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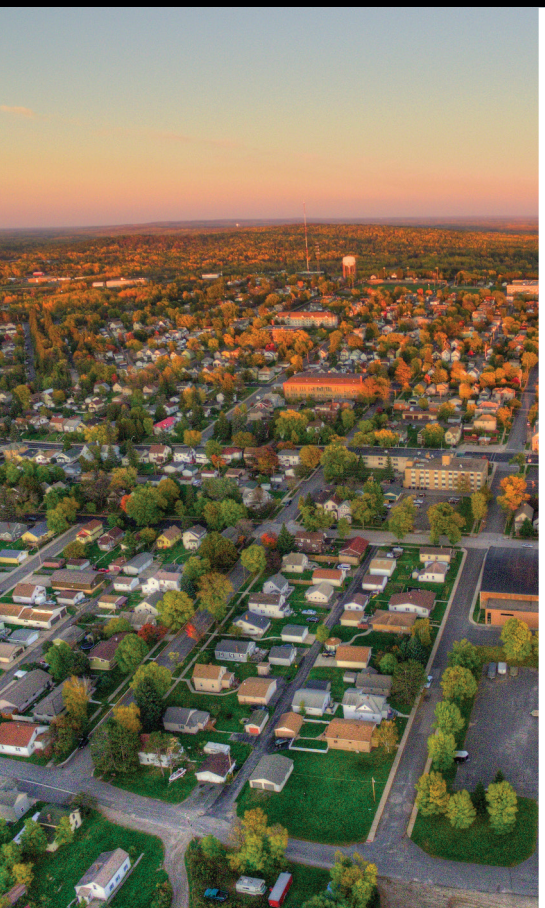
Redistricting Law | 2020



Executive Summary

Constitutionally mandated redistricting is an extraordinarily complicated, once-in-a-decade undertaking for legislators, staff and other authorities. The law surrounding it also is complex, and yet understanding it hopefully will help lead to creation of legislative and congressional plans that meet state objectives, withstand challenges and hold up for a decade.

"Redistricting Law 2020" is here to aid that understanding.

This book includes chapters on 10 major legal topics applicable to redistricting. Several are absolutely mission-critical for everyone: equal population (Chapter 1) and race (Chapter 2). Others are more useful for certain states. If you're in the majority of states where the legislature is responsible for redistricting, the chapter on commissions might be something to read quickly or even ignore. Likewise, the chapter on redistricting for local jurisdictions and courts isn't a must-read if your interests are entirely at the state level.

At its core, this book is about the law. It does not aim to be an all-encompassing "how to redistrict" manual. For instance, it does not include the nonlegal aspects of redistricting, such as how to staff a redistricting office, select redistricting software, manage data or organize citizen engagement (unless required by law). For those topics, visit NCSL's "Into the Thicket: A Redistricting Starter Kit for Legislative Staff," or NCSL's many redistricting webpages.

Below are the key takeaways from each chapter, offered with one very important caveat. These summaries (and, in fact, the chapters themselves) are intended to be informative only. NCSL does not claim to offer legal advice here, but instead aims to provide a good starting point for those who do the intricate work of drawing new districts. We recommend that every state work with its in-state experts because each state's constitution, statutes, court precedents and traditions are different.

What Is Redistricting?

Redistricting is the periodic—usually decennial—redrawing of district boundaries that elected representatives who serve specific geographic areas. The periodic updating of districts must be done because, in a series of 1960s cases, the U.S. Supreme Court held that districts must be equal in population. This is known as the "one-person, one-vote" requirement. Because district population shifts over time (from colder states to warmer ones, from the countryside to the city, from the city to the suburbs), to ensure that each person's vote is equally weighted, district boundaries are redrawn after every decennial census to create equally populated districts. All electoral bodies that elect representatives from districts must be redistricted. These include the U.S. House of Representatives, state legislatures, local jurisdictions and often other local entities.

CHAPTER 1: THE CENSUS

The federal decennial census is the primary data source on population, age and race used in redistricting.

Chapter in brief: Federal decennial census data is at the core of redistricting, although other data may augment this source. The census is an enumeration, or head count, of all the people residing in the United States. It is conducted in the year ending in zero, with the data to determine congressional apportionment—how many seats each state has in the U.S. House of Representatives—delivered on Dec. 31 of that year. Detailed data provided to states for redistricting purposes is delivered by March 31 of the year ending in 1. This data is provided at the "census block" level, the smallest unit of geography maintained by the Census Bureau. The entire nation—including areas with no population at all—is defined by census blocks.

The census includes basic demographic data for redistricting, including total population by age, race, housing and housing occupancy. Redistricting data provided to the states may include citizenship data derived from administrative records, as announced by President Donald Trump in July 2019. (The Census Bureau must first determine how this goal can be accomplished, and an administrative rulemaking process must first be undertaken before that decision becomes final.) Decennial census data does not include economic information, election results or any demographic information beyond population, age, race, housing and—potentially—citizenship data from administrative records.

Because census data is so critical to redistricting, understanding census operations also is critical. This chapter explains how the census is conducted.

CHAPTER 2: EQUAL POPULATION

> *Equal population among districts is a fundamental principle of redistricting. For congressional redistricting, districts within a state must be "as nearly equal as possible." For legislative districts, they must be "substantially equal," a less stringent standard.*

Chapter in brief: Modern redistricting began after a series of court rulings in the 1960s required states to create districts of equal population for congressional seats and for state legislative seats every 10 years. Before these rulings, many states did not change boundary lines even as populations shifted throughout the nation and within each state. As a result, some elected representatives had many more constituents than other representatives in the same legislative body.

Wesberry v. Sanders (1964) established the requirement to redistrict the U.S. House of Representatives so that its districts are "as nearly equal as possible." This has been interpreted to mean that congressional districts within each state must be so close in population that they essentially are equal in population.

Reynolds v. Sims (1964) established the same concept for all other legislative bodies. For state house and senate chambers, however, a bit more leeway in terms of deviation from the ideal district size is permitted than for congressional districts: They must be "substantially" equal. That is because it is more difficult to balance population in these smaller districts while at the same time heeding political boundaries such as county or municipal lines.

CHAPTER 3: RACIAL AND LANGUAGE MINORITIES

> *Denial or abridgement of the right to vote based on race, color or membership in a minority language group is prohibited under the Equal Protection Clause of the 14th Amendment and the Voting Rights Act.*

Chapter in brief: Creating a districting plan to limit the right to vote of any racial minority is unconstitutional and prohibited by the Voting Rights Act (VRA).

In general, the VRA prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any U.S. citizen's right to vote on account of race, color or status as a member of a language minority group. Section 2 is specific

in prohibiting vote dilution—when minority voters are dispersed or "cracked" among districts so that they are ineffective as a voting bloc, or so concentrated or "packed" in a district as to constitute an excessive majority.

The 14th Amendment has been interpreted to prohibit racial gerrymandering, or the drawing of plans to segregate voters among districts based on race. Such plans may not be adopted even if race is used as a proxy for political affiliation. To comply with both the 14th Amendment and the VRA, race must be considered so that minorities' votes are not diluted under the VRA, but at the same time, race cannot be the predominant factor.

Section 5 of the VRA required several jurisdictions and states that had a history of voting discrimination against minority voters to have any changes to electoral procedures reviewed by a federal entity (often called "preclearance") before they went into effect. In 2013, the Supreme Court in *Shelby County v. Holder* removed preclearance requirements nationwide. The decision was based on the fact that the formula to determine what states and jurisdictions were required to pre-clear their plans (laid out in Section 4) had not been changed since the VRA was adopted in 1965 and did not adequately reflect current voter participation rates.

While Section 5 is no longer enforceable, Section 2 remains enforceable, and Section 3 creates a "bail-in" option for states or jurisdictions to go under preclearance via court order if discriminatory practices are found to be present.

CHAPTER 4: PRINCIPLES AND CRITERIA

> *While districts must be equal in population and cannot discriminate based on race, each state separately has its own set of principles, or criteria, in its constitution, statutes and/or guidelines.*

Chapter in brief: When redistricting, two fundamental federal law principles apply to all states: 1) equal population based on the 14th Amendment, and 2) race and language minority status based on the 14th Amendment and the VRA. "Redistricting Law 2020" devotes chapters to each of these.

In addition, all states have at least some principles, or criteria, set out in their constitutions, statutes or guidelines. Depending on the state, these may apply to legislative redistricting, congressional redistricting or both. The most common principle is contiguity—districts must be one whole piece, with the boundary never broken. Compactness, maintaining the cores of previous districts, and preserving "communities of interest" are common criteria as well.

In recent years, a few states have added emerging criteria such as districts being competitive and "neither favoring nor disfavoring" a party or a person.

It is rarely possible to fully honor all principles or criteria, in that they frequently conflict with each other. A few states have prioritized their principles, or criteria.

CHAPTER 5: REDISTRICTING COMMISSIONS

In most states, legislatures are responsible for redistricting. In a small but increasing number of states, commissions play a role. Commissions must adhere to the same legal standards as legislatures.

Chapter in brief: While legislatures are responsible for redistricting in most states, several states have delegated this authority to commissions. In the 2010 decade in particular, movement toward commissions increased. Commissions, like legislatures, must comply with federal standards and state laws.

Some commissions have been created by citizens' voter initiatives, but more have been created by legislative referrals.

All commissions are unique, but they can be grouped into three categories: commissions with primary responsibility for redistricting congressional lines, legislative lines or both; advisory commissions that submit their work to the legislatures where the final responsibility resides; and back-up commissions that are constituted only if legislatures fail to adopt maps.

Commissions vary in how members are selected, what qualifications they must meet, the partisan composition (sometimes including unaffiliated members), what constitutes an affirmative vote to pass a plan, and other factors.

CHAPTER 6: PARTISAN REDISTRICTING

While redistricting is widely viewed as an inherently political process, for decades federal courts have been asked to consider whether redistricting plans that heavily favor one political party or another are subject to federal constitutional constraints. In 2019, the Supreme Court concluded that they are not and closed the door on federal court review of partisan gerrymandering

claims. Nevertheless, partisan gerrymandering challenges under state constitutions are likely to continue in state courts, and states are likely to reform their own line-drawing processes, as a handful of states already have done.

Chapter in brief: Partisan (or political) gerrymandering is the drawing of electoral district lines to intentionally benefit one political party over others. Courts have historically recognized that politics is inherent to redistricting. Many times over the last several decades, cases challenging redistricting plans under the federal constitution have made their way to the Supreme Court. Until recently, the Court had said that the issue could be something that a court could adjudicate, provided a judicially manageable standard could be found.

In 2019, however, after failing to develop a workable standard for several decades, the Court ruled in *Rucho v. Common Cause* that partisan gerrymandering claims are political questions beyond the reach of federal courts, foreclosing such further claims in federal courts.

State courts provide a mostly untested alternative avenue for partisan gerrymandering claims. In one case from 2018, *League of Women Voters of PA v. Pennsylvania*, the Pennsylvania Supreme Court overturned the General Assembly's congressional map as a partisan gerrymander on state constitutional grounds. The specific constitutional provision in the Pennsylvania constitution, the free and fair elections clause, is present in many other state constitutions.

During the last decade, a number of states have proactively reformed their own redistricting processes. Whether they did so by establishing a separate commission empowered with line-drawing authority, enacting specific criteria applicable to the line-drawing process, or requiring an affirmative vote that includes substantial support from the minority party, states have been proactively addressing their constituents' growing demand for redistricting reform.

CHAPTER 7: LEGISLATIVE PRIVILEGE IN REDISTRICTING CASES

Unlike members of Congress, state legislators do not have an absolute right to legislative privilege. Increasingly, courts have permitted discovery of more documents and testimony in redistricting-related cases. States are advised to have, and follow, good protocols in regard to document retention and disposal.

Chapter in brief: Federal courts hearing constitutional challenges to newly drawn maps have increasingly allowed plaintiffs greater access to documents from legislators than in previous decades. Therefore, "Redistricting Law 2020" includes a new chapter on this topic that was not included in previous editions.

Courts have found that legislators, unlike members of Congress, do not have an absolute right to legislative privilege. Although the legislative privilege doctrine does protect state legislators from disclosing certain documents, federal courts continue to narrow the scope of the privilege and typically require state legislators to turn over most of their records for redistricting, including legislative and personal email. Consequently, attorneys advising state legislators and their staff must be well-versed on the scope of legislative privilege in redistricting cases specifically. Caution is advised in regard to unintended waivers of any applicable protections.

A state should have a specific policy for managing and retaining communications, including documents, emails and text messages, that includes a schedule for deleting or destroying them. More important, the policy must be followed. Courts will take note if the policy is ignored until a challenge arises.

CHAPTER 8: FEDERALISM AND REDISTRICTING

> *The U.S. Constitution, as interpreted by the Supreme Court, grants states considerable, yet equal, latitude in determining their redistricting processes. This authority was a central factor in 2013 when the Supreme Court struck down a key provision of the Voting Rights Act that previously treated some states and jurisdictions differently because of their record of discrimination in the 1960s.*

Chapter in brief: Earlier editions of "Redistricting Law" dealt extensively with federalism, and specifically with the Election Clause (Article 1, Section 4, of the U.S. Constitution), which gives responsibility for elections to the states but also reserves a role for the federal government.

In this edition, the content of this chapter has been significantly updated because of two monumental cases decided since 2010. The first is *Shelby County v. Holder* (2013), where the Supreme Court struck down Section 4 of the VRA, effectively precluding the enforcement of Section 5. Section 5 requires that, for certain "covered" jurisdictions, all state law electoral practice changes must be pre-cleared before going into effect by a special federal district court in Washington, D.C., or by the U.S. Department of Justice. Section 4 set forth the formula by which some jurisdictions were identified, a formula that had not been updated since the passage of the VRA in 1965. The Court concluded that the "federalism costs" (a statutory scheme that treats some states differently than others) of the formula no longer could be justified.

The second case is *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015), which focused on the meaning of the Elections Clause. The Arizona redistricting commission was established by a citizens' initiative approved by the voters in 2000. The Arizona Legislature challenged the constitutional authority of the commission to develop and implement a congressional redistricting

plan for the state, arguing that the Elections Clause granted that authority to state legislatures (not commissions). The Supreme Court disagreed and interpreted basic federalism principles as allowing states considerable latitude to establish election-related processes, including removing redistricting responsibility from the legislature through a citizens' initiative so long as the state's constitution grants such authority to its people.

CHAPTER 9: REDISTRICTING FOR LOCAL JURISDICTIONS, COURTS AND OTHER STATE ENTITIES

All jurisdictions that elect representatives based on districts are required to redistrict periodically. Generally, the same requirements pertain to local jurisdictions, with the exception that courts do not adhere to equal population.

Chapter in brief: While the U.S. House of Representatives and state legislative chambers must be redistricted, other entities—including local governing bodies, state courts and some statewide boards or commissions—also elect members by districts and must also redistrict. Over the decades, the jurisprudence governing congressional and state legislative redistricting has been applied, in large part, to redistricting for both local jurisdictions and judicial districts. For local redistricting, the requirement for equal population may be less stringent than for legislative seats.

The same legal principles that apply to congressional and legislative redistricting apply for all other electoral bodies that elect representatives based on geography, with one major exception. Courts do not have to comply with the one-person, one-vote requirement. This is because courts are not representative bodies, and thus one-person, one-vote is not relevant. Some states may have state requirements for equal population that would pertain.

The VRA applies locally as it does at the state level. Many VRA cases challenge local procedures.

"Redistricting Law 2020" does not cover this topic in detail.

CHAPTER 10: ENACTING A REDISTRICTING PLAN THROUGH THE LEGISLATIVE PROCESS

States vary on the details of how plans are enacted, such as whether congressional and legislative plans follow the same principles, whether the governor has a role, or how multi-member districts (if any) are to be designed.

Chapter in brief: Beyond federal and state legal standards for redistricting, state procedures vary greatly.

For instance, a dozen or so states use multi-member districts, where a single district is represented by more than one legislator. For those states, a key issue is how multi-member districts are designed. Other key issues include whether, for redistricting purposes, prisoners are reallocated to their last known address; whether the governor has a veto over redistricting plans; and how, in 24 states, the citizens' initiative process can change how redistricting is undertaken.

This chapter also addresses public input requirements, the legal format used to describe districts, how states address technical errors in published maps, and defense of a plan in the face of legal challenges.

The underlying principle in this chapter is that states have varying procedures for handling the redistricting process.