2009) <www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action2000.htm>.

Near the end of the 1990s, the Supreme Court upheld a court-drawn congressional plan in Georgia with an overall range of 0.35 percent (about 2,000 people). *Abrams v. Johnson*, 521 U.S. 74 (1997). But that was the lowest range of all the plans that met constitutional requirements, Georgia was able to show it had a consistent historical practice of not splitting counties outside the Atlanta area, and likely shifts in population since 1990 had made any further effort to achieve population equality illusory.

D. Legislative Plans

1. An Overall Range of Less than Ten Percent

Fortunately for those of you who will be drawing redistricting plans after the 2010 census, the Supreme Court has adopted a less exacting standard for legislative plans. It is not based on the Apportionment Clause of Article I, § 2, which governs congressional plans. Rather, it is based on the Equal Protection Clause of the 14th Amendment.

As Chief Justice Earl Warren observed in the 1964 case of *Reynolds v. Sims*, 377 U.S. 533, "mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that they achieve "substantial equality of population among the various districts." *Id.* at 579.

"Substantial equality of population" has come to mean that a legislative plan will not be thrown out for inequality of population if its overall range is less than ten percent, unless there is proof of intentional discrimination within that range.

The ten-percent standard was first articulated in a dissenting opinion written by Justice Brennan in the cases of *Gaffney v. Cummings*, 412 U.S. 735, and *White v. Regester*, 412 U.S. 755, in 1973. In later cases, the Court majority has endorsed and followed the rule Justice Brennan's dissent accused them of establishing. *See, e.g.*, *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Voinovich v. Quilter*, 507 U.S. 146 (1993).

An overall range of less than ten percent is not a safe harbor. Where a court found that the Georgia General Assembly had systematically underpopulated districts in rural south Georgia and inner-city Atlanta and overpopulated districts in the suburban areas north, east, and west of Atlanta in order to favor Democratic candidates and disfavor Republican candidates, that the plans systematically paired Republican incumbents while reducing the number of Democratic incumbents who were paired, and that the plans tended to ignore the traditional districting principles used in Georgia in previous decades, such as keeping districts compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts, it struck the districts down as a violation of the Equal Protection Clause. *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S.947 (2004) (mem.).

2. Unless Necessary to Achieve Some "Rational State Policy"

The Supreme Court in *Reynolds v. Sims* had anticipated that some deviations from population equality in legislative plans might be justified if they were "based on legitimate considerations incident to the effectuation of a rational state policy . . . ." 377 U.S. 533, 579 (1964). So far, the only "rational state policy" that has served to justify an overall range of more than ten percent in a legislative plan has been respecting the boundaries of political subdivisions. And that has happened in only three Supreme Court cases: *Mahan v. Howell*, 410 U.S. 315 (1973); *Brown v. Thomson*, 462 U.S. 835 (1983); and *Voinovich v. Quilter*, 507 U.S. 146 (1993).

In *Mahan v. Howell*, the Supreme Court upheld a legislative redistricting plan enacted by the Virginia General Assembly that had an overall range among House districts of about 16 percent. The Court took note of the General Assembly's constitutional authority to enact legislation dealing with particular political subdivisions, and found that this legislative function was a significant and a substantial aspect of the Assembly's powers and practices, and thus justified an attempt to preserve political subdivision boundaries in drawing House districts.

Brown v. Thomson, 462 U.S. 835 (1983), upholding a legislative plan with an overall range of 89 percent, was decided by the Supreme Court on the same day that it decided *Karcher v. Daggett*, 462 U.S. 725 (1983), where it threw out a congressional plan with an overall range of less than one percent. Reconciling these two cases is not easy. Nevertheless, I shall try.

First, as I have noted, the constitutional standard for legislative plans is different from the standard for congressional plans.

Second, it is important to understand that in *Brown v. Thomson* the Court was faced with a *reapportionment* plan rather than with a *redistricting* plan. The members of the Wyoming House of Representatives were being *reapportioned* among Wyoming's counties, rather than having new districts created for them. Because the boundaries of the districts were not being changed, the opportunities for partisan mischief were far reduced.

Third, Wyoming put forward a "rational state policy" to justify an overall range of more than ten percent, and the Court endorsed it. Writing for the Court, Justice Powell concluded that Wyoming's constitutional policy—followed since statehood—of using counties as representative districts and insuring that each county had at least one representative, was supported by substantial and legitimate state concerns, and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were no greater than necessary to preserve counties as representative districts, and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas. 462 U.S. at 843-46.

But Wyoming's policy of affording representation to political subdivisions may have been less important to the result than was the peculiar posture in which the case was presented to the Court. The appellants chose not to challenge the 89 percent overall range of the plan, but rather to challenge only the effect of giving the smallest county a representative. Justice O'Connor, joined by Justice Stevens, concurred in the result but emphasized that it was only because the challenge was

so narrowly drawn that she had voted to reject it. 462 U.S. at 850. The Court reaffirmed this narrow view of its holding in *Brown* by later citing it as authority for the statement that "no case of ours has indicated that a deviation of some 78% could ever be justified." *Board of Estimate v. Morris*, 489 U.S. 688, 702 (1989).

In *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Supreme Court reversed a decision of the federal district court striking down Ohio's legislative plan because the overall range of the House plan was 13.81 percent and the overall range of the Senate plan was 10.54 percent. The Court pointed out that preserving the boundaries of political subdivisions was a "rational state policy" that might justify an overall range in excess of ten percent.

There may not be any other "rational state policies" that will justify a legislature in exceeding the ten-percent standard. But with the multitude of plans that are likely to be submitted to you for your consideration, you may wish to adopt other policies to govern plans that are within the ten-percent overall range.

Courts that are called upon to draw redistricting plans, when legislatures have not, often have adopted policies for the parties to follow in submitting proposed plans to the court. These policies are not required by the federal constitution, and have not been used to justify exceeding the ten-percent standard, but they have helped the three-judge courts to show the Supreme Court that they were fair in adopting their plans. These policies often have included:

- districts must be composed of contiguous territory; *Carstens v. Lamm*, 543 F. Supp. 68, 87-88 (D. Colo. 1982); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 931 (W.D. Mo. 1982) *aff'd sub nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *LaComb v. Growe*, 541 F. Supp. 145, 148 (D. Minn. 1982);

- districts must be compact; *e.g.*, *Carstens v. Lamm*, 543 F. Supp. at 87-88; *Shayer v. Kirkpatrick*, 541 F. Supp. at 931; *LaComb v. Growe*, *supra*; *South Carolina State Conference of Branches of the National Association for the Advancement of Colored People v. Riley*, 533 F. Supp. 1178, 1181 (D. S.C. 1982); *Dunnell v. Austin*, 344 F. Supp. 210 (E.D. Mich. 1972); *David v. Cahill*, 342 F. Supp. 463 (D. N.J. 1972); *Preisler v. Secretary of State*, 341 F. Supp. 1158 (W.D. Mo. 1972); *Skolnick v. State Electoral Board*, 336 F. Supp. 839, 843 (N.D. Ill. 1971); *Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 734 (D. Md. 1966) *aff'd mem. sub nom. Alton v. Tawes*, 384 U.S. 315 (1966); and

- districts should attempt to preserve communities of interest; *e.g.*, *Carstens v. Lamm*, 543 F. Supp. at 91-93; *Shayer v. Kirkpatrick*, 541 F. Supp. at 934; *LaComb v. Growe*, *supra*; *Riley*, 533 F. Supp. at 1181; *Dunnell v. Austin*, 344 F. Supp. at 216; *Tawes*, 253 F. Supp. at 735; *Skolnick*, 336 F. Supp. at 845-46.

As of 1983, the constitutions of 27 states required districts to be composed of contiguous territory, and the constitutions of 21 states required that districts be compact. *Karcher v. Daggett*, 462 U.S. 725, 756 n. 18 (1983) (Stevens, J., concurring).

The Supreme Court refers to these policies (including respecting the boundaries of political subdivisions) as "traditional districting principles." *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (slip op. at 6-17); *Miller v. Johnson*, 515 U.S. 900, 919 (slip op. at 16) (1995); *Shaw v. Hunt*, 517 U.S. 899, (1996); *Bush v. Vera*, 517 U.S. 952, 959 (1996); *Abrams v. Johnson*, 521 U.S. 74, 84-95 (1997).

III. Don't Discriminate Against Racial or Language Minorities

A. Section 2 of the Voting Rights Act

1. A National Standard

Assuming that you are prepared to meet equal population requirements, you will also want to make sure you do not discriminate against minorities.

In a democracy, "power to the people" means the power to vote. Section 2 of the Voting Rights Act of 1965 (codified as amended at 42 U.S.C. § 1973[1]), attempts to secure this political power for racial and language minorities by prohibiting states and political subdivisions from imposing or applying voting qualifications; prerequisites to voting; or standards, practices, or procedures to deny or abridge the right to vote on account of race or color or because a person is a

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[1] **§ 1973 Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§ 1973b (f)(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

§ 1973l(c)(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

member of a language minority group. A "language minority group" is defined as "American Indian, Asian American, Alaskan Natives or of Spanish heritage."[2]

Section 2 applies throughout the United States. It has been used to attack reapportionment and redistricting plans on the ground that they discriminated against Blacks, Hispanics, or American Indians and abridged their right to vote by diluting the voting strength of their population in the state.

2. Data on Race and Language Minorities

In order to facilitate enforcement of the Voting Rights Act, the Census Bureau asks each person counted to identify their race and whether they are of Hispanic or Latino origin. For the 2010 Census, the racial categories are: White, Black, American Indian, Asian, Native Hawaiians and other Pacific Islanders, and Some Other Race. Persons of Hispanic or Latino origin might be of any race. Persons are given the opportunity to select more than one race.

The Census Bureau reports racial data in 63 categories, covering those who report being in up to all six racial groups. Double that for Hispanic or Latino origin and double it again for those under and over 18. There are 263 potential categories of population count *for each block*!

In order to reduce the categories of racial data to a manageable number, and to provide guidance to states and local governments that must submit their redistricting plans for preclearance before they may take effect, the U.S. Department of Justice says that, in most of the usual cases, the Department will analyze only eight categories of race data:[3]

Non-Hispanic White
Non-Hispanic Black plus Non-Hispanic Black and White
Non-Hispanic Asian plus Non-Hispanic Asian and White
Non-Hispanic American Indian plus Non-Hispanic American Indian and White
Non-Hispanic Pacific Islander plus Non-Hispanic Pacific Islander and White
Non-Hispanic Some Other Race plus Non-Hispanic Some Other Race and White
Non-Hispanic Other multiple-race (where more than one minority race is listed)
Hispanic

The total of these racial groups will add to 100 percent.

In the 2000 census, out of 281 million people, only 6.8 million reported they were of two or more races and 93 percent of those reported only two races.

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[2] 42 U.S.C. § 1973l(c)(3) (2006).

[3] U.S. Dept. of Justice, "Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c," 66 Fed. Reg. 5412.

In most areas of the country, you will only need to be concerned about the first three: Whites, Blacks, and Hispanics.

3. No Discriminatory Effect

Purity of intent will not save your plan from attack under § 2. The test is whether your plan will have the effect of diluting minority voting strength, not whether is was enacted with an intent to discriminate.

It is true that in 1980, in *City of Mobile v. Bolden*, 446 U.S. 55, the U.S. Supreme Court interpreted § 2 as applying only to actions *intended* to discriminate. Black residents of Mobile, Alabama, had charged that the city's practice of electing commissioners at large diluted minority voting strength. They failed to prove the at-large plan was adopted with an *intent* to discriminate against Blacks. The Supreme Court refused to strike it down.

In 1982, Congress amended the Voting Rights Act to reject the Court's interpretation. As enacted, § 2 had prohibited conduct "to deny or abridge" the rights of racial and language minorities. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as 42 U.S.C. § 1973). The 1982 amendments changed that to prohibit conduct "which results in a denial or abridgement" of those rights. Pub.L. No. 97-205, § 3, June 29, 1982, 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973). Before *Bolden*, courts had generally considered whether a particular redistricting plan had the *effect* of diluting the voting strength of the Black population. Congress codified that pre-*Bolden* case law by adding:

> A violation of [§ 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [§ 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (b).

4. The Three *Gingles* Preconditions

In order to assist courts in evaluating challenges to redistricting plans, the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), imposed three preconditions that a plaintiff must prove before a court must proceed to a detailed analysis of a plan:

> 1) that the minority is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.

478 U.S. at 50-51.

Gingles was the first case in which the Supreme Court considered the 1982 amendments to § 2. It was a challenge to legislative redistricting plans in North Carolina. At issue were one multimember Senate district, one single-member Senate district, and five multimember House districts. Justice Brennan's majority opinion upheld the constitutionality of § 2, as amended.

The Court has since held that the three preconditions also apply to § 2 challenges to single-member districts. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

5. "The Totality of the Circumstances"

Once these three preconditions are satisfied, Justice Brennan said that a court must consider several additional "objective factors" in determining the "totality of the circumstances" surrounding an alleged violation of § 2. They include the following:

1) the extent of the history of official discrimination touching on the class participation in the democratic process;

2) racially polarized voting;

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

4) denial of access to the candidate slating process for members of the class;

5) the extent to which the members of the minority group bear the effects of discrimination in areas like education, employment, and health, which hinder effective participation;

6) whether political campaigns have been characterized by racial appeals;

7) the extent to which members of the protected class have been elected;

8) whether there is a significant lack of responsiveness by elected officials to the particularized needs of the group; and

9) whether the policy underlying the use of the voting qualification, standard, practice, or procedure is tenuous.

478 U.S. at 36-37.

In *Gingles*, the Court threw out all of the challenged multimember districts, except one where Black candidates had sometimes managed to get elected.

6. Draw Districts the Minority Has a Fair Chance to Win

If you have a minority population that could elect a representative if given an ideal district, and the minority population has been politically cohesive, but bloc voting by Whites has prevented the minority's preferred candidates from being elected in the past, you may have to create a district that the minority has a fair chance to win. To do that, they will need an effective voting majority in the district. How much of a majority is that?

It has taken awhile to get there, but the U.S. Supreme Court has now reached the conclusion that § 2 does not require the creation of a district that a minority population has a fair chance to win unless the minority will constitute a majority of the voting age population in the district. That happened in the North Carolina case of *Bartlett v. Strickland*, No. 07-689, 129 S.Ct. 1231 (2009).

In 1977, the Supreme Court had upheld a determination by the Justice Department that a 65 percent non-White population majority was required to achieve a non-White majority of eligible voters in certain legislative districts in New York City. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977).

In 1984, the Court of Appeals for the Seventh Circuit, in the case of *Ketchum v. Byrne*, 740 F.2d 1398, endorsed the use of a 65 percent Black population majority to achieve an effective voting majority, in the absence of empirical evidence that some other figure was more appropriate.

Ketchum involved the redistricting of city council wards in the city of Chicago after the 1980 census. The Court of Appeals found that "minority groups generally have a younger population and, consequently, a larger proportion of individuals who are ineligible to vote," and that therefore, voting age population was a more appropriate measure of their voting strength than was total population. Further, because the voting age population of Blacks usually has lower rates of voter registration and voter turnout, the district court should have considered the use of a supermajority, such as 65 percent of total population or 60 percent of voting age population when attempting to draw districts the Blacks could win. The Court of Appeals noted that:

> [J]udicial experience can provide a reliable guide to action where empirical data is ambiguous or not determinative and that a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence.
>
> . . . This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out . . . .

Id. at 1415.

But the Court of Appeals in *Ketchum* also noted that "The 65% figure . . . should be reconsidered regularly to reflect new information and new statistical data," *id.* at 1416. In redistricting following the 1990 census, several courts found that, in view of rising rates of voter registration and voter participation among minority groups, a minority voting age population of slightly more than 50 percent was sufficient to provide an effective voting majority. With *Bartlett v. Strickland*, the 65 percent guideline has been abandoned.

The Seventh Circuit in *Ketchum* warned that "provision of majorities exceeding 65%-70% may result in packing." *Id.* at 1418. But the Court of Appeals for the First Circuit upheld a redistricting plan for the city of Boston where, of two districts where Blacks were a majority, one district had a Black population of 82.1 percent. *Latino Political Action Committee v. City of Boston*, 784 F.2d 409 (1st Cir. 1986). The Court found that this packing of Black voters did not discriminate against Blacks because there was only a moderate degree of racial polarization. As the Court said, "[T]he *less* cohesive the bloc, the *more* "packing" needed to assure . . . a Black representative (though, of course, the less polarized the voting, the less the need to seek that assurance.)" *Id.* at 414. The Black population was so distributed that, even if fewer Blacks were put into these two districts, there were not enough Blacks to create a third district with an effective Black majority. *Id.*

If you face a charge of a § 2 violation, you had better be prepared with empirical data to show what is "reasonable and fair" under "the totality of the circumstances," because your plan may be invalidated for putting either too few or too many members of a minority group into a given district.

While political party members have spent the last decade packing themselves, racial and language minority groups have spent the last decade fracturing themselves, moving from the central cities to the suburbs, diluting their votes within the majority White population. *See, e.g.,* Richard Fry, *The Rapid Growth and Changing Complexion of Suburban Public Schools*, Pew Hispanic Center (Mar. 31, 2009). You may find that drawing majority-minority districts after the 2010 census is harder than it was before.

B. Section 5 of the Voting Rights Act

1. In "Covered Jurisdictions," Plans Must be Precleared

While § 2 of the Voting Rights Act applies throughout the United States, § 5, (codified as amended at 42 U.S.C. § 1973c), applies only to certain covered jurisdictions, which are listed in an appendix to the Code of Federal Regulations, 28 C.F.R. Part 51. If you're covered, you know it, because all of your election law changes since 1965, and not just your redistricting plans, have had to be precleared, before they take effect, by either the U.S. Department of Justice or the U.S. District Court for the District of Columbia.

The preclearance requirement has been challenged repeatedly and upheld, most recently in 2009. *See, e.g., Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*, No. 08-322, 557 U.S. ____ (June 22, 2009); *City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). The Court in *NAMUDNO* expressed serious doubt that § 5's "current burdens [were] justified by current needs," slip op. at 6-11, but avoided the

constitutional issue by permitting the utility district to escape those burdens by "bailing out" of the preclearance requirement, slip op. at 11-17.

2. Do Not Regress

Section 5 preclearance of a redistricting plan will be denied if the Justice Department or the Court concludes that the plan makes the members of a racial or language minority worse off than they were before, that is, if it causes the minority to regress. One measure of whether they will be worse off than before is whether they are likely to be able to elect fewer minority representatives than before.

The no "retrogression" test was first set forth in *Beer v. United States*, 425 U.S. 130 (1976). It was reaffirmed in the next round of redistricting, in *City of Lockhart v. United States*, 460 U.S. 125 (1985).

Beer was a challenge to the 1971 redistricting of the city council seats for the city of New Orleans. Since 1954, two of the seven council members had been elected at large; five others had been elected from single-member wards last redrawn in 1961. Even though Blacks were 45 percent of the population and 35 percent of the registered voters in the city as a whole, Blacks were not a majority of the registered voters in any of the wards, and were a majority of the population in only one ward. No ward had ever elected a council member who was Black. Under the 1971 redistricting plan, one ward was created where Blacks were a majority of both the population and of the registered voters, and one ward was created where Blacks were a majority of the population but a minority of the registered voters. The Supreme Court held that the plan was entitled to preclearance since it enhanced, rather than diminished, Blacks' electoral power.

In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Supreme Court opined that retrogression is determined by evaluating the plan as a whole. It said a state has a choice whether to adopt a plan with a certain number of "safe" majority-minority districts or a plan with fewer safe districts but more "coalitional districts" (where the minority may elect a representative of their choice by forming coalitions with other racial and ethnic groups) or more "influence districts"(where the minority may play a substantial, if not decisive, role in determining who is elected). 539 U.S. at 479-83.

Justice O'Connor further instructed that, "In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice." 539 U.S. at 480. She said that whether minority incumbents benefit by and support the plan is relevant to whether the plan is retrogressive. 539 U.S. at 483-84. This further instruction was rejected by Congress in 2006, when it stated explicitly that the purpose of § 5 was "to protect the ability of [racial and language minorities] to elect their preferred candidates of choice." Act of July 27, 2006, Pub.L. No. 109-246, sec. 5(d), 120 Stat. 581 (codified as amended at 42 U.S.C. § 1973c); *see* H.R. REP. NO. 109-478 at 93-94, *reprinted in* 2006 U.S.C.C.A.N. 618, 678-79.

To defend against a charge that your plan will make members of a racial or language minority group worse off than they were before, you will want to have at least a ten-year history of the success of the minority at electing representatives of their choice.

3. Do Not Intend to Discriminate

In 1987, the Justice Department announced that, notwithstanding the retrogression test employed by the courts when considering preclearance under § 5, the Justice Department would apply the stricter standards of § 2 when deciding whether to preclear a plan under § 5. Supplemental Information, 52 Fed. Reg. 487 (1987). This practice was discredited by the Supreme Court in 1997, *see Reno v. Bossier Parish School Bd. (Bossier Parish I)*, 520 U.S. 471 (1997), and repealed by the Justice Department in 1998. *See* 63 Fed. Reg. 24108, 24109 (May 1, 1998).

The Bossier Parish (Louisiana) School Board had redrawn its 12 single-member districts following the 1990 census using the same plan already precleared for use by its governing body. In doing so, it rejected a plan proposed by the NAACP that would have created two majority-Black districts. The Justice Department refused to grant preclearance on the ground that the NAACP plan demonstrated that Black residents could have been given more opportunity to elect candidates of their choice and that therefore their voting strength was diluted in violation of § 2. In *Bossier Parish I* the Supreme Court rejected this argument, saying that preclearance under § 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2. The Court pointed out that sections 2 and 5 were designed to combat two different evils, and that § 5 was only directed at effects that are retrogressive.

When the case returned to the Supreme Court, *Bossier Parish II*, 528 U.S. 320, 328–300 (2000), the Court ruled that a discriminatory purpose only encompasses an intent to regress, not any other intent to discriminate.

In 2006, Congress rejected the Court's *Bossier Parish II* interpretation of § 5, amending it to say that "any discriminatory purpose" (not just a purpose to regress) requires denial of preclearance. *See* Act of July 27, 2006, Pub.L. No. 109-246, sec. 5(c), 120 Stat. 581 (codified as amended at 42 U.S.C. § 1973c); H.R. REP. NO. 109-478 at 93-94, *reprinted in* 2006 U.S.C.C.A.N. 618, 678-79.

4. You Need Not Maximize the Number of Minority Districts

Notwithstanding anything you might have been told by the Justice Department in the 1990s, you are not required to maximize the number of majority-minority districts.

In the 1990s round of redistricting, the natural desire of some minority populations to be grouped together in districts they could win coincided with the desire of some plan drafters to pack them. Since African Americans and Hispanics have tended to vote Democratic, Republican plan drafters were more than willing to accommodate their desire to have districts drawn for them. When new redistricting plans were drawn in preparation for the 1991 and 1992 elections, the Justice Department was controlled by Republicans. As states like North Carolina, Georgia, Louisiana, and Texas presented their plans to the Justice Department for approval, the Justice Department insisted that they create additional majority-minority districts wherever the minority populations could be found to create them. This insistence was not limited by any concern that the districts be "geographically compact." The states' plans were first denied preclearance and then, after majority-

minority districts were added, the plans were precleared. The plans were all struck down by the courts. *Shaw v. Hunt*, 517 U.S. 899 (1996); *Johnson v. Miller,* 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 515 U.S. 900 (1995); *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

The Justice Department's policy of pressuring states to maximize the number of majority-minority districts was not based on a correct reading of the Voting Rights Act.

Section 2 included a proviso, added through the efforts of Senator Dole in 1982, that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (b). In other words, § 2 did not mandate proportional representation. So, how could it be construed by the Justice Department to require that a minority group be given the *maximum* number of elected representatives?

In *Johnson v. DeGrandy*, 512 U.S. 997 (1994), the Supreme Court found that it could not be so construed. The Florida Legislature had drawn a House plan that created nine districts in Dade County (Miami) where Hispanics had an effective voting majority. Miguel DeGrandy and the Justice Department attacked the plan in federal court, alleging that the Hispanic population in Dade County was sufficient to create 11 House districts where Hispanics would have an effective voting majority. The district court agreed, imposing its own plan (based on one submitted by DeGrandy) that created 11 Hispanic districts. The Supreme Court reversed, saying that maximizing the number of majority-minority districts was not required. As Justice Souter said in his opinion for the Court, "Failure to maximize cannot be the measure of § 2." 512 U.S. 1017 (slip op. at 20). Indeed, even a failure to achieve proportionality does not, by itself, constitute a violation of § 2. 512 U.S. at 1009-12 (slip op. at 11-14).

The Court refused to draw a bright line giving plan drafters a safe harbor if they created minority districts in proportion to the minority population. That, the Court said, would ignore the clear command of the statute that the question of whether minority voters have been given an equal opportunity to elect representatives of their choice must be decided based on "the totality of the circumstances," rather than on any single test. It would encourage drafters to draw majority-minority districts to achieve proportionality even when they were not otherwise necessary and would foreclose consideration of possible fragmentation of minority populations among other districts where they were not given a majority. 512 U.S. at 1017-21 (slip op. at 20-24).

In the Georgia congressional redistricting case, *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court scolded the Justice Department for having pursued its policy of maximizing the number of majority-minority districts. As the Court said:

> Although the Government now disavows having had that policy . . . and seems to concede its impropriety . . . the District Court's well-documented factual finding was that the Department did adopt a maximization policy and followed it in objecting to Georgia's first two plans . . . . In utilizing § 5 to require States to create majority-

> minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld.

515 U.S. at 924-25.

C. Equal Protection Clause of the 14th Amendment

When drawing a minority district to avoid a violation of § 2 or § 5 of the Voting Rights Act, you must take care not to create a racial gerrymander that runs afoul of the Equal Protection Clause of the 14th Amendment.

1. You May Consider Race in Drawing Districts

Race-based redistricting is not always unconstitutional. As the Supreme Court recognized in *Shaw v. Reno*, 509 U.S. 630 (1993):

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature is always *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. . . . [W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

509 U.S. at 646 (slip op. at 14).

You may even intentionally create majority-minority districts without violating the Equal Protection clause. *See Bush v. Vera*, 517 U.S. 952, 958 (1996); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd* 515 U.S. 1170 (1995).

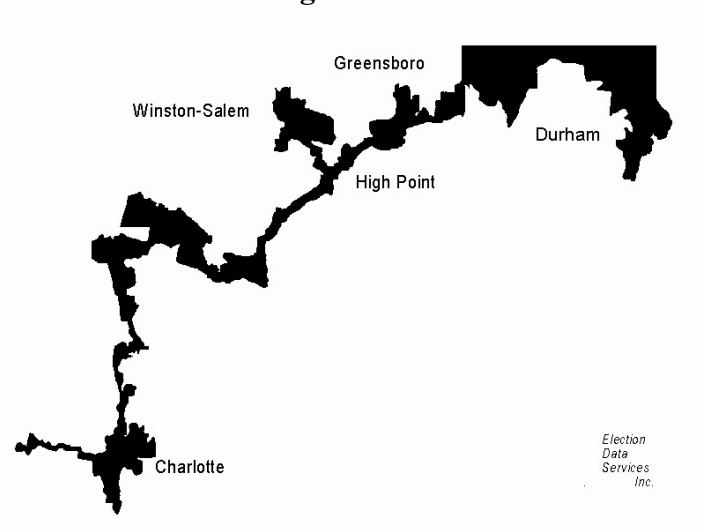
2. Avoid Drawing a Racial Gerrymander

But, when a state creates a majority-minority district without regard to "traditional districting principles," the district will be subject to strict scrutiny and probably struck down. *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996). If you want your majority-minority districts to stand up in court, you would best avoid drawing a racial gerrymander.

a. Beware of Bizarre Shapes

The first step toward avoiding drawing a racial gerrymander is to beware of bizarre shapes.

North Carolina Congressional District 12 - 1992



The 12th Congressional District in North Carolina, as put into place for the 1992 election, was one of the most egregious racial gerrymanders ever drawn. The "I-85" district, stretching 160 miles across the state, for much of its length no wider than the freeway, but reaching out to pick up pockets of African Americans all along the way. It was first attacked as a partisan gerrymander. That attack failed. *Pope v. Blue*, 809 F. Supp. 392 (W.D. N.C. 1992), *aff'd mem.* 506 U.S. 801 (1992).

Next, it was attacked as a racial gerrymander. That attack failed in the district court, *Shaw v. Barr*, 809 F. Supp. 392 (W.D. N.C. 1992), but the legal theory on which it was based was endorsed by the Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993).

As Justice O'Connor said, "[R]eapportionment is one area in which appearances do matter." 509 U.S. at 647 (slip op. at 15).

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls . . . . By perpetuating such notions, a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract.

509 U.S. at 647-48 (slip op. at 15-16).

The Court said that a redistricting plan that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny under the Equal Protection Clause given to other state laws that classify citizens by race. 509 U.S. at 644 (slip op. at 12).

In *Bush v. Vera*, Justice O'Connor further observed that:

> [B]izarre shape and noncompactness cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial. . . . [C]utting across pre-existing precinct lines and other natural or traditional divisions, is not merely evidentially significant; it is part of the constitutional problem insofar as it disrupts nonracial bases of identity and thus intensifies the emphasis on race.

517 U.S. 952, 980-81 (1996).

b. Draw Districts that are Reasonably Compact

To avoid districts with bizarre shapes, you will want to draw districts that are compact. How compact must they be? *Reasonably* compact. As Justice O'Connor said in *Bush v. Vera*, 517 U.S. 952 (1996):

> A § 2 district that is *reasonably* compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests."

517 U.S.at 977.

To give you some idea of what the lower federal courts have considered to be "reasonably compact," there follows a series of "before and after" pictures of congressional districts first used in the 1992 election and then struck down, and the districts approved by the federal courts to replace them. They come from the states of Texas, Louisiana, Florida, and North Carolina.

Texas

Congressional District 30

1992

1996

Congressional District 18

1992

1996

Congressional District 29

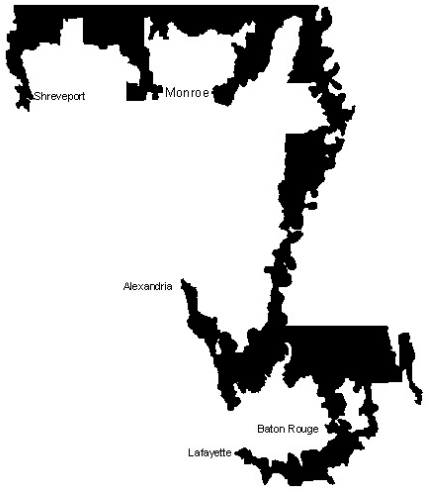
1992

1996

Louisiana

Congressional District 4

1992

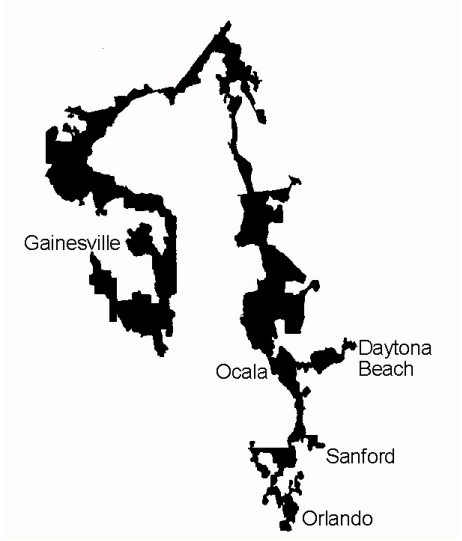


1996

Florida

Congressional District 3

1992

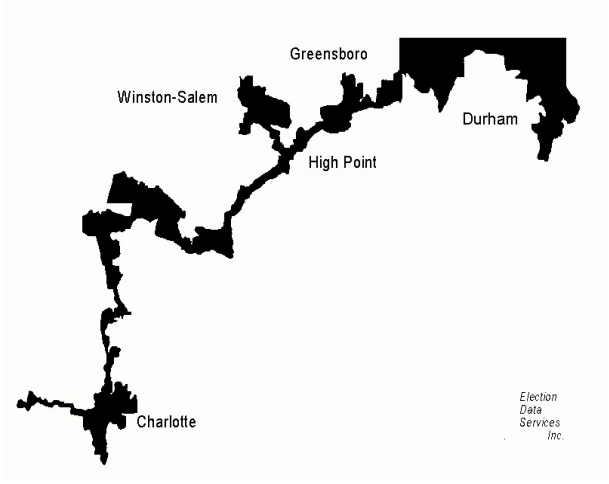


1996

North Carolina

Congressional District 12

1992



1998

2000

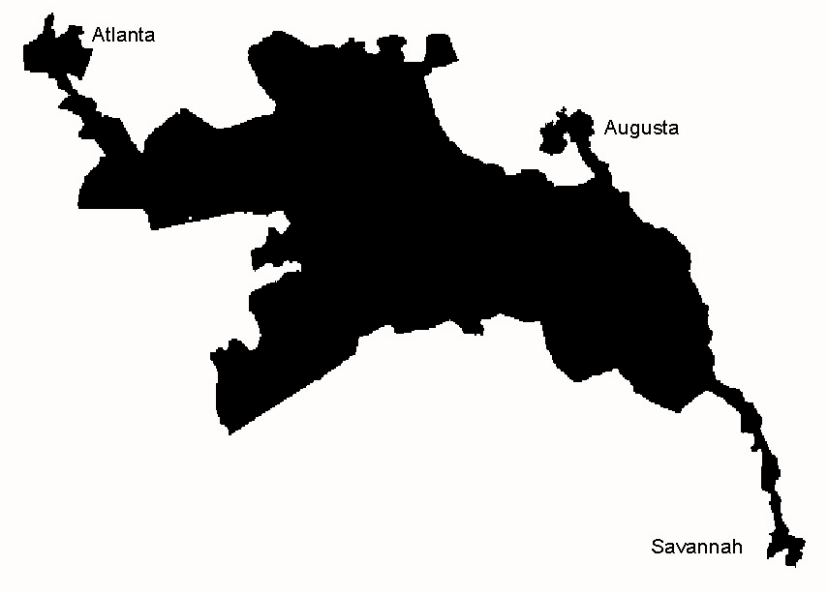
Compactness is not just a geometrical concept; it is also a political concept. Where the Texas Legislature created a Latino-majority district that ran 300 miles from McAllen on the Rio Grande to Austin in Central Texas, the Court found that the Latinos in the Rio Grande Valley and those in Central Texas were "disparate communities of interest" and thus not a compact population, so the district that encompassed them was not compact. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 432-33 (2006).

c. Beware of Making Race Your Dominant Motive

Even if the shapes of your districts are not bizarre, and even if they are reasonably compact, you may nevertheless run afoul of the Equal Protection Clause if race was your dominant motive for drawing the lines the way you did.

Georgia

Congressional District 11 - 1992



Georgia's 11th Congressional District, as enacted in 1992, stretched from Atlanta to the sea, but not in the 60-mile-wide swath cleared by General Sherman. Rather, it began with a small pocket of Blacks in Atlanta, spread out to pick up the sparsely populated rural areas, and narrowed considerably to pick up more pockets of Blacks in Augusta and Savannah, 260 miles away. *Miller v. Johnson*, 515 U.S. 900, 908-09 (1995).

It had not been included in either of the first two plans enacted by the Legislature in 1991 and sent to the Department of Justice for preclearance. Both of those plans had included two Black-majority districts. The Justice Department had rejected them for failure to create a third. This rejection had occurred notwithstanding that the 1980 plan had included only one Black-majority district and that there was no evidence the Georgia Legislature had intended to discriminate against Blacks in drawing the 1991 plans. The new district in the 1992 plan was drawn to meet the Department's requirement that the state maximize the number of Black-majority districts, and it's inclusion in the third plan was sufficient to obtain preclearance from the Justice Department. 515 U.S. at 906-09.

In *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court shifted its focus away from the shape of the district, saying that plaintiffs challenging a racial gerrymander need not prove that a district has a bizarre shape. The shape of the district is relevant, not because bizarreness is a

necessary element of the constitutional wrong, but because it may be persuasive circumstantial evidence that race was the Legislature's dominant motive in drawing district lines. Where district lines are not so bizarre, plaintiffs may rely on other evidence to establish race-based redistricting. 515 U.S. at 912-13.

In Georgia's case, the Legislature's correspondence with the Justice Department throughout the preclearance process demonstrated that race was the dominant factor the Legislature considered when drawing the 11th District. The Court found that the Legislature had considered "traditional race-neutral districting principles," such as compactness, contiguity, and respect for political subdivisions and communities of interest, but that those principles had been subordinated to race in order to give the 11th District a Black majority. 515 U.S. at 919-20. The Court subjected the district to strict scrutiny and struck it down. 515 U.S. at 920-27.

d. Beware of Using Race as a Proxy for Political Affiliation

If you want to argue that partisan politics, not race, was your dominant motive in drawing district lines, beware of using racial data as a proxy for political affiliation. The Texas Legislature tried that in the 1990s, and three of its congressional districts were struck down.

Congressional District 30 **Congressional District 18** **Congressional District 29**

Under the 1990 reapportionment of seats in Congress, Texas was entitled to three additional congressional districts. The Texas Legislature decided to draw one new Hispanic-majority district in South Texas, one new African American majority district in Dallas County (District 30), and one new Hispanic-majority district in the Houston area (District 29). In addition, the Legislature decided to reconfigure a district in the Houston area (District 18) to increase its percentage of African Americans. The Texas Legislature had developed a state-of-the-art computer system that allowed it to draw congressional districts using racial data at the census block level. Working closely with the Texas congressional delegation and various members of the Legislature who intended to run for Congress, the Texas Legislature took great care to draw three new districts and reconfigure a district that the chosen candidates could win.

Plaintiffs challenged 24 of the state's 30 congressional districts as racial gerrymanders. The federal district court struck down three, Districts 18, 29, and 30, *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994). On appeal, the state argued that the bizarre shape of District 30 in Dallas County was explained by the drafters' desire to unite urban communities of interest and that the bizarre shape of all three districts was attributable to the Legislature's efforts to protect incumbents of old districts while designing the new ones. The Supreme Court upheld the district court's finding to the contrary, holding that race was the predominant factor.

The Legislature's redistricting system had election data and other political information at the precinct level, but it had race data down to the block level. The district lines closely tracked the racial block data. The Court found that, to the extent there was political manipulation, race was used as a proxy for political affiliation. It was race that predominated. *Bush v. Vera*, 517 U.S. 952, 965-73 (1996). The Court subjected the districts to strict scrutiny and struck them down. 517 U.S. at 976-83.

e. Follow Traditional Districting Principles

As the preceding discussion shows, one way to avoid drawing a racial gerrymander that runs afoul of the Equal Protection Clause is to follow traditional districting principles. What are "traditional districting principles" and where do they come from?

The Supreme Court first used the term "traditional districting principles" in the 1993 North Carolina case, mentioning "compactness, contiguity, and respect for political subdivisions" as examples. *Shaw v. Reno*, 509 U.S. 630 at 647 (slip op. at 15). Later, in the 1995 Georgia case, it added "respect for . . . communities defined by actual shared interests." *Miller v. Johnson*, 515 U.S. 900, 919-20 (1995). In the Texas case, it added "maintaining . . . traditional boundaries." *Bush v. Vera*, 517 U.S. 952, 977 (1996). And in the 1997 Georgia case, it added "maintaining . . . district cores" and "[p]rotecting incumbents from contests with each other." *Abrams v. Johnson*, 521 U.S. 74 , 84.

These "traditional districting principles" are not found in the U.S. Constitution, but rather in the constitutions, laws, and resolutions of the several states. The districting principles used by each state in the 2000s are shown in table 8 and appendix E of NCSL's book, *Redistricting Law 2010*. The Supreme Court has now mentioned all of the most common districting principles used by the states, but there are a number of others used only by a few states.

Before drawing any plan for your state, you will want to become familiar with the requirements of your own constitution and consider whether to adopt additional districting principles to govern your plans.

3. Strict Scrutiny is Almost Always Fatal

If you do choose to subordinate traditional districting principles to race in order to create a majority-minority district, be aware that it is unlikely your district will stand up in court. A racial gerrymander is subject to strict scrutiny under the Equal Protection Clause of the 14th Amendment.

Shaw v. Reno, 509 U.S. 630 (1993). To survive strict scrutiny, a racial classification must be narrowly tailored to serve a compelling governmental interest. *Id.*

a. A Compelling Governmental Interest

What may qualify as a "compelling governmental interest"? So far, the Supreme Court has considered remedying past discrimination, avoiding retrogression in violation of § 5 of the Voting Rights Act, and avoiding a violation of § 2 of the Voting Rights Act to be possible compelling governmental interests.

b. Narrowly Tailored to Achieve that Interest

During the 1990s and 2000s, however, no racial gerrymander was explicitly found by the Supreme Court to have been sufficiently narrowly tailored to achieve any of these compelling governmental interests. *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006); *contra, King v. State Board of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996), *vacated mem. sub nom. King v. Illinois Board of Elections*, 519 U.S. 978, *on remand* 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd mem.* 522 U.S. 1087 (1998). Don't assume that yours will be the first.

(1) Remedying Past Discrimination

Remedying past discrimination has traditionally been a justification for a governmental entity to adopt a racial classification. *See, e.g., Richmond v. J.A. Crosun Co.*, 488 U.S. 469, 491-93 (1989); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280-82 (1986). In the context of redistricting, this justification has not yet proved sufficient. In *Shaw v. Reno*, the Supreme Court warned that the state must have "a strong basis in evidence for concluding that remedial action is necessary," 509 U.S. 630, 656 (slip op. at 24), and that "race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the state employs sound districting principles, and only when the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority." 509 U.S. at 657 (slip op. at 25) (internal citations and quotations omitted). North Carolina failed to meet this standard, and its 12th congressional district was struck down. *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996).

In *Bush v. Vera*, 517 U.S. 952 (1996), the Court found that the district lines drawn by the Texas Legislature were not justified as an attempt to remedy the effects of past discrimination, since there was no evidence of present discrimination other than racially polarized voting.

(2) Avoiding Retrogression Under § 5

The Supreme Court has assumed, without deciding, that avoiding retrogression in violation of § 5 of the Voting Rights Act would be a compelling governmental interest.

In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court anticipated that the state might assert on remand that complying with § 5 was a compelling governmental interest that justified the creation

of District 12. But the Court warned that "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." 509 U.S. at 655 (slip op. at 23). In *Shaw v. Hunt*, 517 U.S. 899 (1996), the Court noted that, before the 1990 census, North Carolina had had no Black-majority districts. The first plan drawn by the state after the 1990 census had included one Black-majority district, not District 12. The Court found that adding District 12 as a second Black-majority district was not necessary in order to avoid retrogression. 517 U.S. at 912-13. Since the 12th district was not narrowly tailored to serve the state's interest in complying with § 5, or any other compelling state interest, the Court struck it down.

In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court found that it was not necessary for the Georgia Legislature to draw a third Black-majority district in order to comply with § 5. The plan for the 1980s had included one Black-majority district. The first two previous plans enacted by the Georgia Legislature after the 1990 census had included two Black-majority districts, thus improving on the status quo. Adding a third Black-majority district was not necessary and thus not narrowly tailored to achieve the state's interest in complying with § 5. 515 U.S. at 920-27.

On remand, the federal district court first allowed the Georgia Legislature an opportunity to draw a new plan. When the Legislature failed to agree on a plan, the district court found that Georgia's Second Congressional District was also an unconstitutional racial gerrymander. *Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga., Dec. 1, 1995). The district court reasoned that, since the enacted plan was the product of improper pressure imposed by the Justice Department, it did not embody the Legislature's own policy choices and therefore should not be used as the basis for the court's remedial plan. The district court then imposed an entirely new plan with only one Black-majority district, District 4. *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga.1995).

Georgia Congressional District 4 - 1996

The court's plan was used for the 1996 election, but the district court's decision was appealed to the Supreme Court on the ground that the court failed to give due deference to the Legislature's policy choices.

In *Abrams v. Johnson*, 521 U.S. 74 (1997), the Supreme Court affirmed. It found that neither the Legislature's 1991 plan, rejected by the Justice Department because it contained only two Black-majority districts, nor the 1992 plan, with three Black-majority districts, embodied the Legislature's own policy choices because of the improper pressure imposed by the Justice Department. It found the district court was within its discretion in deciding it could not draw two Black-majority districts without engaging in racial gerrymandering. Since the last valid plan, the 1982 plan, contained only one Black-majority district, the district court's one-district plan did not retrogress in violation of § 5 of the Voting Rights Act.

(3) Avoiding a Violation of § 2

In *Shaw v. Reno*, 509 U.S. 630 (1993), the Supreme Court noted that the State of North Carolina had asserted that a race-based district was necessary to comply with § 2 of the Voting Rights Act. The Court left the arguments on that question open for consideration on remand. 509 U.S. at 655-56 (slip op. at 23-24).

When the case returned to the Court for a second time, after the district court had found the plan to be narrowly tailored to comply with both § 2 and § 5, *Shaw v. Hunt*, 861 F. Supp. 408 (E.D. N.C. 1994), the Supreme Court again reversed the district court.

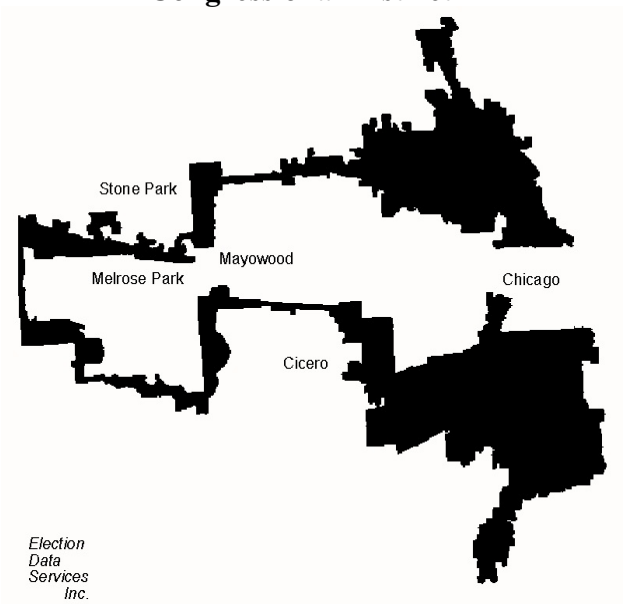
The Court said that, to make out a violation of § 2, a plaintiff must show that a minority population is "sufficiently large and geographically compact to constitute a majority in a single member district." The Court noted that District 12 had been called "the least geographically compact district in the Nation." *Shaw v. Hunt*, 517 U.S. 899, 905-06 (1996). There may have been a place in North Carolina where a geographically compact minority population existed, but the shape of District 12 showed that District 12 was not that place. Since District 12 did not encompass any "geographically compact" minority population, there was no legal wrong for which it could be said to provide the remedy. 517 U.S. at 916.

In the Texas case, *Bush v. Vera*, 517 U.S. 952 (1996), the Court again assumed without deciding that complying with § 2 was a compelling state interest, 517 U.S. at 977, but found that the districts were not narrowly tailored to comply with § 2 because all three districts were bizarrely shaped and far from compact as a result of racial manipulation. The Court pointed out that, if the minority population is not sufficiently compact to draw a compact district, there is no violation of § 2; if the minority population is sufficiently compact to draw a compact district, nothing in § 2 requires the creation of a race-based district that is far from compact. 517 U.S. at 979. The Court reached a similar result in a Texas case ten years later. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 423-43 (2006).

During the 1990s, one racial gerrymander did survive strict scrutiny: the Fourth Congressional District of Illinois, the "ear muff" district in Chicago. It was found necessary in order to achieve the compelling state interest of remedying a potential violation of or achieving compliance with § 2 of the Voting Rights Act.

Illinois

Congressional District 4



The district had been drawn by a federal district court to create an Hispanic-voting-majority district without diminishing the African American voting strength in three adjacent districts with African American majorities. *See Hastert v. Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). Following the Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), plaintiffs in Illinois attacked District 4.

A different panel of the district court found that the compactness requirement of *Thornburg v. Gingles* applied only in determining whether a § 2 violation had occurred, not in drawing a district to remedy the violation. It found that the ear muff shape was necessary in order to provide Hispanics with the representation that their population warranted without causing retrogression in three adjacent African American districts. It held that the Fourth District survived strict scrutiny. *King v. State Board of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996).

Plaintiffs appealed. The Supreme Court vacated the judgment and remanded to the district court for further consideration in light of its decisions in the North Carolina and Texas cases. *King v. Illinois Board of Elections*, 519 U.S. 978 (1996) (mem.).

On remand, the district court found that the Fourth District had been narrowly tailored to achieve the compelling state interest of remedying a potential violation of or achieving compliance with § 2 and, therefore, did not violate the Equal Protection Clause. *King v. State Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd mem.* 522 U.S. 1087 (1998).

IV. Don't Go Overboard with Partisan Gerrymandering

A. Partisan Gerrymandering is a Justiciable Issue

The Voting Rights Act does not apply to conduct that has the effect of diluting the voting strength of partisan minorities, such as Republicans in some states and Democrats in others. Partisan minorities must look for protection to the Equal Protection Clause of the 14th Amendment.

Modern technology, while making it practicable to draw districts that are mathematically equal, has also allowed the majority to draw districts that pack and fracture the partisan minority in such a way as to minimize the possibility of their ever becoming a majority.

While the federal courts have not yet developed criteria for judging whether a gerrymandered redistricting plan is so unfair as to deny a partisan minority the equal protection of the laws, the Supreme Court held, in *Davis v. Bandemer*, 478 U.S. 109 (1986), that partisan gerrymandering is a justiciable issue. What this means is that you must be prepared to defend an action in federal court challenging your redistricting plans on the ground that they unconstitutionally discriminate against the partisan minority.

Davis v. Bandemer involved a legislative redistricting plan adopted by the Indiana Legislature in 1981. Republicans controlled both houses. Before the 1982 election, several Indiana Democrats attacked the plan in federal court for denying them, as Democrats, the equal protection of the laws.

The plan had an overall range of 1.15 percent for the Senate districts and 1.05 percent for the House districts, well within equal-population requirements. The plan's treatment of racial and language minorities met the no-retrogression test of the Voting Rights Act.

The Senate was all single-member districts, but the House included nine double-member districts and seven triple-member districts, in addition to 61 that were single-member. The lower court found the multimember districts were "suspect in terms of compactness." Many of the districts were "unwieldy shapes." County and city lines were not consistently followed, although township lines generally were. Various House districts combined urban and suburban or rural voters with dissimilar interests. Democrats were packed into districts with large Democratic majorities, and fractured into districts where Republicans had a safe but not excessive majority. The Speaker of the House testified that the purpose of the multimember districts was "to save as many incumbent Republicans as possible."

At the 1982 election, held under the challenged plan, Democratic candidates for the Senate received 53.1 percent of the vote statewide and won 13 of the 25 seats up for election. (Twenty-five other Senate seats were not up for election.) Democratic candidates for the House received 51.9 percent of the vote statewide, but won only 43 of 100 seats. In two groups of multimember House districts, Democratic candidates received 46.6 percent of the vote, but won only 3 of 21 seats.

The Supreme Court, in an opinion by Justice White, held that the issue of fair representation for Indiana Democrats was justiciable, but that the Democrats had failed to prove that the plan

denied them fair representation. The Court denied that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be," since, if the vote in all districts were proportional to the vote statewide, the minority would win no seats at all. Further, if districts were drawn to give each party its proportional share of safe seats, the minority in each district would go unrepresented. Justice White concluded that:

> [A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.
>
> . . . Rather, unconstitutional discrimination occurs only when *the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole*. (Emphasis added.)
>
> . . . Such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

478 U.S. at 132-33.

Merely showing that the minority is likely to lose elections held under the plan is not enough. As the Court pointed out, "the power to influence the political process is not limited to winning elections. . . . We cannot presume . . . , without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters [who did not vote for him or her]." 478 U.S. at 132.

B. Can It Be Proved?

How do the members of a major political party prove that they do not have "a fair chance to influence the political process?"

When California Republicans attacked the partisan gerrymander enacted by the Democratic legislature to govern congressional redistricting, the Supreme Court summarily affirmed the decision of a three-judge court dismissing the suit on the ground that the Republicans had failed to show that they had been denied a fair chance to influence the political process. *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989). As the lower court said:

> Specifically, there are no factual allegations regarding California Republicans' role in 'the political process as a whole.' [citation omitted] There are no allegations that California Republicans have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fundraising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any

> impediments to their full participation in the 'uninhibited, robust, and wide-open' public debate on which our political system relies. [citation omitted]

694 F. Supp. at 670.

Further, the Court took judicial notice that Republicans held 40 percent of the congressional seats and had a Republican governor and United States senator.

> Given also the fact that a recent former Republican governor of California has for seven years been President of the United States, we see the fulcrum of political power to be such as to belie any attempt of plaintiffs to claim that they are bereft of the ability to exercise potent power in 'the political process as a whole' because of the paralysis of an unfair gerrymander.

694 F. Supp. at 672.

During the 1990s, the Virginia state house plan and the North Carolina congressional plan were attacked as partisan political gerrymanders, but both attacks failed. *Republican Party of Virginia v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991); *Pope v. Blue*, 809 F. Supp. 392 (W.D. N.C. 1992), *aff'd mem.* 506 U.S. 801 (1992).

During the 2000s, attacks on the Pennsylvania and Texas congressional plans also failed. *Vieth v. Jubelirer*, No. 02-1580, 541 U.S. 267 (2004); *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 416-23 (2006). In the Pennsylvania case, Justices Scalia, Thomas, Rehnquist, and O'Connor expressed their desire to overrule *Davis v. Bandemer*. They concluded that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards exist for adjudicating them. Justice Kennedy agreed to dismiss the complaint, but held open the possibility that standards might yet be found. Justices Stevens, Souter, and Breyer each proposed different standards. In the Texas case, Justice Kennedy considered the appellants proposed standards, but found them wanting. *League of United Latin American Citizens v. Perry*, 548 US. 420-23 (2006).

In a democracy, the majority does not need to have the leaders of the opposition shot, or jailed, or banished from the country, or even silenced. They do not need to shut the minority out of the political process—they simply out vote them.

If the members of the majority party in your state are prepared to let the minority party participate fully in the process of drawing redistricting plans, and simply out vote them when necessary, your state should be prepared to withstand a challenge that the plans unconstitutionally discriminate against the partisan minority.

V. Prepare to Defend Your Plan in Both State and Federal Courts

After the 2000 census, 18 states had suits in state courts concerning legislative or congressional redistricting plans; 21 states had suits in federal court. Nine states had suits in both state and federal courts *on the same plan*. *See* National Conference of State Legislatures, "Action on Redistricting Plans, 2001-07 (visited Oct. 18, 2009) <www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action2000.htm>.

After the 2010 census, you had better be prepared to defend your plan in both state and federal courts *at the same time*. How should all this parallel litigation be coordinated?

A. Federal Court Must Defer to State Court

In a 1965 case, *Scott v. Germano*, 381 U.S. 407 (per curiam), the Supreme Court recognized that state courts have a significant role in redistricting and ordered the federal district court to defer action until the state authorities, including the state courts, had had an opportunity to redistrict. In the 1990s, some federal district courts properly deferred action pending the outcome of state proceedings. *See, e.g., Members of the Cal. Democratic Congressional Delegation v. Eu*, 790 F. Supp. 925 (N.D. Cal. 1992), *rev'd, Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994) (deferral until conclusion of state proceedings was proper; dismissal "went too far"), but others did not. *See, e.g., Puerto Rican Legal Defense and Education Fund v. Gantt*, 796 F. Supp. 677 (E.D. N.Y. 1992), *injunction stayed mem. sub nom. Gantt v. Skelos*, 504 U.S. 902 (1992).

In Minnesota, after a state court had issued a preliminary order correcting the technical errors in the legislative plan enacted by the Legislature, the federal district court enjoined the state court from issuing its final plan. *Emison v. Growe*, Order, No. 4-91-202 (D. Minn. Dec. 5, 1991). The U.S. Supreme Court summarily vacated the injunction a month later. *Cotlow v. Emison*, 502 U.S. 1022 (1992) (mem.). After the state court issued its final order on the legislative plan and had held its final hearing before adopting a congressional plan, the federal court threw out the state court's legislative plan, issued one of its own, and enjoined the secretary of state from implementing any congressional plan other than the one issued by the federal court. *Emison v. Growe*, 782 F. Supp. 427 (D. Minn. 1992). The federal court's order regarding the legislative plan was stayed pending appeal, *Growe v. Emison*, No. 91-1420 (Mar. 11, 1992) (Blackmun, J., in chambers), but the congressional plan was allowed to go into effect for the 1992 election. After the election, the Supreme Court reversed.

In *Growe v. Emison*, 507 U.S. 25 (1993), the Court held that the district court had erred in not deferring to the state court. The Court repeated its words from several previous cases that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." 507 U.S. at 34. As the court said:

> Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer.

507 U.S. at 35.

Rather than coming to the rescue of the Minnesota electoral process, the federal court had raced to beat the state court to the finish line, even tripping it along the way. 507 U.S. at 37. It would have been appropriate for the federal court to have established a deadline by which, if the state court had not acted, the federal court would proceed. 507 U.S. at 34. However, the Supreme Court found that the state court had been both willing and able to adopt a congressional plan in time for the elections. *Id.* The Supreme Court reversed the federal court's decision in its entirety, allowing the state court's congressional plan to become effective for the 1994 election.

B. Federal Court May Not Directly Review State Court Decision

Once a state court has completed its work, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires a federal court to give the state court's judgment the same effect as it would have in the state's own courts. *Parsons Steel Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986). A federal district court may not simply modify or reverse the state court's judgment. That may be done only by the U.S. Supreme Court on appeal from or writ of certiorari to the state's highest court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). This principle is now known as the "*Rooker-Feldman* doctrine." *See also*, *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281 (1970).

C. Plan Approved by State Court Subject to Collateral Attack in Federal Court

Although the state court's judgment on a redistricting plan is not subject to review or direct attack in federal district court, the plan remains subject to collateral attack. That is, it may be attacked in federal court for different reasons or by different parties. *See, e.g., Branch v. Smith*, 538 U.S. 254, 261-66 (slip op. at 5-9) (2003); *Johnson v. DeGrandy*, 512 U.S. 997 (slip op. at 6-8) (1994); *Nerch v. Mitchell*, No. 3:CV-92-0095, (M.D. Pa. Aug. 13, 1992) (per curiam).

The judicial doctrines that establish limits on those collateral attacks are called *res judicata* and collateral estoppel. *Res judicata* translates literally as "the matter has been decided." It means that a decision by a court of competent jurisdiction on a matter in dispute between two parties is forever binding on those parties and any others who were working with ("in privity with") them. *Res judicata* applies when the parties are the same, the cause of action is the same, and the factual issues are the same. If the parties and the issues are the same, but the cause of action is different, the term "collateral estoppel" is used to describe the same concept.

What this means for those who draw redistricting plans is that, if an issue was not raised and decided in state court, it is open for decision in a federal court. It also means that, if parties raise in federal court the same issue raised by different parties in state court, the federal court may come to a different conclusion.

D. Federal Court Must Defer To State Remedies

After a federal court has determined that a state redistricting plan violates federal law, it will usually allow the state authorities a reasonable time to conform the plan to federal law.

In the 1990s in North Carolina, Georgia, and Texas, the federal district court that had struck down a congressional plan as a racial gerrymander allowed the legislature an opportunity to correct the plan at its next session. *See Cromartie v. Hunt*, 34 F. Supp. 1029 (E.D. N.C. 1998), *rev'd, Hunt v. Cromartie*, 526 U.S. 541 (1999); *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd sub nom. Miller v. Johnson*, 515 U.S. 900 (1995); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996). Only when the Georgia and Texas legislatures had failed to enact a corrected plan did the federal courts in those states impose plans of their own. *See Johnson v. Miller*, 922 F. Supp. 1552 (S.D. Ga. 1995); 922 F. Supp. 1556 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); *Vera v. Bush*, 933 F. Supp. 1341 (S.D. Tex. 1996); 980 F. Supp. 251 (S.D. Tex. 1997); 980 F. Supp. 254 (S.D. Tex. 1997).

In contrast, the federal district court in Florida imposed a legislative plan of its own within three hours of having struck down the plan enacted by the Legislature and approved by the Florida Supreme Court. The court's order imposing its plan was immediately stayed by the U.S. Supreme Court, *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992) (mem.), and eventually reversed on the merits without comment on the conduct of the district court in so hastily imposing a remedy. *See Johnson v. DeGrandy*, 512 U.S. 997 (1994).

If the state's legislative and judicial branches fail to conform a redistricting plan to federal law after having been given a reasonable opportunity to do so, a federal court may impose its own remedy. Even then, however, the federal court must follow discernible state redistricting policy to the fullest extent possible. *Upham v. Seamon*, 456 U.S. 37 (1982). The federal court must adopt a plan that remedies the violations but incorporates as much of the state's redistricting law as possible. *Upham v. Seamon*, 456 U.S. at 43; *White v. Weiser*, 412 U.S. 783, 793-97 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971). *See also Abrams v. Johnson*, 521 U.S. 74 (1997).

E. Attorney General May Represent State in Federal Court

Although the U.S. Supreme Court has been unanimous in holding that a federal court must defer to a state court that is in the process of redistricting, *Growe v. Emison*, 507 U.S. 25 (1993), in *Lawyer v. Department of Justice* it split 5-4 on the question of what procedure a federal court should follow when deferring to a state legislature whose redistricting plan has come under attack. 521 U.S. 567 (1997).

Florida Senate District 21 (Tampa Bay) had been challenged in federal court on the ground that it violated the Equal Protection Clause of the U.S. Constitution. The district had been drawn by the Florida Legislature; the Justice Department had refused to preclear it because it failed to create a majority-minority district in the area; the governor and legislative leaders had refused to call a special session to revise the plan; the state Supreme Court, performing a review mandated by the Florida Constitution before the plan could be put into effect, had revised the plan to accommodate

the Justice Department's objection; and the plan had been used for the 1992 and 1994 elections. A suit had been filed in April 1994, and a settlement agreement was presented for court approval in November 1995. The Florida attorney general appeared representing the State of Florida, and lawyers for the president of the Senate and the speaker of the House appeared representing their respective bodies. All parties but two supported the settlement agreement, and in March 1996 the district court approved it. Appellants argued that the district court had erred in not affording the Legislature a reasonable opportunity to adopt a substitute plan of its own. The Supreme Court did not agree.

Justice Souter, writing for the majority, found that action by the Legislature was not necessary. He found that the state was properly represented in the litigation by the attorney general and that the attorney general had broad discretion to settle it without either a trial or the passage of legislation. 521 U.S. at 578n.4 (slip op. at 8-11).

Justice Scalia, writing for the four dissenters, argued that:

> The "opportunity to apportion" that our case law requires the state legislature to be afforded is an opportunity to apportion through normal legislative processes, not through courthouse negotiations attended by one member of each House, followed by a court decree.

521 U.S. at 589 (slip op. at 7).

Now that it is clear that federal courts must defer to redistricting proceedings in a state court, legislatures will want to be prepared to defend their plans in state court. Once the state court proceedings are concluded, and even while they are in progress, legislatures must be prepared to defend the plans in federal court as well. In both courts, legislatures will want to remain on good terms with their attorney general.

Table of Authorities

United States Constitution:

Full Faith and Credit Act

Voting Rights Act of 1965:

Regulations:

Federal Cases:

Other Authorities: