Redistricting Law 2020

Prepared by the National Conference of State Legislatures

The Redistricting Law 2020 Team

Michelle Davis

Frank Strigari

Wendy Underhill

Jeffrey M. Wice

Christi Zamarripa

NCSL

NATIONAL CONFERENCE OF STATE LEGISLATURES

Tim Storey, Executive Director

7700 East First Place, Denver, CO 80230

444 North Capitol Street, N.W., Suite 515, Washington, D.C. 20001

www.ncsl.org

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The National Conference of State Legislatures is the bipartisan organization that serves the legislators and legislative staff of the states, commonwealths and territories.

NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues and is an effective and respected advocate for the interests of the states in the American federal system. Its objectives are:

To improve the quality and effectiveness of state legislatures.
To promote policy innovation and communication among state legislatures.
To ensure state legislatures a strong, cohesive voice in the federal system.

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Contents

7 | Legislative Privilege in Redistricting Cases

8 | Federalism and Redistricting

9 | Redistricting for Local Jurisdictions, Courts and Other State Entities

10 | Enacting a Redistricting Plan Through the Legislative Process

Appendices

Exhibits

Foreword

Redistricting—the redrawing of electoral district boundaries every 10 years to accommodate population shifts—is hot.

Of course, for those involved in politics, redistricting is always hot, decade after decade. What is new this cycle is that the general public is paying close attention to redistricting, or to "gerrymandering" as they might call it. Thus, this core state function will be conducted at the start of the next decade under more public scrutiny than ever.

In addition, since redistricting is a core state function, it also is core to NCSL's mission to support the work of state legislators and legislative staff nationwide.

For four decades, NCSL has worked with legislative staff to provide a handbook summarizing the law governing this arcane and complicated topic. The goal of each edition has been to provide a practical legal outline covering redistricting for congressional and legislative seats (and, by extension, for local jurisdictions). This edition, NCSL's fifth, is no different.

Until 2010, the legal framework for redistricting remained fairly consistent. During the past decade, however, rarely a year went by without a significant redistricting opinion from the U.S. Supreme Court that altered the redistricting landscape. While this edition continues the tradition of explaining the fundamentals of redistricting, the spotlight is on the new developments in redistricting law:

- Some parts of the Voting Rights Act are no longer enforceable.
- Partisanship was determined to be outside the federal courts' purview, although states may choose to address it through criteria, guidelines and processes.

- Legislative privilege is narrower than previously believed, meaning more communications such as emails are "discoverable."
- The Supreme Court ruled that total population is a constitutional basis for redistricting, but did not address the question of whether other options, such as voting-eligible population, also are acceptable.

Of course, technology continues to evolve at lightning speed. Improvements in map-drawing and data-management software have led to laser-precise mapping capabilities, where units as small as a handful of houses can be easily added to or subtracted from a district. Although this book does not cover technology in detail, technology has driven some of the changes in redistricting procedures, including the growth of participation by citizens and reform advocates.

In addition to substantively new material, the format of "Redistricting Law 2020" has been redesigned to make the material easier to understand and digest. Readers will find a first-ever index, an appendix of relevant cases from this decade, summaries of historic Supreme Court cases that still govern redistricting, and additional timelines and tables.

After the release of census data to the states in early 2021, redistricting will be under a national microscope. Based on recent redistricting litigation and referendums, it is safe to say the courts and the public will be more involved in the redistricting process than in previous decades.

In past decades, redistricting litigation usually lasted just a few years after initial plans were enacted. During the 2010s, though, an increasing number of cases have been brought against states late in the decade, with every expectation that federal and state courts still will be grappling with redistricting cases as the next decade begins. Five states enacted major redistricting reforms in 2018 alone. Even more states considered reforms in 2019, with more bills to come in 2020. This is unprecedented, and it is our hope that this book provides legislators and legislative staff with the information they need to understand the complex underpinnings for their redistricting endeavors.

On a final note, we ask that, if you have comments or suggestions, please send them to elections-info @ncsl.org.

Here's to an exciting and challenging few years ahead!

The editors—Michelle Davis, Frank Strigari, Wendy Underhill, Jeffrey M. Wice and Christi Zamarripa

The 2020 edition of "Redistricting Law 2020" is dedicated to Peter Wattson, a retired legislative staff member in Minnesota, and current friend and contributor to NCSL. Peter's extraordinary knowledge of and expertise on redistricting law have been, and continue to be, invaluable both to NCSL and to the nation's redistricting community. Over the span of three decades, he served as the general editor for the "Redistricting Law" books and, for this edition, the editors often used "What would Peter do?" to guide their decisions.

Acknowledgments

"Redistricting Law 2020" would not exist without the labors of a wide group of experts—all key to tackling a once-in-a-decade task. The result is this book—written by legislative staff—for legislative staff and legislators.

Work on the book started more than two years ago with a request from the National Conference of State Legislatures to experienced legislative staff across the nation to "take a chapter" from the 2010 edition and update it with new information from the 2010s. These drafts were sent to the central editing team: Michelle Davis, senior policy analyst, Maryland Department of Legislative Services; Frank Strigari, chief legal counsel, Ohio Senate; and Jeffrey M. Wice, special counsel, New York State Assembly.

Meanwhile, NCSL's Wendy Underhill and Christi Zamarripa assembled the data for the chapter exhibits and appendices. While much information was available on state websites, the rest was provided by members of NCSL's informal redistricting staff network in each state.

Special recognition goes to the following people for their work on the project.

Chapter 1 | The Census: James Whitehorne, chief, Census Redistricting & Voting Rights Data Office, U.S. Census Bureau.

Chapter 2 | Equal Population: Raysa Martinez Kruger, principal research analyst, New Jersey Office of Legislative Services (OLS); Tracey Pino Murphy, lead counsel, New Jersey OLS; Jamie Galemba, senior counsel, New Jersey OLS; Stephanie Wozunk, senior counsel, New Jersey OLS; and Edward Doherty, former associate counsel, New Jersey OLS.

Chapter 3 | Racial and Language Minorities: Kara McCraw, Legislative Analysis Division staff, North Carolina General Assembly; Paula G. Benson, assistant director of research and senior staff attorney,

South Carolina Senate; Andy Fiffick, chief of staff and director of research, South Carolina Senate Judiciary Committee; Maura Baker, staff attorney, South Carolina Senate Judiciary Committee; and Johanna Valenzuela, staff attorney, South Carolina Senate Judiciary Committee.

Chapter 4 | Redistricting Principles and Criteria: Bryan Barash, general counsel, Massachusetts General Court, Office of State Senate President Emerita Harriette Chandler.

Chapter 5 | Redistricting Commissions: Karin Mac Donald, director, Statewide Database at Berkeley Law, University of California.

Chapter 6 | Partisan Redistricting: Jason Long, senior assistant revisor, Office of Revisor of Statutes, Kansas and Michelle Davis, senior policy analyst, Maryland Department of Legislative Services.

Chapter 7 | Legislative Privilege in Redistricing Cases: Frank Strigari, chief legal counsel, Ohio Senate and James F. "Ted" Booth, general counsel, PEER Committee and staff counsel, Redistricting/Reapportionment, Mississippi.

Chapter 8 | Federalism and Redistricting: Ted Booth.

Chapter 9 | Redistricting for Local Jurisdictions, Courts and Other State Entities: Ted Booth.

Chapter 10 | Enacting a Redistricting Plan through the Legislative Process: Matt Gehring, staff coordinator, Research Department, Minnesota House of Representatives.

NCSL also acknowledges assistance from Kim Brace of Election Data Services; Clark Bensen of Polidata; Peter Wattson, the lead editor for the 2010 edition and now a redistricting consultant; Katy Owens Hubler of Democracy Research; Ben Williams, a former NCSL legal intern and graduate of William & Mary Law School; Amanda Zoch, a fellow at NCSL supported by the American Council of Learned Societies; and Drew Marvel, NCSL legal intern and student at William and Mary Law School.

It takes many more people than writers to publish a book. This project was conducted under the auspices of the NCSL Redistricting and Elections Standing Committee. Tim Storey, NCSL's executive director, provided inspiration and historical context. NCSL's director of content, Ed Smith, provided guidance throughout the process. Leann Stelzer edited every word in the book—twice. NCSL's designer, Steve Miller, worked with Anita Koury to design the book.

To all these knowledgeable and generous contributors, NCSL extends tremendous gratitude. It is our hope that each person's contribution was an intriguing intellectual challenge, and that seeing their labor presented in this worthy document brings a deep sense of satisfaction to all.

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 boundaries of districts that elect 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 December 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 first must determine how this goal can be accomplished through an administrative rulemaking process.) 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 abridgment 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 both 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: REDISTRICTING 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 which determined the jurisdictions which would be subject to Section 5. 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 are not required to 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 also must 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 the one-person, one-vote requirement 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.

1 | The Census

INTRODUCTION

The 2020 census will provide the basis for the next apportionment among the states of the 435 seats in the U.S. House of Representatives. The census data also will be used for redrawing congressional, state and local election districts, as well as for many other purposes, including distributing federal funds when these are based on population-driven formulas. This chapter reviews some of the legal and practical issues that will affect the 2020 census. These include:

- The Legal Underpinning of the Census
- How the Census Will Collect and Report Data
- Census-Related Legal Issues

THE LEGAL UNDERPINNING OF THE CENSUS

Established by the U.S. Constitution, the census has been conducted every 10 years since 1790. The 2020 census will be the 24th in U.S. history. Federal law governs management of the census and gives responsibility for it to the U.S. Department of Commerce. Some states refer specifically to the U.S. census in their constitutions or statutes as well. These provisions are addressed later in this section.

U.S. Constitutional Provisions

Article I, Section 2, Clause 3, of the U.S. Constitution requires an "actual Enumeration" of all people in the United States:

> *The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as*

> *they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*

The phrase, "as they shall by Law direct," gives Congress authority over the census, while requiring that it be an "actual Enumeration" as opposed to an estimate.

Federal Law—For Apportionment of Congressional Seats

Congress delegates responsibility for conducting the census to the Department of Commerce and its U.S. Census Bureau in Title 13 of the U.S. Code. The law, as amended, directs the secretary of Commerce "in the year 1980 and every 10 years thereafter, to take a decennial census of population as of the first day of April . . . which date shall be known as the 'decennial census date.'" Thus, the official date of the 2020 census is April 1, 2020.

The bureau must complete the census and report the total population, by state, to the president by December 31 of the census year (2020). The data in this report is used for "the apportionment of Representatives in Congress among the several States" as required by Article I, Section 2, of the U.S. Constitution.[1]

Within one week of the opening of Congress in 2021, the president will transmit to the clerk of the U.S. House of Representatives the apportionment population counts for each state and the number of representatives to which each state is entitled. The clerk must inform the governors of the number of representatives to which each state is entitled within 15 days, although this is likely to be done much sooner.[2]

Congress used the census results to reapportion the seats in the House of Representatives among the states in every decade except the 1920s. For that decade, despite the constitutional mandate, no reapportionment bill passed both houses of Congress until 1929, when Congress passed an automatic prospective reapportionment law for the 1930 and later censuses. Thus, the 1911 allocation of congressional seats remained in effect until revised with the results of the 1930 census in 1931. For more information, see "The American Census: A Social History" by Margo Anderson.

The number of representatives allocated to each state is based on the census results and determined by the "method of equal proportions," which is outlined by the census. Each state is guaranteed at least one representative, and the remaining 385 seats are apportioned among the states based on a formula set forth in federal law.[3]

Exhibits 1.1 and 1.2 show how the apportionment formula worked in 2000 and 2010 and how close the last few states came to gaining or losing a seat in those decades.

EXHIBIT 1.1 Congressional Apportionment, 2000 and 2010

This table shows the last six congressional seats apportioned for the 2000 and 2010 cycles and where the next six seats would have been awarded.

LAST SIX SEATS AWARDED (WITH NUMBER OF PEOPLE TO SPARE)

Seat	2000		2010	
430	Georgia	142,388	South Carolina	50,723
431	Iowa	44,338	Florida	113,953
432	Florida	212,934	Washington	26,609
433	Ohio	79,688	Texas	99,184
434	California	33,941	California	117,877
435	North Carolina	3,086	Minnesota	8,739

STATES THAT WOULD HAVE RECEIVED SEATS IF ADDITIONAL SEATS WERE APPORTIONED (With Number of People Missed By)

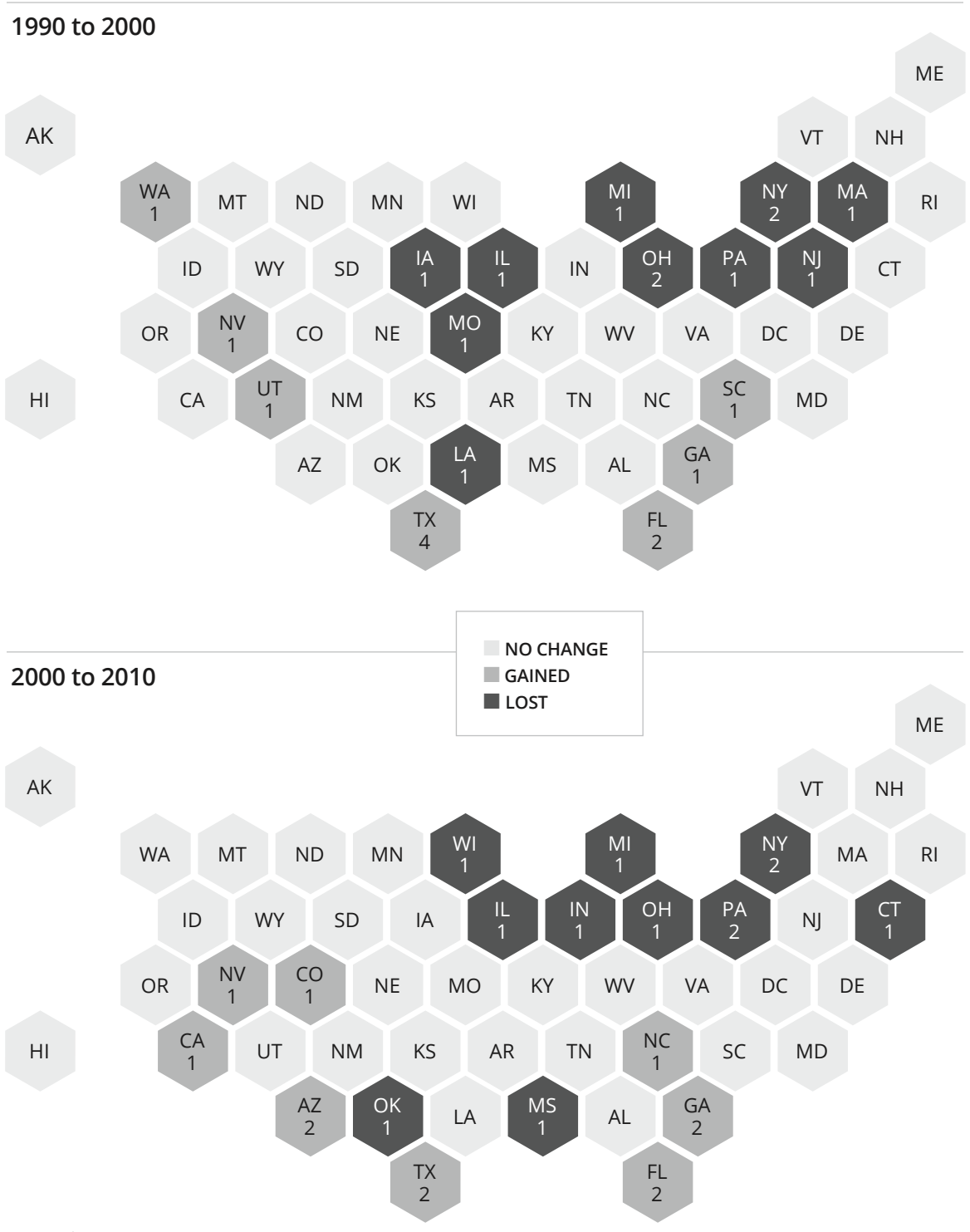
Seat	2000		2010	
436	Utah	-856	North Carolina	-15,754
437	New York	-47,249	Missouri	-15,029
438	Texas	-86,273	New York	-107,058
439	Michigan	-50,888	New Jersey	-63,277
440	Indiana	-37,056	Montana	-10,002

Source: Election Data Services Inc., 2019

Federal Law—For Redistricting by the States

Title 13, as amended by Public Law 94-171 (1975), requires the secretary of Commerce to report census results to the states—or more specifically to the bodies or officials charged with redistricting authority and to the governors—no later than April 1, 2021. As in previous decades, the 2021 report will contain population data—along with data on age (18+), race and ethnicity—for various geographic areas within the state, including the smallest geographic units known as census blocks.[4] The April 1 report provides

EXHIBIT 1.2 Congressional Apportionment Maps



Source: Election Data Services Inc.

the basis not only for state and local redistricting, but also for redrawing congressional districts within each state.[5]

The 2020 census operations will be conducted under guidance from the "2020 Census Operational Plan," published in November 2015. It directs the U.S. Census Bureau to undertake the 2020 census at or below the inflation-adjusted cost of the 2010 census, while maintaining quality. The bureau also was directed to modernize census operations by leveraging advances in technology. In effect, this means the 2020 census will be the first to allow and encourage reporting over the internet.

What Is Public Law 94-171, aka P.L. 94-171?

Public Law 94-171, enacted in 1975, directs the U.S. Census Bureau to make special preparations to provide redistricting data needed by the 50 states. Within a year following Census Day, the Census Bureau must send the data for redrawing districts to each state's governor and majority and minority legislative leaders.

To meet this legal requirement, the Census Bureau set up a voluntary program that enables participating states to define and receive data for voting districts (e.g., election precincts, wards, state house and senate districts) in addition to standard census geographic areas such as counties, cities, census tracts and blocks.[6]

State Laws—Use of the Census for Redistricting

The data collected by the decennial census has several purposes. First, census data helps to determine how federal funds are distributed to the states. Second, it is used to apportion the number of seats each state has in the U.S. House of Representatives. Third, states use census data to redistrict.

While the U.S. Constitution requires the use of census data for apportionment, how that data is used for redistricting is decided by the states. Appendix B, Redistricting and the Use of Census Data, examines whether each state's constitution or statutes explicitly mention the use of the census data for congressional and legislative redistricting. In summary:

- Twenty-one states—Alaska, Ariz., Colo., Del., Fla., Idaho, Iowa, Kan., La., Mass., Miss., Neb., N.J., N.M., Okla., S.D., Tenn., Utah, Va., Wash. and Wyo.—explicitly require use of census data for redistricting.

- Seventeen states—Calif., Conn., Ga., Ill., Ky., Md., Mich., Minn., Mont., Nev., N.C., N.D., Pa., R.I., Vt., W.V. and Wis.—have an implied basis or in-practice reliance on using the census for redistricting.

- Six states—Ala., Maine, N.H., Nev., Ore. and S.C.—permit use of the census *or* may permit other datasets for their redistricting, depending on circumstances.

- Two states— N.Y. and Ohio—use the federal census data unless it is unavailable or delayed. In that case, these states can conduct their own census or use an alternative data source.

- Arkansas explicitly requires that federal census data be used for redistricting the state House of Representatives. However, the Arkansas Constitution does not use explicit language to address redistricting for either the state Senate or congressional districts.

- Hawaii requires that U.S. census data be used for congressional redistricting when practicable. The Hawaii Constitution and statutes are silent regarding the use of federal census data and boundaries for state legislative redistricting, nor do they specifically provide an alternative option other than the use of federal census data for redistricting.

- Indiana explicitly requires that federal census data be used for legislative redistricting. Neither the Indiana Constitution nor statute use explicit language to address congressional redistricting.

- Texas requires the use of population data[7] from the U.S. census to redraw state House districts but does not use the same language for state Senate districts.

HOW THE CENSUS WILL COLLECT AND REPORT DATA

This section includes information about how the 2020 census will be conducted and what information it will provide. While process and data dissemination decisions are made well in advance of the census—and therefore even further in advance of redistricting—this section explains how the census will operate as data is gathered and distributed. This section includes:

- Census operations
- Data collection and the new internet self-response option
- Nonresponse and imputation
- Building the census address list
- The Redistricting Data Program

- Residence criteria for certain groups
- Wording on race and ethnicity questions
- The proposed (but not adopted) citizenship question

Census Operations

Like the 2010 census, the 2020 census will be a short-form only decennial census that will collect basic information from all people residing in the United States. This data will include these topics: name, age, gender, race, ethnicity, relationship and whether a home is owned or rented. (While the Department of Commerce, which oversees the Census Bureau, had expected to include a citizenship question as well, the final version of the response form will not include this question.) Only the population and housing count are included in the data released to the states for redistricting purposes. The other information (ownership type, relationship, gender) are provided in subsequent products.

The U.S. Constitution, which calls for an "actual Enumeration," requires the federal decennial census to count individuals; it does not permit reporting population numbers based on sampling. No such enumeration, or census, can be expected to be entirely accurate, and undercounting of some populations does occur. Overcounting also can occur (see sidebar). Nevertheless, for apportionment of seats in the U.S. House of Representatives, the Supreme Court has ruled that statistical sampling (or statistical adjustments with the intention of having a more accurate number) is not permitted.[8]

The 2020 census operations will be conducted under guidance from the 2020 Census Operational Plan.[9] The 2020 census will be the first to use the internet as the primary channel for response collection. This change was made to meet the goal of holding down costs and modernizing operations. Use of the internet for data collection will allow the Census Bureau to provide more options or methods for self-response. Telephone questionnaire assistance centers also will be available to capture respondent information from callers; operators will directly enter the respondents' information into the internet instrument, rather than providing instructions on how to fill out the paper form, as was done in 2010.

Paper forms still will be available. These will be used in areas with poor internet access, populations with low internet use, and other areas where an internet response is considered unlikely. In addition, paper forms may be requested by any resident and may be used when no internet response has been received from an address and a census worker goes in person to the address and leaves a paper form, and in a few other cases.

While the goal is to encourage households to self-report, almost 400,000 enumerators (i.e., staff who will go door to door contacting households that have not completed the census) will be deployed to ensure as complete a count as possible.

Adjusting the Census: Sampling, Undercounts and Overcounts

The census is not, and cannot be, 100% accurate. The U.S. Census Bureau conducted a post-enumeration survey—the Census Coverage Measurement (CCM)—to assess the quality of the 2010 census. The results found that the 2010 census had a net overcount of 0.01%, meaning about 36,000 people were overcounted in the census. This sample-based result, however, was not statistically different from zero.

As with previous censuses, undercounts and overcounts varied across demographic characteristics. Based on the CCM, it appears that the 2010 census undercounted renters by 1.1%, showing no significant change compared with 2000. Homeowners were overcounted in the 2000 census by 1.2% and in the 2010 census by 0.6%. Renters were more likely to be duplicated than owners.

Children under age 5 were undercounted in 2010 by 0.7%.

Men ages 18 to 29 and 30 to 49 were undercounted in 2010, while women ages 30 to 49 were overcounted, a pattern consistent with 2000. The estimated overcount of women 18 to 29 was not statistically significant.

As with prior censuses, under/overcounts in the 2010 census varied by race and Hispanic origin. The non-Hispanic white alone population was undercounted by 0.8%, not statistically different from an overcount of 1.1% in 2000.

The black population was undercounted by 2.1%, which was not statistically different from a 1.8% undercount in 2000.

The Hispanic population overall was undercounted by 1.5%. In 2000, the estimated undercount of 0.7% was not statistically different from zero. The difference between the two censuses also was not statistically significant.

There was no significant undercount for the Asian or for the Native Hawaiian and Other Pacific Islander populations in 2010 (at 0.1% and 1.3% undercount, respectively). These estimates also were not statistically different from the results measured in 2000 (0.8% overcount and a 2.1% undercount, respectively).

Coverage of the American Indian and Alaska Native population varied by geography. American Indians and Alaska Natives living on reservations were undercounted by 4.9%, compared with a 0.9% overcount in 2000. The net error for American Indians not living on reservations was not statistically different from zero in 2010 or 2000.

To lessen the impact of undercounting, at times the Census Bureau and others have advocated the use of "statistical sampling" to improve the accuracy of the census. Two references to sampling in Title 13 appear to be in conflict. Section 141(a) directs the secretary of Commerce to take the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." Section 195, however, directs the secretary to use sampling methods in fulfilling his duties under Title 13, "except for the determination of population for purposes of apportionment of Representatives in Congress among the several States."

As stated above, the Supreme Court has ruled that sampling is unconstitutional.[10]

Data Collection and the New Internet Self-Response Option

The U.S. Census Bureau is responsible for administering the decennial census and the American Community Survey (ACS). Information from both the decennial census and the ACS will be used to distribute over $800 billion annually under a wide array of federal, state, local and tribal programs. While population data from the decennial census will be used for redistricting, ACS data, along with many other data sources, may be used to supplement it. For instance, ACS data may be used by some states or jurisdictions as they consider their state-specific criteria (see Chapter 4, Redistricting Principles and Criteria). ACS data does not provide accuracy at the voting district level.

Responses to both the 2020 census and the ACS are mandatory for the U.S. population.

Nonresponse and Imputation

The Census Bureau published the "2010 Decennial Census: Item Nonresponse and Imputation Assessment Report"[11] in February 2012. This report provided information on data quality, specifically data completeness, for the person-level and household-level items from the 2010 census. These items include tenure, relationship, sex, age/date of birth, Hispanic origin and race. The item nonresponse

rates, along with imputation rates, are types of response quality measures. The item nonresponse rate is mainly used as an indicator of respondent cooperation. Imputation rates incorporate respondent cooperation, but also consider inconsistent and unusable responses. The results presented in the report apply to characteristic imputation as opposed to count imputation. The characteristic imputation process assessed in the report begins after the household population is established or resolved through various processes, such as count imputation.

Unlike sampling, imputation is permitted. Imputation has been used by the Census Bureau to estimate the number of people residing at an address from which it has not received a response. Following the 2000 census, Utah sued the Census Bureau, alleging that "imputation" was a form of sampling, and thus prohibited.[12] Based on imputation that decade, North Carolina's population increased by 0.4%, whereas Utah's population increased by only 0.2%. The difference resulted in North Carolina receiving an additional U.S. representative and Utah receiving one less representative than it would have, had the Census Bureau not used imputation. The U.S. Supreme Court rejected Utah's complaint and upheld the Census Bureau's use of imputation in *Utah v. Evans*. The Court held that imputation was different from "the statistical method known as 'sampling'" in that it was filling in blanks rather than using a subset of the population to estimate a larger population.[13]

Building the Census Address List

The Census Bureau needs the address and physical location of each living quarter in the United States and Puerto Rico to conduct and tabulate the census. An accurate list ensures that residents will be invited to participate in the census and that the census counts residents in the correct location. The Address Canvassing Program implements methods to improve the Census Bureau's address list in advance of the 2020 census enumeration.

American Community Survey

The American Community Survey (ACS) asks more detailed questions than the census itself, and does so as a survey of 3.5 million households per year. The Census Bureau conducts the ACS on an ongoing basis, with the survey being sent consistently throughout the year, every year. ACS data is reported on both an annual basis, for larger areas, and on a rolling five-year basis for smaller geographic areas. The ACS data can be, and often is, used as a complement to the census data for redistricting and voting rights purposes. Unlike the census data, ACS data are based on sampling. The ACS, as its predecessor the decennial long-form, will continue to be the primary survey for collecting detailed information such as housing and economic information.[14]

For the 2020 census, the Census Bureau has reengineered the Address Canvassing Program to enable continual address and spatial updates to occur throughout the decade as part of an In-Office Address Canvassing effort, with a smaller In-Field operation.

The availability of up-to-date, high-resolution aerial and street-level imagery now provides a viable tool to help reduce field work for many parts of the United States. More efficient uses of land use and land cover data and various sources of address information reviewed in the office can provide a substitute for field work, especially in areas that have been relatively stable residentially. An In-Field Address Canvassing now will be needed only in select areas of the country as determined by In-Office Address Canvassing.

The Census Bureau continues to recognize the U.S. Postal Service as the authoritative source for mail delivery addresses and postal codes in the United States and Puerto Rico.

The Local Update of Census Addresses (LUCA) further supplemented the address list development. Established in response to requirements of Public Law 103-430, LUCA provided local and tribal governments the opportunity to review and update individual address information or block-by-block address counts and associated geographic information in Census Bureau databases. These updates are verified during the address canvassing operation.

See the U.S. Census Bureau's website for more information on LUCA.[15]

2020 Census Redistricting Data Program

The Census Bureau established the 2020 Census Redistricting Data Program (www.census.gov/rdo) through a Federal Register notice on July 15, 2014.

The five-phase process by which the Census Bureau's Redistricting Data Program is operating as described in Exhibit 1.3.

EXHIBIT 1.3 2020 Census Redistricting Data Program Phases

This is the Census Bureau's explanation of its five-phase process for gathering and distributing redistricting data, based on Public Law 94-171.

PHASE 1 **Block Boundary Suggestion Project (BBSP): 2015-2017**	**KEY CENSUS DATE:** June 26, 2015 *Federal Register* Notice Announcing the 2020 Census Redistricting Data Program Commencement of Phase1: The Block Boundary Suggestion Project (BBSP) **PURPOSE:** To give States the opportunity to provide the Census Bureau with their suggestions for the 2020 Census tabulation block inventory. Suggestions are made by designating the desirability of linear features to use as 2020 Census tabulation block boundaries. In addition, States can provide updates to area landmarks (state parks, prisons, etc.) and suggest changes to legal boundaries. In addition, each state had the opportunity to host a 2020 Census Redistricting Kick-off meeting detailing the plans for the 2020 Redistricting Data Program, the 2020 Census design, 2020 geographic partnership programs, and their Census Regional Office's activities. These meetings provided information regarding various programs and timelines for the 2020 Census, allowing states to plan appropriately by providing this information early in the decade. **TIMELINE:** December 2015 - May 2017
PHASE 2 **Voting District Project (VTD): 2017-2020**	**KEY CENSUS DATE:** June 28, 2017 *Federal Register* Notice announcing the 2020 Census Redistricting Data Program Commencement of Phase 2: The Voting District project (VTD) **PURPOSE:** To give States the opportunity to provide the Census Bureau with their voting district boundaries (election precincts, wards, etc.) for inclusion in the Public Law 94-171 data sets. In addition, States can provide updates to area landmarks (state parks, prisons, etc.) and suggest changes to legal boundaries. **TIMELINE:** December 2017 - March 2020
PHASE 3 **Delivering the Data: 2020-2021**	**KEY CENSUS DATES:** ■ April 1, 2020 - Census Day ■ April 1, 2021. By law, the Census Bureau must deliver population totals for the small area geography needed for legislative redistricting to the governor, legislative leadership, and public bodies with responsibility for legislative redistricting in each state no later than one year from Census Day, April 1, 2021. **PURPOSE:** To provide, as required under Public Law 94-171, each governor and the majority and minority leaders of each house of the state legislature with 2020 Census population totals for small area geography, such as counties, American Indian areas, school districts, cities, towns, county subdivisions, census tracts, block groups and blocks. States that participated in Phase 2 of the Redistricting Data Program will receive data summaries for voting districts (election precincts, wards, etc.). State legislative districts collected during other operations will also be included in the Public Law 94-171 Redistricting Data. That data will include population totals by race, Hispanic origin, and voting age. The tables will also include housing units by occupied and vacancy status and group quarters by total group quarters population. *Continues*

Phase 3 continues	These public law data will be accompanied by census maps (in PDF format) showing blocks, census tracts, counties, towns, cities (as of their January 1, 2020 corporate limits), county subdivisions, state legislative districts, and voting districts for participating states. Comparable geographic TIGER/Line® Shape files will also be provided to these designated state officials. The Census Bureau will, to the extent possible, process and deliver the redistricting data and maps in a sequence that reflects the known state constitutional and court-established deadlines for completing redistricting in 2021 legislative sessions. **TIMELINES** ■ Geography - November 2020 – January 2021 ■ Tabulated Data - February 2021-March 31, 2021
PHASE 4 **Collection of the Post-2020 Census Redistricting Data Plans: 2021-2023**	**PURPOSE:** To collect state legislative district and congressional district plans from the states for insertion into the Census Bureau's MAF/TIGER database. The Census Bureau plans to provide geographic and data products for the 118th Congress and new state legislative districts by re-tabulating the 2020 Census data for the newly drawn post-2020 Census districts. The Census Bureau also plans to provide ongoing data for these areas through the American Community Survey. **TIMELINE:** Summer 2023
PHASE 5 **Evaluation and Recommendation for the 2030 Census: 2021-2025**	**PURPOSE:** To work with the states in reviewing the 2020 Census Redistricting Data Program. States will conduct a review documenting the successes and failures of the Census Bureau to meet the needs of the states as required by Public Law 94-171. A final publication will summarize the view from the states and their recommendations for the 2030 Census. **TIMELINE:** April 2021-January 2025

Direct questions to: *Census Redistricting & Voting Rights Data Office. Phone: (301) 763-4039. E-mail: rdo@census.gov.*

Residence Criteria and Situations

The Census Bureau has explicit guidance for determining where people should be counted during the 2020 census. The overall goal is to count people at their usual residence, which is the place where they live and sleep most of the time.

This has been interpreted to mean that people who reside in certain types of group facilities on Census Day are counted at the group facility, and that people who do not have a usual residence are counted where they are on Census Day. The census defines "all people not living in housing units (house, apartment, mobile home, rented rooms) as living in group quarters."[16] This is further broken down into institutional group quarters (including correctional facilities, nursing homes and mental hospitals) and non-institutional group quarters (such as college dormitories, military barracks, group homes, missions or shelters). See the Census Bureau's webpage on Group Quarters/Residence Rules.[17]

For the 2020 census, the bureau published the Final 2020 Census Residence Criteria and Residence Situations[18] in February 2018. It provides guidance on where to count people in specific residence situations. The guidance for five residence situations that have changed or are of specific interest to the redistricting community are described below.

1. **Overseas military and civilian employees of the U.S. government:** The 2020 census will count military and civilian employees of the U.S. government who are temporarily deployed overseas on Census Day at their usual home address in the United States as part of the resident population, instead of at their home state of record. Military and civilian employees of the U.S. government who are stationed or assigned overseas on Census Day, as well as dependents living with them, will continue to be counted in their home state of record for apportionment purposes only.

   "Usual home address" refers to where someone lives and sleeps. The "home state of record" is the state from which they enlisted or declared as their home state.

2. **Overseas federal employees who are not U.S. citizens:** The 2020 census will count any non-U.S. citizens who are military or civilian employees of the U.S. government and who are deployed, stationed or assigned overseas on Census Day in the same way as U.S. citizens who are included in the federally affiliated overseas count.

3. **Maritime/merchant vessel crews:** The 2020 census will count the crews of U.S. flagged maritime or merchant vessels who are sailing between a U.S. port and a foreign port on Census Day at their usual home address or at the U.S. port if they have no usual address.

4. **Juveniles in treatment centers:** The 2020 census will count juveniles staying in non-correctional residential treatment centers on Census Day at their usual home address or at the facility if they have no usual home address.

5. **Religious group quarters residents:** The 2020 census will count people living in religious group quarters on Census Day at the facility.

Adjustments to federal census regarding prisoners

The 2020 census will continue to count prisoners, college students and people in other residence situations at the group location where they live and sleep most of the time, as it has been done in the past. Some states have chosen to allocate prisoners to their pre-incarceration addresses or to remove data relating to out-of-state prisoners for redistricting purposes.

In the 2010 cycle, two states, New York and Maryland, adjusted federal census data to "reallocate" prisoners from the prison address to their last known address for either congressional redistricting, legislative redistricting or both. Four additional states (California, Delaware, Nevada and Washington) intend to do so for the 2020 cycle.

See the NCSL webpage, Reallocating Incarcerated Persons for Redistricting (www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx) and Chapter 2, Equal Population.

For more on residency determinations, see Appendix A, Census Residence Concepts.

Wording for Questions on Race and Ethnicity

The Voting Rights Act (VRA) of 1965, as amended, prohibits a state from enacting a redistricting plan that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"[19] or because a person is "a member of a language minority group."[20] In addition, Section 203 of the VRA defines the "language minority groups" covered as those who speak Asian, American Indian, Alaska Native and Spanish languages.[21]

To facilitate enforcement of the VRA, since 1980 the Census Bureau has asked each person counted to identify their race and whether they are of Hispanic or Latino origin. An individual's responses to the race and ethnicity questions are based upon self-identification.

In accordance with current Office of Management and Budget (OMB) standards, the 2020 census will use two separate questions[22] for collecting data on race and ethnicity.

The OMB standards specify five minimum categories for data on race: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White. It also includes two categories for data on ethnicity: "Hispanic or Latino" and "Not Hispanic or Latino." The standards explain that the specified race and ethnicity categories are socio-political constructs and should not be interpreted as being scientific or anthropological in nature. The standards provide the following definitions for the race and ethnicity categories.

- **American Indian or Alaska Native** - A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

- **Asian** - A person having origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam.

- **Black or African American** - A person having origins in any of the black racial groups of Africa. Terms such as "Haitian" can be used in addition to "Black or African American."

- **Native Hawaiian or Other Pacific Islander** - A person having origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands.

- **White** - A person having origins in any of the original peoples of Europe, the Middle East or North Africa.

- **Hispanic or Latino** - A person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race. The term, "Spanish origin," can be used in addition to "Hispanic or Latino."

Based on the OMB standards and Census Bureau guidance, respondents will be offered the option of reporting more than one race. The standards also specify that, when the race and ethnicity questions are asked separately, ethnicity will be asked first.

The 2020 questions regarding race and ethnicity will be significantly different than those in 2010 in the following ways:

- Collecting multiple Hispanic ethnicities such as Mexican and Puerto Rican within the broader category;
- Adding a write-in area and examples for the White racial category and for the Black racial category;
- Removing the term "Negro;" and
- Adding examples for the American Indian or Alaska Native racial category.

The Proposed (but not Adopted) Citizenship Question

The U.S. Census Bureau, at the direction of the secretary of Commerce, had planned for the 2020 decennial census to include a citizenship question to provide census block-level citizenship and citizenship voting-age population (CVAP) data. The last time the decennial census included this question for all respondents was in 1950. Since then, the question has been included on the "long form" (received by a subset of addresses) and more recently on the American Communities Survey (ACS), which replaced the long form.

The decision to include the citizenship question was challenged in several federal courts. See the section below on Census-Related Legal Issues for more information.

In *New York v. Department of Commerce*,[23] a federal district court judge held that the decision-making process to add a new citizenship question violated the Administrative Procedures Act (APA). The court held that the Commerce Department failed to follow federal administrative procedures when the question was added in 2018.[24] On a direct appeal to the U.S. Supreme Court, the Court held that the Commerce secretary is authorized to ask about citizenship on the census questionnaire. Nevertheless, the Court saw a "significant mismatch" in the record between the Commerce secretary's decision to include the citizenship question and the explanation he provided for doing so. Consequently, the Court put the citizenship question on hold by remanding the case to the federal district court for further review.[25]

The Trump Administration announced in July 2019 that it would not place a citizenship question on the 2020 census questionnaire. At the time of publication, the Department of Commerce has directed the Census Bureau to add citizenship population derived from government agency administrative records to the block level data. The Census Bureau has not made any further announcements on how this effort will be accomplished.

CENSUS-RELATED LEGAL ISSUES

Over the decades, a number of legal issues have arisen surrounding various aspects of the Census Bureau's methodologies. Most have related to whether census data *must* be used for redistricting or whether alternative data sources may be used instead. In short, federal courts have upheld the use of alternative population bases for redistricting if the alternative database is used uniformly and if the results are comparable to what would be produced by a plan based on census population.[26]

Other significant census-related cases have related to what data states can use for redistricting, the Census Bureau's methodologies for collecting and tabulating the census, and how the states may use the data for redistricting. See case summaries below.

CONCLUSION

Since the 1960s, the federal decennial census has been the primary data source for redistricting. The census is an enumeration, or head count, of all the people living in the United States. Although the census has many purposes, two key uses are to determine congressional apportionment—how many seats each state has in the U.S. House of Representatives—and for state redistricting for congressional and legislative seats. Detailed data provided for redistricting purposes is to be delivered to the states by law no later than March 31, 2021. This data is provided at the "census block" level, the smallest unit of geography maintained by the Census Bureau.

The census includes basic demographic data such as total population by age and race.[27] (Citizenship status was not gathered from 1960 to 2010 on the decennial census form and, at the time of this writing, will not be gathered in 2020.) Decennial census data does not include economic information, election results or any demographic information beyond population, age and race.

CASES RELATING TO THE FEDERAL DECENNIAL CENSUS (IN CHRONOLOGICAL ORDER)

Burns v. Richardson[28]

In 1966 in *Burns v. Richardson*, the U.S. Supreme Court upheld Hawaii's legislative redistricting, which was based on the number of registered voters, not on total population as enumerated by the census.[29] Given Hawaii's special military and tourist populations, the Court allowed the use of an alternative population base after finding that the results did not substantially differ from results if redistricting were based on total population. The Court ruling indicated that the Equal Protection Clause does not require the use of total population figures derived from the federal census as the only standard to measure substantial population equivalency.[30]

Kirkpatrick v. Preisler[31]

In 1969, the U.S. Supreme Court reviewed Missouri's congressional redistricting and declared it unconstitutional because the districts did not meet the standard of population equality for congressional districts, which allows for little deviation. The Court also noted, respecting Missouri's effort to use eligible voter population as a basis for redistricting, that even if this is permitted under the Constitution, the state's failure to ascertain the number of eligible voters in each district made the Missouri plan unacceptable.

Ely v. Klahr[32]

In 1971, the U.S. Supreme Court cautioned in *Ely v. Klahr* that a new plan for Arizona legislative districts could use registered voter data only if the result would be a "distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."[33]

Wisconsin v. City of New York[34]

In a court case involving the 1990 census, the secretary of Commerce, in the 1990 census, decided not to use a statistical correction—known as the post-enumeration survey (PES)—to adjust an undercount in the initial population count. The U.S. Supreme Court ruled that the secretary's decision was valid and that it bore "a reasonable relationship" to the task required by the U.S. Constitution. The Court cited the broad discretion lodged by the U.S. Constitution in Congress on the conduct of the census and the broad discretion given the secretary under Title 13 to determine the "form and content" of the census.

Department of Commerce v. U.S. House of Representatives[35]

Before conducting the 2000 census, the Census Bureau announced plans to use two forms of statistical sampling to improve the accuracy of the 2000 census. The Supreme Court ruled that 13 U.S.C. §195 specifically prohibits the use of statistical sampling for purposes of reapportioning the seats in the U.S. House of Representatives. The court held that the use of statistical sampling in the execution of the census is inconsistent with provisions of the Census Act.

Utah v. Evans[36]

Following the 2000 census, the State of Utah sued the Census Bureau, alleging that "hot-deck imputation" was a form of sampling prohibited by 13 U.S.C.S. § 195. "Hot-deck imputation" refers to the way in which the Census Bureau, when conducting the 2000 census, filled in a missing value or certain gaps in its information and resolved certain conflicts in the data.[37] The Supreme Court upheld the Census Bureau's use of imputation. The Court held that imputation was different from "the statistical method known as 'sampling'" in respect to the nature of the enterprise, the methodology used, and the immediate objective sought.[38] It was filling in blanks rather than using a subset of the population to estimate a larger population.

Evenwel v. Abbott[39]

In a 2014 Texas case, the plaintiffs argued that using total population for drawing Texas' legislative districts violated the Equal Protection Clause by discriminating against voters in districts with low immigrant populations. The plaintiffs argued this gave voters in districts with significant immigrant populations a disproportionately weighted vote. The U.S. Supreme Court held that its past opinions confirmed that states *may* use total population to comply with constitutional requirements for equal population but are not required to do so (the one-person, one-vote principle, addressed in Chapter 2, Equal Population). The Court did not answer the question of whether other methods are impermissible, leaving this question for future cases.

Alabama v. U.S. Department of Commerce[40]

In 2018, Alabama initiated a lawsuit against the Census Bureau to require it to exclude undocumented residents from population counts used to apportion Congress. As of May 15, 2019, this case has yet to proceed to trial. In the past, Pennsylvania and other states have sought without success to require the Census Bureau to exclude undocumented immigrants from the population counts used to apportion the members of Congress among the states.[41]

New York v. U.S. Department of Commerce[42]

The 2018 decision to include a citizenship question on the 2020 census form sparked a new round of litigation seeking to block inclusion of the question. As of publication, six lawsuits in federal district

courts in California, Maryland and New York had been filed challenging the inclusion of the citizenship question.[43] After a lower court decision barred the inclusion of the question in the 2020 census, the Department of Commerce appealed. In June 2018, the Supreme Court held that the Commerce secretary is authorized to ask about citizenship on the census questionnaire. Nevertheless, the Court saw a "significant mismatch" in the record between the Commerce secretary's decision to include the citizenship question and the explanation he provided for doing so. The Court put the citizenship question on hold by remanding the case back to the federal district court for further review.[44]

CHAPTER NOTES

1. Population and other Census Information, 13 U.S.C. § 141 (a) and (b) (1976). "Apportionment" or "reapportionment" refers to the allocation of seats among units, such as the allocation of congressional seats among the states. "Redistricting" concerns redrawing boundaries of election districts.

2. U.S. Census Bureau, "Congressional Apportionment Frequently Asked Questions" (Washington, D.C.: U.S. Census Bureau, Aug. 26, 2015), https://www.census.gov/topics/public-sector/congressional-apportionment/about/faqs.html#Q15.

3. Reapportionment of Representatives, 2 U.S.C. § 2a and 2b (2006). The current method of apportioning seats, adopted in 1941, uses a mathematical formula to assign a priority value to each seat in the House. The formula uses the state's population divided by the geometric mean of that state's current number of seats and the next seat (the square root of n(n-1)). This formula distributes seats so that "leftover" fractions of excess population are factored into the apportionment. Previous formulas simply divided the national or state populations by the number of congressional seats, so a state could have fewer seats than its population warranted. See https://www.census.gov/population/apportionment/about/computing.html.

4. At the time of publication, the census questionnaire does not include a question about citizenship. After several challenges to a proposed citizenship question, the U.S. Supreme Court has remanded *New York v. Dep't of Commerce.*

5. Population and other Census Information, 13 U.S.C. § 141 (c) (2006).

6. U.S. Census Bureau, https://factfinder.census.gov/help/en/public_law_94_171_p_l_94_171.htm.

7. Tex. Const. Art. III, § 26, "Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census."

8. *Wisconsin v. City of New York*, 517 U.S. 1 (1996); *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

9. https://www.census.gov/programs-surveys/decennial-census/2020-census/planning-management/planning-docs/operational-plan.html.

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11. U.S. Department of Commerce, "2010 Census Planning Memoranda Series," https://www.census.gov/content/dam/Census/library/publications/2012/dec/2010_cpex_173.pdf.

12. *Utah v. Evans,* 536 U.S. 452 (2002).

13. *Ibid*. at 467.

14. U.S. Census Bureau, https://www.census.gov/programs-surveys/acs.

15. U.S. Census Bureau, "Decennial Census of Population and Housing," https://www.census.gov/programs-surveys/decennial-census/about/luca.html.

16. U.S. Census Bureau, "Poverty – Group Quarters/Residence Rules" (Washington, D.C.: U.S. Census Bureau, March 20, 2018), https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html.

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18. U.S. Census Bureau, "Final 2020 Census Residence Criteria and Residence Situations," https://www.federalregister.gov/documents/2018/02/08/2018-02370/final-2020-census-residence-criteria-and-residence-situations.

19. The Voting Rights Act (VRA), 52 USCS § 10301 (2006).

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23. *New York v. United States Department of Commerce*, 351 F. Supp. 3d 502 (S.D.N.Y. 2019).

24. *Ibid*.

25. *Department of Commerce v. New York*, No. 18-966, 588 U. S. ___ (2019).

26. *Burns v. Richardson*, 384 U.S. 73 (1966) (the Supreme Court upheld Hawaii's legislative redistricting based on the number of registered voters.); *Bacon v. Carlin*, 575 F. Supp. 763 (D. Kan. 1983) aff'd 466 U.S. 966 (1984) (the federal court upheld Kansas' legislative redistricting based on the state's 1978 agricultural census); and *McGovern v. Connolly*, 637 F. Supp. 111 (D. Mass 1986) (the federal court upheld Massachusetts' legislative redistricting based on the 1986 state census).

27. See note 4.

28. *Burns v. Richardson*, 384 U.S. 73 (1966).

29. *Ibid*. at 384 U.S. at 92-96; see also *WMCA Inc. v. Lomenzo*, 377 U.S. 633, 641 and 653 (1964).

30. *Ibid*. at 90-92.

31. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

32. *Ely v. Klahr*, 403 U.S. 108 (1971).

33. *Ibid*. at 116-117, note 7.

34. *Wisconsin v. City of New York*, 517 U.S. 1 (1996).

35. *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

36. *Utah v. Evans*, 536 U.S. 452 (2002).

37. *Ibid*. at 457.

38. *Ibid*. at 473-74.

39. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

40. *State of Alabama v. United States Dep't of Commerce*, Case No. 2:18-cv-00772 (N.D. Ala., May 21, 2018).

41. See *Ridge v. Verity*, 715 F. Supp. 1308 (W .D. Pa. 1989); and *Federation for American Immigration Reform (FAIR) v. Klutznick, 486 F. Supp. 564* (D.D.C. 1980, appeal dismissed, 447 U.S. 916 (1980).

42. *State of New York, et al. v. United States Dep't of Commerce et al.*, Case No. 18-cv-2921 (S.D.N.Y filed April 3, 2018).

43. *State of New York* was consolidated in the Southern District of New York with *New York Immigration Coalition, et al. v. United States Dep't of Commerce, et al*., Case No. 18-cv-05025 (S.D. N.Y. filed June 6, 2018); *State of California v. Ross*, No. 18-cv-01865 (N.D. Cal. filed March 26, 2018) and *City of San Jose et al. v. Ross*, No. 18-cv-02279 (N.D. Cal. filed April 17, 2018) were consolidated as one case in the Northern District of California. The remaining two suits, *Kravitz, et al. v. United States Dep't of Commerce, et al.*, No. 18-cv-01041 (D. Md. filed April 11, 2018) and *La Union del Pueblo Entero et al. v. Ross et al.*, No. 18-cv-01570 (D. Md. filed May 31, 2018) both are pending separately in the District of Maryland.

44. *Department of Commerce v. New York*, No. 18-966, 588 U. S. ___ (2019).

2 | Equal Population

INTRODUCTION

Equal population is the most fundamental requirement of redistricting for congressional, state and local map-drawing. During the 1960s, after the U.S. Supreme Court ruled that cases involving population disparities were justiciable,[1] and that equal population among districts was a constitutional requirement, the Court began to develop standards for judging equal population claims.

Since then, states, with guidance from the courts, have wrestled with determining how much population deviation is constitutionally allowable between congressional districts, state legislative districts and local electoral districts. This chapter discusses the various standards for congressional and legislative redistricting, as well as the statistical concepts used to measure population equality and disparity:

- Congressional redistricting: Based on Article 1, Section 2 (strict standard of equality)
- Legislative redistricting: Based on the 14th Amendment's Equal Protection Clause (substantial equality)
- Measuring Population Equality Among Districts
- Evolution of the 10% standard for population deviation and legislative redistricting[2]
- Proving discrimination within the 10% range

CONGRESSIONAL REDISTRICTING: BASED ON ARTICLE 1, SECTION 2 (STRICT STANDARD OF EQUALITY[3])

In 1964, the U.S. Supreme Court formulated an equal population requirement for congressional redistricting. In *Wesberry v. Sanders,*[4] the Supreme Court was confronted with considerable population deviation among Georgia's congressional districts following the 1960 census. One district contained

823,680 individuals, while the average population of the state's 10 districts was 394,312.[5] In finding for the plaintiffs, the Court relied heavily on an historical understanding of the conditions leading up to the ratification of the U.S. Constitution. Of particular note was this quotation from James Wilson, a signer of the Constitution, who stated shortly after ratification:

> *"All elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same."*[6]

The Court considered this and other historical evidence when concluding that Article 1, Section 2, of the U.S. Constitution protects the integrity of an individual's vote. As the Court construed in its historical context, the language of Article I, Section 2, stating "that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one person's vote in a congressional election is to be worth as much as another's."[7] This has come to be known as the one-person, one-vote principle.

LEGISLATIVE REDISTRICTING: BASED ON THE EQUAL PROTECTION CLAUSE (SUBSTANTIAL EQUALITY)

Unlike for congressional redistricting, the Court has made clear that state legislative district maps are not subject to the strict standard of population equality based on Article 1, Section 2. Instead the Equal Protection Clause requires "substantial equality" among legislative districts.

The Court distinguished congressional and legislative districting in *Reynolds v. Sims*:

> *"[S]ome distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a [s]tate than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State."*[8]

Reynolds is notable not only for ruling that the 14th Amendment's Equal Protection Clause requires that both houses of a bicameral state legislature must be districted on the basis of population, but also for its guidance about what population-based districting requires. *Reynolds* includes the often-quoted comment that "mathematical nicety is not a constitutional requisite,"[9] but nevertheless states that "the overriding objective must be substantial equality of population among the various districts."[10]

In *White v. Regester*[11] and *Gaffney v. Cummings*,[12] the Court took steps toward devising a standard for adjudicating disparities in legislative district populations. In both cases, the Court reversed district

court decisions. *Gaffney* invalidated a Connecticut General Assembly plan that featured a district deviation of 7.83%, and *White* invalidated a Texas House of Representatives plan that featured a district deviation of 9.9%.

In reversing the district courts in both cases, the court made clear that:

- State redistricting statutes are not subject to the stricter standard of Article 1, Section 2, that is applied in congressional redistricting cases,[13] and
- Minor deviations from mathematical equality do not make out a prima facie case under the Equal Protection Clause.[14]

See Appendix C, Population Equality of Districts from the 2010 Cycle Plans (aka Deviation).

MEASURING POPULATION EQUALITY AMONG DISTRICTS

How is the degree of population equality (or inequality) among legislative or congressional districts measured? The courts have not always been consistent or precise in their terms, and this has led to considerable misunderstanding and confusion. For example, courts have sometimes used terms with definite statistical meaning in a general, nonstatistical manner. A definition of terms, therefore, may be helpful at this point. See Exhibit 2.1 for formulas relating to statistical terminology.[15]

Ideal population. In a single-member district plan, the "ideal" district population is equal to the total state population divided by the total number of districts.[16] For example, if a state's population is 4 million and there are 40 legislative districts, the "ideal" district population is 100,000. There is, then, the need to express the degree to which: l) an individual district's population varies from the ideal; and 2) all districts collectively vary in population from the ideal.

Deviation. The degree by which a single district's population varies from the ideal may be stated in terms of "absolute deviation" or "relative deviation." The "absolute deviation" is equal to the difference between its population and the ideal population, meaning that the district's population exceeds or falls short of the "ideal" by that number of people. For example, if the ideal population is 100,000 and a given district has a population of 102,000, its "absolute deviation" is +2,000. "Relative deviation," the more commonly used measure, is obtained by dividing the district's absolute deviation by the "ideal" population. The resulting quotient indicates the proportion by which the district's population exceeds or falls short of the ideal population and usually is expressed as a percentage of the ideal population. (In the preceding example, the "relative deviation" is +2%).

EXHIBIT 2.1 Statistical Terminology for Redistricting

This table provides information on formulas for statistical terminology used in the redistricting process.

REDISTRICTING GOAL		
Ideal district population	= state population / number of districts	**EXAMPLE:** 10,000 population/10 districts = 1,000 ideal district population
INDIVIDUAL DISTRICTS		
Absolute deviation (sometimes referred to as "raw deviation")	= district population – ideal population	**EXAMPLE:** 975 district population-1,000 ideal population = -25 absolute deviation
Relative deviation (sometimes referred to as "percent deviation")	= absolute deviation / ideal population	**EXAMPLE:** -25 absolute deviation/1,000 ideal population = -0.025 or -2.5% relative deviation
ALL DISTRICTS		
Mean deviation* (also called "average deviation")	= sum of all deviations / number of districts	**EXAMPLE:** -2.5 deviation + 1.5 deviation + 1.0 deviation = 5.0/3 districts = 1.67 mean deviation
Deviation range* (also called "overall range")	= largest positive deviation and largest negative deviation in a plan	**EXAMPLE:** -2.5% largest negative deviation and 1.5% largest positive deviation = deviation range
Overall range* (also called "total deviation")	= largest positive deviation + largest negative deviation (ignoring + or – signs)	**EXAMPLE:** -2.5 largest negative deviation + 1.5 largest positive deviation = 4.0% total deviation

*Can be "absolute" ("raw number") or "relative" (percentage)

Source: NCSL 2019

Mean deviation. The "absolute mean deviation" of a set of districts from the ideal is equal to the sum of the absolute deviations of all the districts divided by the total number of districts. The "relative mean deviation" is equal to the sum of the individual district relative deviations divided by the total number of districts.

Overall range. Perhaps the most commonly used measure of population equality or inequality of all districts in a plan is "overall range," which again can be expressed in absolute or relative terms. The "range" is a statement of the population deviations of the most populous district and the least populous district, expressed in either absolute or relative terms. The "overall range" is the difference in population between the largest and the smallest districts, expressed either as a percentage or as the number of people. Although courts normally measure a plan using the statistician's "overall range," they almost always call it something else, such as "maximum deviation."[17]

None of the foregoing measures provides a complete picture of the degree of population equality or inequality, and perhaps several measures should be used in evaluating any set of districts. (For example,

the overall range may be large because of the large deviation of only one district, but all the remaining districts may be clustered closely around the ideal. The use of "mean deviation" would reveal this.) For purposes of comparison and clarity, this book uses the measures of relative overall range and relative mean deviation expressed simply as overall range and mean deviation.

No Minimal Level of Population Deviation Has Been Accepted by the Court

The Court has rejected arguments by states that suggested there was a minimal, or *de minimis*, level of deviation among congressional districts that is generally allowable under Article 1, Section 2.

According to the Court, Article 1, Section 2, allows only "limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[18]

In 1969 the Court invalidated a congressional map for Missouri's 10 U.S. House districts in *Kirkpatrick v. Preisler*.[19] The map had an overall range, or deviation, of 6%, and the Court rejected the argument that that degree of population deviation was acceptable as *de minimis*. It noted that the establishment of an acceptable *de minimis* variance would be arbitrary, and inconsistent with the "as nearly as practicable" standard commanded by Article I, Section 2.[20] The Court made clear that any amount of deviation in conjunction with the absence of any legally acceptable justification for the population variances would render a map unconstitutional.

The Court's reasoning for rejecting an acceptable *de minimis* standard was clear:

> *Such a practice "would encourage legislators to strive for that [de minimis] range rather than for equality as nearly as practicable"*[21]

Subsequently, in *White v. Weiser*,[22] the U.S. Supreme Court followed *Kirkpatrick* in upholding a district court decision that struck down a Texas congressional plan with an overall range of 4.13% that had a maximum deviation of 2.43% above the ideal district and a minimum deviation of 1.7% below the ideal district. As in *Kirkpatrick*, the Court ruled that the plan was not as mathematically equal as reasonably possible. Further, the Court rejected Texas' stated justification of its desire to avoid fragmenting political subdivisions because alternative plans with less deviations were available that achieved their stated goal.[23]

Justifications for Population Deviations in Congressional Maps

Perhaps the most significant case since *Wesberry* is *Karcher v. Daggett*.[24] In *Karcher*, the Supreme Court affirmed a district court decision that struck down a New Jersey congressional plan that deviated from the ideal-sized district by an average of 0.1384%, or about 726 people. The Court concluded that the New

Jersey Legislature's attempt to justify the deviations—because they were smaller than the estimated undercount in the decennial census—was a form of a *de minimis* standard rejected in *Kirkpatrick*, and any departure from the census count must be supported with "precision."[25]

Most significantly, the Court restated several principles and tests announced in earlier cases.

- Plaintiffs bear the burden of establishing that "population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population."[26]

- If plaintiffs succeed in meeting their burden, the state must "bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal."[27] "...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. As long as the criteria are nondiscriminatory..."[28]

- "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. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the [s]tate's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors."[29]

- The "as nearly as practicable" standard is "inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."[30]

The U.S. Supreme Court recently revisited this issue in *Tennant v. Jefferson County Commission*.[31] In 2011, West Virginia adopted a three-district congressional redistricting plan. The largest of the three districts exceeded the ideal district population by 3,197 people or 0.52%, with the smallest falling below the ideal population by 1,674 people or 0.27%. The plan varied only slightly from the plan in place for the previous decade by moving one county from the Second District to the Third. The state's goal was to avoid splitting a county between two congressional districts. Members of the Jefferson County Commission challenged the constitutionality of the plan, alleging a violation of Article 1, Section 2. In their argument, they asserted that the population variance between the districts was avoidable, given modern redistricting technology that makes drawing plans with very low population variances practicable, and not justifiable under the one-person, one-vote principle.[32]

On direct appeal, the U.S. Supreme Court reversed the district court finding that the state had not sufficiently proven that its effort to maintain county lines was a legitimate state objective.[33] In addition, the Court disagreed with the district court's conclusion that what might have been a minor variance in population when *Karcher* was decided is now a major one in view of the technology available for use in redistricting. Specifically, the court stated:

> *"As an initial matter, the District Court erred in concluding that improved technology has converted a 'minor' variation in Karcher into a 'major' variation today. Nothing about technological advances in redistricting and mapping software has, for example, decreased population variations between a [s]tate's counties. Thus, if a [s]tate wishes to maintain whole counties, it will inevitably have population variations between districts reflecting the fact that its districts are composed of unevenly populated counties. Despite technological advances, a variance of 0.79 percent results in no more (or less) vote dilution today than in 1983, when this Court said that such a minor harm could be justified by legitimate state objectives."*[34]

Further, the Court stated that avoiding contests between incumbents and addressing potential changes in population were legitimate state objectives.[35] In the Court's view, the plan adopted by the West Virginia Legislature was the plan that best advanced the state's several asserted objectives.[36]

As a result of these cases, and as a general rule, state legislatures and redistricting commissions must take care to make congressional district populations as close to equal as practicable. If a congressional plan is challenged on population deviation grounds, courts will look to whether the deviation was unavoidable and, if avoidable, whether the deviation can be justified by the application of nondiscriminatory redistricting criteria or policy. The U.S. Supreme Court has never approved a set level of deviation that constitutes an acceptable "*de minimis*" population disparity. Following *Tennant*, however, the court still appears to be willing to consider justifications for district variances, despite the fact that modern technology makes it practicable to draw plans with deviations approaching zero.

EVOLUTION OF THE 10% STANDARD FOR POPULATION DEVIATION FOR LEGISLATIVE REDISTRICTING

In subsequent decisions, a 10% standard evolved for population for legislative redistricting.

In *Chapman v. Meier*[37] and *Connor v. Finch*,[38] the Court set aside court-ordered plans for the North Dakota Senate and the Mississippi Legislature, respectively. In *Chapman*, the North Dakota plan's variance between the largest and smallest districts was 20.14%. In *Connor*, the variance for the Mississippi Senate plan was 16.5% and for the House plan was 19.3%. While noting that the court-ordered plans

did not support these substantial population deviations with any historically significant state policy or unique features, the Court articulated the following general principles:

- Deviations of less than 10% are considered to be of prima facie constitutional validity in the context of legislatively enacted apportionments.[39]

- When greater deviations exist in a plan, the proponents of the plan must offer a justification for these deviations by showing significant state considerations—e.g., keeping political subdivisions whole—that cannot be achieved with plans of lower deviations.[40]

Most recently, in *Evenwel v. Abbott,*[41] the Supreme Court set out the most succinct formulation on district deviation and the one-person, one-vote rule in redistricting cases since *Reynolds v. Sims.*

> *"States must draw congressional districts with populations as close to perfect equality as possible. But, when drawing state and local legislative districts, jurisdictions are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness. Where the maximum population deviation between the largest and smallest district is less than 10 percent, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule. Maximum deviations above 10 percent are presumptively impermissible".*[42]

Rational State Policies that Could Justify Exceeding the 10% Standard

If a state enacts or adopts a legislative plan with an overall population range exceeding 10% in either chamber and the plan is challenged in court, the state will have the burden of showing that the overall range is necessary to implement a "rational state policy."

In several cases, states have attempted to defend total deviations in excess of 10% by arguing that the deviations were necessary to respect local governmental boundaries and that the deviation under such plans was no more than necessary to achieve that policy.

Maintaining Political Subdivision Lines and Deviation for Legislative Districts

In 1971, in *Mahan v. Howell*,[43] the Supreme Court found that the 16.4% deviation in the Virginia House of Delegates map was constitutional. The Court emphasized that the deviation was lower than those stricken in earlier cases and that the policy of keeping boundaries of local governmental subdivisions whole was a rational state policy.

Further, the Court stated:

> *"The policy of maintaining the integrity of political subdivision lines in the process of reapportioning a state legislature, the policy consistently advanced by Virginia as a justification for disparities in population among districts that elect members to the House of Delegates, is a rational one. It can reasonably be said, upon examination of the legislative plan, that it does in fact advance that policy. The population disparities that are permitted thereunder result in a maximum percentage deviation that we hold to be within tolerable constitutional limits."*[44]

Rational state policies that exempt a map from the 10% standard must be achieved using the least amount of population disparity possible. The Court made this clear in *Millsaps v. Langsdon.*[45] There, Tennessee's apportionment plan for its House of Representatives had a "maximum deviation" of 13.9% and divided 30 counties. The state argued that the "variance" of 13.9% was necessary in order to comply with the state constitutional prohibition on splitting counties, but the plaintiffs presented a plan with a "total population variance" of 9.847% that split only 27 counties. The district court held, and the Supreme Court affirmed, that although the "constitutional provision against splitting counties is a rational state policy to be considered in apportionment legislation," in this case it was "patently unreasonable to justify a 14% variance on the basis of not splitting counties" because, as plaintiffs had shown, fewer counties may be split while decreasing the variance below the goal of 10%.[46]

PROVING DISCRIMINATION WITHIN THE 10% RANGE

While legislative plans with a total deviation of 10% or less are presumed to be constitutional, the presumption is rebuttable. In order to prevail in an Equal Population challenge in which the total plan deviation is below 10%, a plaintiff must establish that illegitimate factors predominated in the redistricting process, such as favoring suburban and rural district residents over urban district residents.[47]

Regional Interests and Incumbent Protection

In *Larios v. Cox*, plaintiffs successfully rebutted the presumptive validity of two of Georgia's state legislative maps enacted by the Georgia General Assembly in 2001 and 2002, although the plan for each chamber had an overall range of 9.98%. A federal district court ruled the maps unconstitutional, ruling that the plans violated the one-person, one-vote principle. The U.S. Supreme Court affirmed.

- In the lower court, testimony was given by legislators and redistricting staff that they believed there was a safe harbor of "+/- 5%" and that population deviations below that level did not have to be supported by any legitimate state interest. Testimony also established that the protection of rural Georgia and inner-city Atlanta, and the protection of Democratic incumbents, instead of "traditional redistricting criteria," were the objectives of the plan creators. While the district

> court acknowledged that districting "is intended to have substantial political consequences," the court implied that partisan advantage alone would not be a legitimate state interest under a "one-person, one-vote" analysis.[48] Regardless of the political interests that played a role in the redistricting however, the district court found that the state's political goals were "bound up inextricably with the interests of regionalism and incumbent protection," and thus made its decision based on these concerns.[49]

In invalidating the maps, the court found that regional protectionism, in contrast to the protection of political subdivisions, such as counties, was not a justification for minor population deviations, noting that, unlike regions, political subdivisions provide many governmental services and that state legislatures often enact local legislation:[50]

> *"a state legislative reapportionment plan that systematically and intentionally creates population deviations among districts in order to favor one geographic region of a state over another violates the one person, one vote principle firmly rooted in the Equal Protection Clause."*[51]

The court also rejected protection of incumbents as a legitimate consideration if the policy is "not applied in a consistent and neutral way." The district court found the incumbent protection in this case to be "overexpansive," stating that the Supreme Court has said only that a general interest in avoiding contests between incumbents may justify deviations from exact population equality, not that the protection of specific incumbents may also justify deviations.[52]

In a concurring opinion, Justice Stevens noted his approval of the majority's rejection of the appellant's argument that "a safe harbor for population deviations of less than 10% [exists], within which districting decisions could be made for any reason whatsoever."[53]

Compliance with the Voting Rights Act

More recently in *Harris v. Arizona Independent Redistricting Commission,*[54] the Supreme Court upheld a district court's decision that rejected a challenge to the commission's state legislative district map with an overall deviation of 8.8%. That court found that "the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act…even though partisanship played some role."[55]

Unlike *Larios,*[56] in *Harris,* the Court found that the petitioners had failed to carry their burden of establishing that the shapes and deviations of the Arizona districts were the product of illegitimate factors predominating in the commission's decision to produce the plan in question.[57] The district court's findings supported the fact that the commission was trying to comply with the Voting Rights Act, and plaintiffs could not show that it was more probable than not that illegitimate considerations were the predominant motivation for the deviations.[58]

CONCLUSION

Since the 1960s, the U.S. Supreme Court has set standards of population equality for congressional and legislative redistricting. In congressional redistricting, little, if any, population deviation is allowed in most cases. Congressional district populations must be as close to equal as practicable. States, however, have more leeway in state legislative redistricting. Plans with an overall deviation of 10% or less are presumptively constitutional. To be successful in challenging these plans, a plaintiff bears the burden of proving that illegitimate factors predominated in the redistricting process. Plans with overall deviations in excess of 10% establish a prima facie case that the map violates the Equal Population requirement, and the state bears the burden of proving that there was a rational state policy that was advanced by the higher overall deviations. Generally, cases that involve keeping governmental subdivisions whole have been the only ones wherein a total deviation in excess of 10% has been sustained.

CASES RELATING TO EQUAL POPULATION (IN CHRONOLOGICAL ORDER)

Reynolds v. Sims[59]

Two counties challenged the validity of the existing apportionment provisions for the Alabama Legislature, which created a 35-member state Senate from 35 districts varying in population from 15,417 to 634,864, and a 106-member state House of Representatives with population variances from 6,731 to 104,767. The Supreme Court held that the Equal Protection Clause of the 14th Amendment requires states to construct legislative districts that are substantially equal in population. "So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal population principle are constitutionally permissible."[60]

Wesberry v. Sanders[61]

Voters in Georgia's Fifth Congressional District—which had a population of 823,680, whereas the average congressional district was 394,312—alleged that this imbalance denied them the full benefit of their right to vote. The Supreme Court held that the population of congressional districts in the same state must be as nearly equal in population as practicable. Congressional districts must be drawn so that, as nearly as is practicable, one person's vote in a congressional election is worth as much as another's vote.

Kirkpatrick v. Preisler[62]

The Missouri General Assembly drew 10 congressional districts with an overall range of approximately 6%. The congressional districts varied in population from about 420,000 to about 445,000. The Supreme Court held that the congressional plan failed to satisfy the "as near as practicable" standard of population equality. The Court declined to establish an acceptable de minimis level of variance for congressional districts because it would be inconsistent with the "as nearly as practicable" standard commanded by Article I, Section 2.[63]

Gaffney v. Cummings[64]

Connecticut voters challenged the 1971 redrawing of Senate and House districts by the Apportionment Board. The Senate districts had a total population deviation of 1.81%. The House districts had a total deviation of 7.83%. The challenge alleged that the population deviations were larger than required by the Equal Protection Clause of the 14th Amendment and split too many town boundaries. The Supreme Court held that "minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Equal Protection Clause of the 14th Amendment."[65]

Mahan v. Howell[66]

In 1971, the Virginia General Assembly enacted statutes apportioning the commonwealth into districts for the purpose of electing members to the General Assembly's House of Delegates and Senate. The plan for the House of Representatives provided for 100 representatives from 52 districts, with each House member representing an average of 46,485 constituents. The maximum percentage variation from the ideal district population of 46,485 was 16.4%; one district was overrepresented by 6.8% and another was underrepresented by 9.6%. Henry Howell challenged the constitutionality of the House redistricting statute because its population deviations were impermissible population variances in the districts and were too large to satisfy the "one-person, one-vote" principle. The Supreme Court held that the plan for the reapportionment of the House of Delegates was constitutional under the Equal Protection Clause, which requires a state to make an honest and good-faith effort to construct districts as nearly equal in population as practicable. The Legislature's plan reasonably advanced the rational state policy of respecting the boundaries of political subdivisions. Also, the plan was not to be judged by the more stringent congressional standards in Article I, Section 2.

White v. Regester[67]

A redistricting plan for the Texas House of Representatives provided for 150 representatives to be selected from 79 single-member districts and 11 multi-member districts. Under the plan, drawn by Texas' Legislative Redistricting Board, the population of the smallest district (71,597) was approximately 9.9% smaller than that of the largest district (78,943). The Supreme Court held that the population variations among the districts were insufficient to establish a prima facie case of invidious discrimination under the Equal Protection Clause of the 14th Amendment. The Court observed: "[v]ery likely, larger differences between districts would not be tolerable without justification 'based on legitimate considerations incident to the effectuation of a rational state policy.'"[68] Legislative redistricting plans are not subject to the stricter standards applicable to congressional redistricting under Article I, Section 2, and the total maximum variation of 9.9% did not involve invidious discrimination in violation of the Equal Protection Clause.

White v. Weiser[69]

The Texas Legislature created a plan for 24 congressional districts. Under the plan, the population of the smallest district (458,581) was approximately 4.1% smaller than that of the largest district (477,856), and the average deviation among districts was .745%, or 3,421 people. The Texas districts were not as mathematically equal as reasonably possible and were therefore unacceptable. The Supreme Court rejected the argument that the variances resulted from the Legislature's attempt to avoid fragmenting political subdivisions because alternative plans with less deviations were available that achieved their stated goal.[70] Article 1, Section 2, of the Constitution permits "only those population variances among congressional districts that 'are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.'"[71]

Chapman v. Meier[72]

A federal district court devised a redistricting plan for the North Dakota Senate. The total variance (overall range) among the districts was slightly more than 20%. The U.S. Supreme Court held that a state legislature must be redistricted so that districts are as nearly of equal population as is practicable. The burden is on the district court to clarify the reasons necessitating any departure from approximate population equality and to articulate the relationship between the variance and the state policies. The Court found that a population deviation of 20% was constitutionally impermissible and could not be justified in the absence of significant state policies or other acceptable considerations.

Connor v. Finch[73]

A federal district court devised a legislative redistricting plan for Mississippi's Senate and House of Representatives. The maximum deviation of the Mississippi redistricting plan by the federal court was 16.5% for the Senate and 19.3% for the House. The U.S. Supreme Court stated that, when a court plan deviates from approximate population equality, it must be supported by enunciation of historically significant state policy or unique features. In this case, the court plan failed to cite any unique feature of the Mississippi political structure that would justify such a deviation. The 16.5% variation of the Mississippi plan was substantial and was not justified by the objective of maintaining county lines.

Karcher v. Daggett[74]

The New Jersey Legislature created a congressional redistricting plan with an overall range of 3,674, or .6984%. It was shown that at least one other plan before the Legislature had a "maximum population difference" (overall range) of only 2,375 people or .4515%, thereby proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population. The Supreme Court stated that there is no level of population inequality among congressional districts that is too small to worry about, as long as those challenging the plan can show that the inequality could have been avoided. The Court reaffirmed that there are no de minimis population variations that could practicably be avoided, but that nonetheless meet the standard of Article I, Section 2, without justification.

Larios v. Cox[75]

In 2001 and 2002, the Georgia General Assembly enacted congressional and state legislative redistricting plans. The state legislative redistricting plans had population deviations just below 10%, while the congressional plan's deviation was minimal. The congressional plan with a total deviation of 72 people was constitutional due to a legitimate state interest in avoiding precinct splits along something other than easily recognizable boundaries, despite testimony that an alternative plan that addressed traditional districting principles with less deviation was possible. The state legislative plans were struck down because the plans violated the one-person, one-vote principle of the 14th Amendment without sufficient justification. The Court found that favoring certain geographic areas and protecting Democratic incumbents were not rational, evenly applied state policies.

Tennant v. Jefferson County[76]

The Jefferson County Commission and residents of Jefferson County alleged that West Virginia's 2011 congressional plan violated the one-person, one-vote principle that derives from Article I, Section 2, of the U.S. Constitution. West Virginia created a redistricting plan that had a maximum population deviation of 0.79% (the variance between the smallest and largest districts). The state conceded that it could have made a plan with less deviation, but that other traditional redistricting principles—such as not splitting counties, avoiding contests between incumbents and preserving the cores of prior districts—were legitimate state objectives. The district court held that "the State's asserted objectives did not justify the population variance." The U.S. Supreme Court reversed the district court and held that the Legislature did provide a sufficient record connecting the state's interests and the necessary deviation needed to sustain those interests.

Evenwel v. Abbott **(2016)**[77]

After the 2010 census, the Texas Legislature redrew its Senate districts. The 2011 redistricting plan was challenged because the districts violated the one-person, one-vote principle. The districts were drawn based on total population rather than on registered voter population and, while the new districts are relatively equal in terms of total population, they varied in total voter population. It was argued that the plan's use of total population violated the Equal Protection Clause by discriminating against voters in districts with low immigrant populations by giving voters in districts with significant immigrant populations a disproportionately weighted vote. The Supreme Court held that its past opinions confirmed that states *may* use total population in order to comply with the one-person, one-vote principle of the Equal Protection Clause. Constitutional history, judicial precedent and consistent state practice demonstrate that drawing legislative districts based on total population is permissible under the Equal Protection Clause. The Court did not hold that other methods are impermissible.

Harris v. Ariz. Indep. Redistricting Comm'n **(2016)**[78]

In 2012, the Arizona Independent Redistricting Commission redrew the map for the state legislative districts. Voters in Arizona challenged the independent commission's state legislative redistricting plan

based on alleged equal population violations stemming from alleged partisan bias. It was argued that the new districts were under-populated in Democratic-leaning districts and over-populated in Republican-leaning ones, and therefore that the commission had violated the Equal Protection Clause of the 14th Amendment. The Arizona Independent Redistricting Commission argued that the population deviations were the result of attempts to comply with the Voting Rights Act. The Supreme Court held that deviations are justified by "legitimate considerations incident to the effectuation of a rational state policy." These legitimate factors include compactness, contiguity, integrity of political subdivisions, competitive balance of political parties and Section 5 of the Voting Rights Act. In addition, plaintiffs must show that it is "more probable than not that a deviation of less than 10 percent reflects the predominance of illegitimate reapportionment factors." The Court found that the deviations were the result of a good-faith effort to comply with the Voting Rights Act, and plaintiffs failed to show that it is more probable than not that the deviation reflects the predominance of illegitimate redistricting factors.

CHAPTER NOTES

1. See *Baker v. Carr*, 369 U.S. 186 (1962) (holding that actions against the State of Tennessee for malapportionment of the state legislature were actionable under the Equal Protection Clause of the 14th Amendment). See also *Gray v. Sanders,* 372 U.S. 368 (1963) (holding that a county "unit" system in Georgia used to determine the outcome of party primaries for statewide elected officers violated the Equal Protection Clause of the 14th Amendment. It is significant that this case states that a concept of political equality can only mean one person, one vote. *Ibid.* at 381. In *Colegrove v. Green,* 328 U.S. 549 (1946), the plurality opinion upheld the dismissal of an equal population claim against the Illinois General Assembly's congressional plan on the basis of a lack of justiciability; however, a majority of the justices concluded the claim was justiciable, thereby opening the door for future congressional redistricting litigation.

2. Throughout this chapter, the term "10% standard" is often used in discussing the one-person, one-vote rule as applied to state and local jurisdictions. While no court decision has specifically found that a 10percent standard exists, courts have taken the position that a 10percent deviation in state and local redistricting plans is presumptively constitutional, placing a burden on plaintiffs challenging such a plan to prove some illegitimate factors predominated in the decision to adopt the plan. This is further discussed in the following pages.

3. The first paragraph of Article 1, Section 2, clause 1 of the U.S. Constitution provides, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

4. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

5. *Ibid*. at 2.

6. *Ibid*. at 17; the phrase "one person, one vote" emanates from this case.

7. *Ibid*. at 7-8.

8. *Reynolds v. Sims*, 377 U.S. 533, 578 (1964).

9. *Ibid*. at 569.

10. *Ibid*. at 579.

11. *White v. Regester*, 412 U.S. 755 (1973).

12. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

13. See *White,* 412 U.S. at 763; *Gaffney,* 412 U.S. at 741-42.

14. See *Gaffney*, 412 U.S. at 745; *White*, 412 U.S. at 764.

15. How "population" is defined for equal population purposes is an issue that seemed to be developing in the 1990s, but did not rise to the forefront in the 2000s. In *Chen v. City of Houston*, the Supreme Court denied certiorari to a case arising from the Fifth Circuit in which a violation of the one-person, one-vote principle was alleged because defining population as total population overrepresented the voting power of districts with a high level of noncitizen residents (532 U.S. 1046 (2001)). The Court of Appeals rejected this argument, ruling that the definition of population was an "eminently political question [that] has been left to the political process" (No. 98-20440, 206 F.3d 502, 528 (5th Cir. 2000)). Justice Thomas issued a dissenting opinion in which he identified a developing circuit split on the issue and opined that a determination by the Court of the constitutionality of using citizen voting-age population would be timely due to the immediacy of the next redistricting cycle (532 U.S. at 1047-48).

16. For purposes of this discussion, it will be assumed that a single-member districting plan is being considered. In districting plans that use multi-member districts, the "ideal" population is more properly expressed as the "ideal" population per representative and is obtained by dividing the total state population by the total number of representatives. The number of representatives, rather than the number of districts, thus would be used in performing statistical calculations for districting plans that employ multimember districts.

17. For example, *Abrams v. Johnson*, 521 U.S. 74, 98-99, (1997) ("overall population deviation"); *Board of Estimate v. Morris*, 489 U.S. 688, 700 (1989) ("maximum percentage deviation"); *Ibid.* at 691, 701 ("total deviation"); *Brown v. Thomson*, 462 U.S. 835, 838 (1983) ("maximum percentage deviation"); *Karcher v. Daggett*, 462 U.S. 725, 729 (1983) ("maximum population difference"); *Ibid.* at732, 738, 765-786 ("maximum deviation"); *Connor v. Finch*, 431 U.S. 407, 416-18 (1977) ("maximum deviation"); *Chapman v. Meier*, 420 U.S. 1, 23 (1975) ("deviation," "variation," "total population variance"); *White v. Weiser*, 412 U.S. 783, 785-790 (1973) ("population difference," "total percentage deviation," "total absolute deviation"); *White v. Regester*, 412 U.S. 755, 761, 764 ("total variation"), 762 ("total deviation"), 763 ("population differential") (1973); *Gaffney v. Cummings*, 412 U.S. 735, 742, 750 (1973) ("maximum variation"); *Mahan v. Howell*, 410 U.S. 315, 319-320 (1973) ("maximum percentage variation," "maximum percentage deviation"); and *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1969) ("population difference").

18. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

19. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); see also, the companion case, *Wells v. Rockefeller*, 394 U.S. 542 (1969).

20. *Kirkpatrick*, 394 U.S.at 531.

21. *Ibid*.

22. *White v. Weiser*, 412 U.S. 783 (1973).

23. "The percentage deviations now before us in S.B. 1 are smaller than those invalidated in *Kirkpatrick* and *Wells*, but we agree with the District Court that, under the standards of those cases, they were not 'unavoidable,' and the districts were not as mathematically equal as reasonably possible. Both Plans B and C demonstrate this much, and the State does not really dispute it." *Ibid.* at 790.

24. *Karcher v. Daggett*, 462 U.S. 725 (1983).

25. *Ibid*. at 738.

26. *Ibid.* at 730–731.

27. *Ibid.* at 731.

28. *Ibid*. at 740.

29. *Ibid*. at 741.

30. *Ibid*. at 731.

31. *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758 (2012).

32. *Jefferson Cty. Comm'n v. Tennant*, 876 F. Supp. 2d 682 (S.D. W. Va. 2012).

33. *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758 (2012).

34. *Ibid*. at 764 (emphasis added) (citations omitted).

35. *Ibid*. The Court also made clear that no precedents required the state to have legislative findings on the "discrete, numerically precise portion" of the variance attributable to each factor.

36. *Ibid*. at 765.

37. *Chapman v. Meier*, 420 U.S. 1 (1975).

38. *Connor v. Finch*, 431 U.S. 407 (1977).

39. *Ibid*. at 418.

40. *Ibid*. at 420; *Chapman*, 420 U.S. at 22-27.

41. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

42. *Ibid*. at 1124 (citations omitted).

43. *Mahan v. Howell*, 410 U.S. 315 (1973).

44. *Ibid*. at 329.

45. *Rural W. Tenn. African-American Affairs Council v. McWherter*, 836 F. Supp. 447 (W.D. Tenn. 1993) *aff'd, Millsaps v. Langsdon,* 510 U.S. 1160 (1994).

46. *Ibid*. at 451-52; see also *Bingham Cty. v. Idaho Comm'n for Reapportionament* (*in Re Petition Challenging Legislative Redistricting*), 55 P.3d 863 (2002), wherein the Idaho Supreme Court struck down a plan with a deviation of over 11 percent and held that the Redistricting Commission's stated purpose of keeping counties and political subdivisions whole could not justify the high deviation when the policy of keeping counties whole was not applied consistently.

47. *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016). But see *Baca v. Berry*, 806 F.3d 1262, 1275 (10th Cir. 2015), wherein the U.S. Court of Appeals for the 10th Circuit noted that *Larios*, being a summary affirmance, is of limited precedential value. This extends to the precise issues presented, and necessarily decided.

48. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1351 (N.D. Ga. 2004).

49. *Ibid*. at 1352.

50. *Ibid.*

51. *Ibid*. at 1347.

52. *Ibid.* at 1329-31.

53. *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring).

54. *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016).

55. *Ibid.* at 1306.

56. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga., 2004), *aff'd Cox v. Larios,* 542 U.S. 947 (2004).

57. *Harris,* 136 S. Ct. at 1309.

58. *Ibid*. at 1309-10.

59. *Reynolds v. Sims*, 377 U.S. 533 (1964).

60. *Ibid*. at 579.

61. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

62. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

63. *Ibid*. at 531.

64. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

65. *Ibid*. at 745.

66. *Mahan v. Howell*, 410 U.S. 315 (1973).

67. *White v. Regester*, 412 U.S. 755 (1973).

68. *Ibid.* at 764 (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

69. *White v. Weiser*, 412 U.S. 783 (1973).

70. "The percentage deviations now before us in S.B. 1 are smaller than those invalidated in *Kirkpatrick* and *Wells*, but we agree with the District Court that, under the standards of those cases, they were not 'unavoidable,' and the districts were not as mathematically equal as reasonably possible. Both Plans B and C demonstrate this much, and the State does not really dispute it." *White v. Weiser*, 412 U.S. 783, 790 (1973).

71. *Ibid.* at 790 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)).

72. *Chapman v. Meier*, 420 U.S. 1 (1975).

73. *Connor v. Finch*, 431 U.S. 407 (1977).

74. *Karcher v. Daggett*, 462 U.S. 725 (1983).

75. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

76. *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758 (2012).

77. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

78. *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016).

3 | Racial and Language Minorities

INTRODUCTION

Since the ratification of the 14th and 15th amendments in 1868 and 1870, respectively, the U.S. Constitution has prohibited the denial of citizens' right to vote based on race or color. Yet, for nearly a century, no mechanism existed to enforce the 15th Amendment. That changed with passage of the Voting Rights Act (VRA) in 1965. Since then, most racial discrimination challenges to redistricting maps allege either a violation of the VRA or the 14th Amendment's Equal Protection Clause.

This chapter provides an in-depth look at how the Equal Protection Clause and the VRA have been applied in these redistricting cases. In this decade, the application of the VRA to certain redistricting cases was significantly affected by a landmark decision from the U.S. Supreme Court in 2013. Since 1965, Section 5 of the VRA required that certain "covered" states and jurisdictions obtain approval (known as "preclearance") for any changes to voting laws, including the adoption of a new redistricting plan. In 2013, however, the U.S. Supreme Court determined that covered states no longer need to seek and obtain preclearance for voting changes. Consequently, the states or jurisdictions that previously needed federal preclearance before adopting their redistricting plans now are free to do so without federal approval. Notwithstanding that ruling, the Supreme Court has continued to refine the fundamental principle that a state's redistricting plan shall not discriminate against any individual on the basis of race, color or membership in a language minority group.

To better understand the nuances of how the Equal Protection Clause and the VRA apply to states as they redraw political boundaries, this chapter covers the following:

- The Equal Protection Clause of the 14th Amendment: A brief summary
- The 15th Amendment: A brief summary
- The Voting Rights Act: A brief summary

- Racial gerrymandering under the 14th Amendment
- Challenges Under the Voting Rights Act

THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT: A BRIEF SUMMARY

Redistricting plans must comply with the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. The Equal Protection Clause, set forth in Section 1 of the 14th Amendment, states in relevant part that:

> *[N]o State shall…deny to any person within its jurisdiction the equal protection of the laws.*[1]

The central purpose of the Equal Protection Clause is to prevent the states from purposefully discriminating between individuals on the basis of race.[2] As applied to redistricting litigation, the Supreme Court recently summed it up as follows:

> *"The Equal Protection Clause prohibits a State, without sufficient justification, from separating its citizens into different voting districts on the basis of race."*[3]

In such a case, a state impermissibly constructs a racial gerrymander that is inconsistent with the Equal Protection Clause. "[A] racial gerrymander [is] the deliberate and arbitrary distortion of district boundaries…for [racial] purposes."[4] Racial gerrymandering is not a new phenomenon. As early as the 1870s, the bulk of the African-American population in Mississippi was concentrated into one congressional district, leaving five other districts with white majorities.[5] In 1960, the boundary of the city of Tuskegee, Alabama, was redefined "from a square to an uncouth twenty-eight-sided figure" to allegedly exclude only blacks from the city limits.[6]

The Supreme Court has interpreted the Equal Protection Clause to require that a redistricting plan "that expressly distinguishes among citizens because of their race [must] be narrowly tailored to further a compelling governmental interest."[7] Such strict scrutiny review applies not only to redistricting plans that expressly distinguish citizens because of race, but also to those plans "that, although race neutral, are, on their face, unexplainable on grounds other than race."[8]

THE 15TH AMENDMENT: A BRIEF SUMMARY

Before 1870, neither the federal Constitution nor federal laws set forth the qualifications for voting in this country.[9] Further, just a few states allowed free African-American men to register and vote.[10] That changed on February 3, 1870, when Congress ratified the 15th Amendment, which declared that

African-Americans had the right to vote and also superseded any state law that directly prohibited their right to vote.[11] Specifically, Section 1 of the 15th Amendment declares:

> *"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."*[12]

Even though the amendment prohibits any citizen from being denied the right to vote regardless of race or color, litigation seeking to guarantee those rights "proved time consuming and ineffective, while the will of those who resisted its command was strong and unwavering."[13] As such, Congress finally sought to remedy this ongoing issue through enactment of the Voting Rights Act of 1965, as amended, "to rid the country of racial discrimination in voting."[14]

THE VOTING RIGHTS ACT: A BRIEF SUMMARY

Despite numerous laws passed by Congress between 1957 and 1964, "these...laws [did] little to cure the problem of voting discrimination."[15] Election officials and states either defied or evaded court orders, "switched to discriminatory devices not covered by the federal decrees or ... enacted difficult new tests designed to prolong the existing disparity" between white and black voter registration.[16] Although the Department of Justice filed individual suits against each discriminatory voting law, this approach proved unsuccessful in increasing black voter registration.[17]

In 1965, Congress adopted the VRA to ensure the all citizens the right to vote, regardless of their race, color or membership in a language minority group.[18] Since 1965, Congress has amended the VRA on a number of occasions.[19] Pertinent sections of the VRA are discussed below.

Section 2 of the VRA

Section 2 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.[20] Section 2 was originally a basic restatement of the 15th Amendment as it applies to all jurisdictions. Based on a 1982 amendment, courts apply a "totality of circumstances" test for determining whether a challenged practice results in an abridgment of the right to vote. A violation of Section 2 is established if:

> *"[B]ased 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 racial, color, or language minority class] ... 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 ... 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."*[21]

Although many of the relevant cases decided since enactment of the VRA have involved challenges to at-large election practices, "discrimination in voting applies nationwide to any voting standard, practice, or procedure that results in the denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group."[22]

Section 5 of the VRA

As interpreted by the U.S. Supreme Court, Section 5[23] was the means "designed by Congress to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century."[24] While it has not been enforceable since 2013, as detailed below, its history is significant.

Section 5 was a temporary provision of the VRA when it was first enacted,[25] but Congress elected to extend its coverage each time it was set to expire.[26] Most recently, in 2006, Congress extended Section 5 so that it would cover all redistricting cycles through 2031, after which it would expire unless extended again.[27]

Section 5 applied only to certain jurisdictions covered under the VRA that, based on a coverage formula set forth in Section 4(b),[28] had previously shown a history of discrimination.[29] Each of these covered jurisdictions was required to preclear any changes in its election laws, practices or procedures with either the U.S. Department of Justice or a special U.S. District Court for the District of Columbia.[30]

Until 2013, each covered jurisdiction could not implement a redistricting plan unless it received approval from the federal government.

In 2013, in *Shelby County v. Holder*, the Supreme Court found the coverage formula in Section 4—requiring specific jurisdictions to preclear changes—to be unconstitutional.[31] In that case, the Supreme Court considered a challenge brought by Shelby County, Alabama, that sections 4(b) and 5 of the VRA were unconstitutional.[32] In reviewing Shelby County's challenge, the Court acknowledged that Congress acted in a "permissibly decisive manner" in 1965 when adopting Section 5 of the VRA.[33] At that time, ample occurrences of electoral race discrimination were occurring, so Congress was justified in adopting Section 5 and applying it to certain jurisdictions for a temporary time period.[34] After recognizing the fact that minority voter turnout exceeded white voter turnout in five of the six states originally covered by Section 5, the Court concluded that the restrictions no longer were warranted by current conditions.[35] Therefore, the coverage formula in Section 4(b) of the VRA was deemed to be an unconstitutional exercise of federal authority, making Section 5 unenforceable.[36]

When striking down the Section 4(b) formula, the Court noted that Congress could draft another formula grounded in current voting conditions that did not rely on an outdated standard. It warned, however, that any such "extraordinary measure" must seek to address an "extraordinary problem" that currently exists.[37]

Section 3 (Bail–In or Pocket Trigger Provision)

Section 3 of the VRA[38] often is referred to as the "bail-in" or "pocket trigger" provision because it provides a means for a court to order any jurisdiction found to have purposefully discriminated against minorities to be subject to preclearance. It does not rely on Section 4(b)'s coverage formula and remains in effect, post-*Shelby County v. Holder*.

An action initiated under Section 3 may be brought by the attorney general or an aggrieved person under any statute to enforce the voting guarantees of the 14th or 15th amendments in any state or political subdivision. The three subsections of Section 3 authorize a court to:[39]

1. Appoint federal observers to enforce the voting guarantees of the 14th or 15th amendments;

2. Suspend the use of tests and devices that deny or abridge the right to vote; and

3. Retain jurisdiction for a time it considers appropriate to evaluate voting qualifications or prerequisites and prevent enforcement until the court determines they do not have the effect of denying or abridging the right to vote, or such qualification or prerequisite has been submitted to the attorney general and the attorney general has not interposed an objection within 60 days.

The application of Section 3 differs from that of Section 5 (described above). Section 3's reliance on the 14th or 15th amendment standard, as interpreted by the courts, requires a finding of intentional or purposeful discrimination, which is typically more difficult for a plaintiff to establish.[40] In addition, retained jurisdiction under Section 3 may be limited by a court so that it requires preclearance of only particular types of actions.[41]

Section 3 has been invoked 20 times in the last four decades, largely in local jurisdictions such as cities, counties or school districts.[42] Only the states of New Mexico[43] and Arkansas[44] have been "bailed in" in the past under this provision, in 1984 and 1990, respectively. Following *Shelby County v. Holder*,[45] requests have been made to apply Section 3 in other jurisdictions, including Texas[46] and North Carolina.[47] The courts in those cases have declined to do so.[48]

RACIAL GERRYMANDERING CHALLENGES UNDER THE 14TH AMENDMENT

After the redistricting cycle following the 1990 decennial census, a number of lawsuits were filed in federal district courts challenging the constitutionality of new redistricting plans from certain states on the grounds that they violated the Equal Protection Clause. Over the next three decades, the Supreme Court continued to hear more cases involving allegations of racial gerrymandering in state redistricting efforts. From these cases, the Supreme Court has established a framework for evaluating racial gerrymander challenges to redistricting plans. These are outlined in brief, with details following.

1. A plaintiff alleging racial gerrymandering must have sufficient standing.

2. The evidence must establish that one or more districts were racially gerrymandered.

3. If sufficient evidence is found, courts are to apply strict scrutiny review of the challenged districts.

Standing

In *United States v. Hays*,[49] the Supreme Court expressly set forth the requirements for standing (i.e., an individual's right to bring an action in court) in racial gerrymandering cases alleging violation of the Equal Protection Clause:

1. A plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

2. There must be a causal connection between the conduct complained of and the injury.

3. It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

An individual has standing to allege a racial gerrymandering claim if he or she resides in a racially gerrymandered district.[50] An individual who lives outside a racially gerrymandered district does not have standing, unless that individual presents specific supporting evidence that he or she personally has been subjected to a racial classification.[51] Without such evidence, that individual is simply alleging a generalized grievance against governmental conduct that is not sufficient to establish standing.[52]

Even members of Congress must prove their own individualized injury in a racial gerrymandering case that could ultimately change their own existing district lines. In 2016, the Supreme Court was asked to decide whether individual members of Congress have sufficient Article 3 standing to appeal a district court's order striking down a congressional redistricting plan.[53] In *Wittman v. Personhuballah*,

three members of Congress were permitted to intervene at the district court level to help defend Virginia's 2013 congressional redistricting plan that plaintiffs challenged as an unconstitutional racial gerrymander.[54] After the three-judge district court ruled in plaintiffs' favor, a remedial map ultimately was approved by that court. Virginia decided not to appeal the remedial map, but the three intervenor members of Congress did appeal it to the Supreme Court. The Court dismissed the appeal after concluding that none of the three members of Congress possessed sufficient standing to appeal. The Court's decision rested in part on the fact that one member chose to run from a different district than the one he represented at the time, while the other two provided insufficient evidence to establish a concrete injury, in addition to the fact that they each represented districts different than the ones that were challenged.[55]

Not only do individual members of Congress have limited standing to appeal decisions in racial gerrymandering cases, state legislative chambers also are limited. In 2019, in *Va. House of Delegates v. Bethune-Hill*, the Supreme Court held that the Virginia House of Delegates did not have standing to appeal a federal district court decision that created a new redistricting plan for the House.[56] The Court held that the House lacked standing because Virginia had not designated that chamber to represent the state's interests, and the House could not appeal in its own right. Instead, under Virginia law, authority and responsibility for representing the state's interests in civil litigation was exclusively within the right of the state's attorney general. See Chapter 10, Enacting a Redistricting Plan through the Legislative Process for further information on who is responsible for representing and defending a state's plan.

The Supreme Court has separately found that associations have standing on behalf of their members to bring suit in racial gerrymandering cases. Specifically, an association must show that "its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit."[57]

Proving a Racial Gerrymander

Once standing is established, the plaintiff next has the burden to prove a racial gerrymandering claim. To do that, the plaintiff must "show, either through circumstantial evidence of a district's shape and demographics or more direct evidence as to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."[58] In 2018, in *Abbott v. Perez*, the Supreme Court reaffirmed this burden of proof and further held that a finding of past discrimination will not change "the allocation of the burden of proof and the presumption of legislative good faith."[59]

PROOF THAT RACE WAS ONE OF MANY CONSIDERATIONS, IN AND OF ITSELF, IS NOT SUFFICIENT TO ESTABLISH A PRELIMINARY CASE OF RACIAL GERRYMANDERING

Although the Supreme Court has found several redistricting plans to be unconstitutional racial

gerrymanders, the Court has made it clear that it "never has held that race-conscious state decision making is impermissible in *all* circumstances."[60] Indeed, the Court acknowledges 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."[61]

PROOF THAT RACE WAS THE PREDOMINANT MOTIVE IN REDISTRICTING IS SUFFICIENT

While race may be one of many factors considered when developing a redistricting plan, the Equal Protection Clause forbids the use of race as a legislature's *predominant* motive in developing one or more specific electoral districts, unless the districts are 'narrowly tailored' to achieve a 'compelling state interest:'[62]

> *"A plaintiff pursuing a racial gerrymandering claim must show that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' To do so, the 'plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'"*[63]

Thus, to establish a racial gerrymander claim, "race must be 'the predominant factor motivating the legislature's [redistricting] decision.'"[64]

In determining predominant motivation, the Supreme Court has cautioned that it is not a threshold requirement that the plan must conflict with traditional redistricting principles:

> "[*A*] *conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering. Of course, a conflict or inconsistency may be persuasive circumstantial evidence tending to show racial predomination, but there is no rule requiring challengers to present this kind of evidence in every case."*[65]

Although traditional redistricting criteria can play a key role in the predominance analysis, the Court clarified in 2015 in *Alabama Legislative Black Caucus v. Alabama* that equal population in particular is not one of the nonracial factors that should be weighed in determining whether race predominates:[66]

> "[*A*]*n equal population goal is not one factor among others to be weighed against the use of race to determine whether race 'predominates.' Rather, it is part of the redistricting background, taken as a given, when determining whether race, or other factors, predominate in a legislator's determination as to how equal population objectives will be met."*[67]

In addition, the analysis of whether race was the predominant factor must be made on a district-by-district basis (not in regard to a state as a whole) and should not be confined to only those portions of the districts that may conflict with traditional districting principles:[68] "A racial gerrymandering claim... applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated 'whole.'"[69] Similarly, in 2017, the Court in *Bethune-Hill v. Va. State Bd. of Elections* found that: "Courts evaluating racial predominance therefore should not divorce any portion of the lines—whatever their relationship to traditional principles—from the rest of the district. . . . The ultimate object of the inquiry, however, is the legislature's predominant motive for the design of the district as a whole."[70]

EVIDENCE FOR PROVING A RACIAL GERRYMANDER

When a plaintiff attempts to prove that race was the predominant factor that motivated a legislature for drawing a district in a particular way, the plaintiff can establish this through: 1) circumstantial evidence of a district's shape and demographics; 2) direct evidence of legislative intent; or 3) a combination of both.[71]

1. **District Shape and Demographics:** The shapes of districts have played an important part in the Supreme Court's decisions: "[R]eapportionment is one area in which appearances do matter."[72] For example, a significant part of the evidence the Court relied on to find racial gerrymandering in a number of cases (including *Shaw v. Hunt*,[73] *Miller*[74] and *Bush*[75]) was the irregular shape of the constructed districts, along with demographic data. In *Miller v. Johnson*, the Court said, "[R]edistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,' ... demands the same close scrutiny that we give other state laws that classify citizens by race."[76]

   The Court additionally noted in *Miller*: "[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale."[77] In fact, "the Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications."[78] Further, in *Cooper v. Harris*, the Supreme Court noted that bizarre shapes may arise from political motivations as well as from racial ones, creating the formidable task of "'a sensitive inquiry' into all 'circumstantial and direct evidence of intent' to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines."[79]

2. **Direct Evidence:** Testimony of state officials, legislators and key staff involved in the drafting process has proven on a number of occasions to provide sufficient direct evidence for the Supreme Court to conclude that race was the predominant factor. See:

   - *Shaw v. Hunt (also known as Shaw II)*,[80] where testimony confirmed the North Carolina General Assembly deliberated creating two districts to assure black-voter majorities;

   - *Bush v. Vera*,[81] where testimony from political figures and statements made in a Section 5 preclearance submission—plus circumstantial evidence that Texas redistricters had access to racial, but not political, data at the block level, enabled redistricters to make more "intricate refinements on the basis of race" than on the basis of other demographic information;[82]

   - *Miller v. Johnson*,[83] where testimony confirmed that the 11th District was created by the Georgia General Assembly for the purpose of creating a majority black district;

   - *Alabama Legislative Black Caucus v. Alabama*,[84] where testimony established that a primary goal was to create a redistricting plan to maintain existing racial percentages in each majority-minority district;

   - *Bethune-Hill v. Virginia State Bd. of Elections*,[85] where testimony showed that race had predominated over traditional districting factors in that the state had employed a mandatory black voting-age population (BVAP) floor of 55% in constructing the challenged districts; and

   - *Cooper v. Harris*,[86] which upheld the lower court's finding of racial predominance respecting a district because the direct evidence offered included witness testimony from North Carolina legislators and experts.

Technological Evidence: The Supreme Court also has recognized the ready availability of racial and voting data and the power redistricters have "to manipulate district lines on computer maps, on which racial and other socioeconomic data were superimposed."[87] However, "[t]he use of sophisticated technology and detailed information in the drawing of majority-minority districts is no more objectionable than it is in the drawing of majority-majority districts."[88] Instead, the Court considers such data to be evidentially significant when considering whether race was the predominant factor.[89]

Use of Alternative Maps and Direct Evidence in Mixed Motive Cases: The Supreme Court has recognized that some cases exist where racial and partisan motives intertwine, and has determined that, when they do, race must not predominate. In *Easley v. Cromartie*, the Court held that the lower

court erred when it concluded that race predominated when the North Carolina General Assembly put black voters into a district to make it more Democratic.[90] In North Carolina, voter registration data by party was available, as was voter registration by race. The Supreme Court determined that the lower court should have taken into account evidence that black Democrats were more reliable in voting for Democratic candidates than white Democrats. Therefore, it could be concluded that the predominant motivation for drawing the district was to make a more reliable Democratic district by increasing its percentage of the more reliable Democratic (i.e., black) voters.[91]

A combination of circumstantial and direct evidence: In a case such as *Cromartie*, where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the plaintiffs must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. The plaintiffs also must show that those districting alternatives would have brought about significantly greater racial balance.[92] This proof, however, need not necessarily include an alternative map that achieves the legislature's political objectives while improving racial balance. Instead, it can rely on direct and circumstantial evidence to persuade the trial court that race, not politics, was the predominant consideration in deciding to place a significant number of voters within or without a particular district: "[a]n alternative map is merely an evidentiary tool to show that such a substantive violation has occurred; neither its presence nor its absence can itself resolve a racial gerrymandering claim."[93]

Strict Scrutiny

If a court finds through circumstantial and/or direct evidence that traditional redistricting principles were subordinated to race and that race was the predominant factor used in a redistricting, strict scrutiny applies and the state must "demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest."[94]

DOES THE STATE HAVE A COMPELLING STATE INTEREST?

Historically, the Supreme Court has recognized that a state has a compelling governmental (or state) interest in eradicating the effects of past discrimination and in complying with the requirements of the VRA.[95] These are addressed separately below.

A compelling interest in remedying past discrimination. To show that a state had a compelling state interest in remedying past or present discrimination, two conditions must be satisfied. First, the state "must identify that discrimination, public or private, with some specificity before [it] may use race-conscious relief."[96] Second, "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative-action program.'"[97]

A compelling interest in complying with Section 2 of the VRA (and the *Gingles* test). A majority-minority district that is created to comply with Section 2 of the VRA, while drawn predominantly using race as a factor, may not be a racial gerrymander if a court determines that compliance with the VRA was necessary. That is, that a compelling state interest exists for drawing the district along racial lines. In such a case, a plaintiff may prove that a district was drawn with race as the predominant consideration, but strict scrutiny analysis would determine that compliance with the VRA was a compelling state interest. Whether or not a compelling state interest exists is determined by direct evidence that minority vote dilution would occur in the absence of a majority-minority district. Whether vote dilution is present in a district is determined by a preliminary three-part test and a review of additional objective factors, both outlined in *Thornburg v. Gingles* (see page 54).

In applying the *Gingles* test, additional "objective" factors are to be considered to determine the "totality of circumstances" surrounding an alleged Section 2 violation. These are described in detail below under *Thornburg v. Gingles*.

IS THE REDISTRICTING PLAN NARROWLY TAILORED?

When a state asserts it has a compelling state interest in creating a race-based district, courts will apply "strict scrutiny" to determine whether the plan is narrowly tailored to achieve the compelling governmental interest. A state "must show not only that its redistricting plan was in pursuit of a compelling state interest, but also that its districting legislation is narrowly tailored to achieve [that] compelling interest."[98]

The Court has held "that race-based districting is narrowly tailored to that objective if a State has good reason to think that all the *Gingles* preconditions are met, then so too it has good reason to believe that Section 2 requires drawing a majority-minority district. But if not, then not."[99]

When a compelling state interest exists, "the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored."[100] At the same time, any state action based on race must not go too far.[101]

CHALLENGES UNDER THE VOTING RIGHTS ACT

The Evolution of Section 2 Cases

Since the *Shelby County* decision, Section 2 of the VRA remains applicable to all jurisdictions. Section 2 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. Courts apply the "totality of circumstances" standard for determining a violation of Section 2.

In the redistricting context, Section 2 prohibits minority vote dilution, and cases fall into one of two categories: 1) those in which the political process was not equally open to certain minorities because of the use of multi-member districts or at-large voting schemes; and 2) those in which "dilution of [a] racial minority group" occurs in single-member districts through the "dispersal of [minorities] into districts in which they constitute an ineffective minority of voters or from the concentration of [minorities] into districts where they constitute an excessive majority."[102] This is commonly referred to as cracking and packing.

Multi-member, at-large and single-member districts can result in impermissible vote dilution of a minority population under Section 2 if a court finds evidence of discrimination in voting, denial of the group's ability to elect preferred candidates, and a sufficient remedy is available. These factors are discussed below.

Discriminatory Effect Versus Discriminatory Intent

In the 1980 case of *City of Mobile v. Bolden*,[103] the Supreme Court rejected earlier cases that measured the effects of particular voting practices and ruled that plaintiffs must prove intent to discriminate in order to prove a vote dilution claim. Congress disapproved of the *Bolden* decision, and in 1982 amended Section 2 of the VRA to codify the discriminatory effect factors analyzed in the pre-*Bolden* court decisions.[104] Thus, the focus shifted from discriminatory intent back to discriminatory effects or "results."

Subsequently, between 1982 and 1986, numerous lower court decisions upheld the constitutionality of the 1982 amendments.[105] Several of these cases dealt with the use of multi-member districts and reaffirmed that those districts were not a violation per se of Section 2.[106]

THORNBURG V. GINGLES

In the seminal case for Section 2 following the 1982 amendments, the Supreme Court considered a claim by black citizens that the 1982 North Carolina state legislative redistricting plan impaired black voters' ability to elect representatives of their choice in violation of the 14th and 15th amendments, as well as Section 2.[107] The plaintiffs challenged the plans for one multi-member state Senate district, one single-member state Senate district, and five multi-member state House districts. The plaintiffs claimed that the North Carolina plan diluted their votes by submerging the black votes in a multi-member district with a substantial white voting majority.[108]

In its opinion, the Supreme Court first gave an exhaustive analysis of the legislative history of Section 2. After doing so, the Court rejected the earlier test of intent to discriminate and affirmed that a court, in deciding whether a violation of Section 2 has occurred, is to determine if "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[109]

To answer this question, a court "must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'"[110] The factors to be considered in determining the "totality of circumstances" surrounding an alleged Section 2 violation was similar to those mentioned pre-*Bolden* and in the 1982 Senate legislative history:

1. The extent of the history of official discrimination touching on the minority group 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, anti single-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 group;

5. The extent to which the members of the minority group bear the effects of discrimination in areas such as education, employment and health that 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 particular needs of the group; and

9. Whether the policy underlying the use of the voting qualification, standard, practice or procedure is tenuous.[111]

In addition to a review of these "objective" factors, the *Gingles* Court developed a new three-pronged test that a plaintiff must meet in order to establish a preliminary vote dilution claim under Section 2. As stated earlier, the test (or preconditions) requires a group of plaintiffs to prove that:

1. The racial or language minority group "is sufficiently numerous and compact to form a majority in a single-member district."

2. The minority group is "politically cohesive," meaning its members tend to vote similarly.

3. The "majority votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate."[112]

Ultimately, the Court held that all but one of the challenged 1982 multi-member districts were characterized by racially polarized voting; a history of official discrimination in voting matters, education, housing, employment and health services; and campaign appeals to racial prejudice. Those factors, in concert with the use of multi-member districts, impaired the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice.[113]

With respect to the remaining multi-member district, the Court found that the lower court had ignored the success of black voters in that district to elect the candidate of their choice over several election cycles. This success resulted in proportional representation, which was inconsistent with the allegation that black voters in that district were less able to elect representatives of their choice than white voters.[114]

POST-*GINGLES* ISSUES AND QUESTIONS

Since *Gingles* was decided in 1986, interpretation of Section 2 has evolved when considering both the application of the *Gingles* preconditions and the totality of the circumstances test.

Application of the *Gingles* Preconditions

➔ *Do the Gingles Preconditions Apply to Single-Member Districts and May Minority Groups Be Aggregated to Meet Them?*

In *Growe v. Emison*,[115] the Supreme Court specifically ruled that the *Gingles* preconditions for a vote dilution claim apply to single-member districts as well as to multi-member and at-large districts.[116] Recognizing that *Gingles* found that multi-member districts and at-large districts pose greater threats to minority-voter participation than single-member districts,[117] the Court chose not to hold the more dangerous multi-member districts to a higher threshold than challenges to single-member districts.[118] Consequently, the *Gingles* preconditions also applied to single-member districts. After applying those, the Court found that there was no evidence of the second or third *Gingles* conditions. Thus, the plaintiffs' claim failed to meet the *Gingles* preconditions, the Supreme Court found there was no need to create a majority-minority district.[119] The Court also noted that the minority voters in this case were a combination of at least three distinct ethnic and language minority groups, and, without deciding if such aggregation were permissible, held that proof of minority political cohesion is all the more essential in such a case.[120]

➔ *What Does Majority Mean in the First Prong?*

In *Bartlett v. Strickland*,[121] the Supreme Court finally delineated the meaning of "majority" in the first *Gingles* prong. The case was an appeal from a North Carolina Supreme Court decision that found a state legislative district in violation of the state of North Carolina Constitution's prohibition on

splitting county lines. The General Assembly had claimed that the district was necessary to comply with Section 2 of the VRA.[122] The district in question was 42.37% black in total population and 39.09% black in voting-age population. The North Carolina Supreme Court interpreted Section 2 compliance to require a district only in which the minority group was a numerical majority—more than 50%—of the voting-age citizen population. The Supreme Court agreed and rejected the state's assertion that the first *Gingles* prong can be satisfied by what the state called an "effective minority district" or, more specifically, a crossover district in which the minority is less than 50% of voting-age population, but can elect its preferred candidates with the "crossover" votes of the majority.[123] The *Strickland* Court cautioned that its ruling concerned the *Gingles* precondition for considering an "effects" violation of Section 2, and insisted that its decison did not apply to consideration of a discriminatory "purpose" violation.[124] Specifically, the Court said "...if there were a showing that a state intentionally drew district lines in order to dismantle otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."[125]

➔ *Must Minority-Groups Be Geographically Compact to Meet the First Prong?*

In *League of United Latin American Citizens (LULAC) v. Perry*,[126] the Supreme Court considered a mid-decade congressional redistricting that occurred in Texas. After determining that the Texas Legislature's mid-decennial redistricting did not violate the Equal Protection Clause as a partisan gerrymander, the Court did find a violation of Section 2 in one congressional district because the new district failed the first *Gingles* precondition. Specifically, the new map dismantled a Latino district with a citizen voting-age population (CVAP) of over 50%, replacing it with a district comprised of a majority Hispanic voting-age population but with a CVAP below 50%. In an attempt to comply with Section 2, a new Latino district was drawn extending 300 miles, uniting two distant Latino populations located at opposite ends of the state. Consequently, plaintiffs argued, the Texas Legislature dismantled an effective Hispanic district replacing it with a district comprised of two "disparate communities of interest."[127] The Supreme Court agreed with the plaintiffs on the basis that the two distinct populations in the new district were not sufficiently compact. The Court distinguished geographical compactness with the compactness required under Section 2, explaining that in an Equal Protection claim, the compactness focus should be on the contours of the district's lines to evaluate if race was the predominant factor; however, for the first *Gingles* prong in a Section 2 claim, the focus should be on the compactness of the minority group, not on the district's shape, and the "[compactness] inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'"[128]

➔ *Does Section 2 Require Majority-Minority Districts in Place of Crossover Districts to Meet the Third Prong?*

In *Cooper v. Harris*,[129] the Supreme Court heard a challenge to the redrawing of two congressional districts in North Carolina on the grounds that they were racial gerrymanders. As to one district, North Carolina defended it on the grounds of complying with Section 2.[130] The district had a long history as

an effective minority crossover district with fewer than 50% citizen voting-age population, but the state contended that, post-*Bartlett*, Section 2 could not be satisfied by crossover districts, and increased the minority citizen voting-age population in the district to more than 50%.[131] The Supreme Court held that, in areas with substantial crossover voting, Section 2 plaintiffs would not be able to establish the third *Gingles* precondition of racial bloc voting, and would therefore be unable to establish a claim.[132] Since the *Gingles* preconditions could not be established, the state had no compelling interest to comply with Section 2 and thus could not satisfy the requirements of strict scrutiny.

Application of the Totality of Circumstances Test

➔ *Are States Required to Maximize Majority-Minority Districts and Can Proportionality Be a Safe Harbor?*

In *Johnson v. DeGrandy*,[133] plaintiffs argued that the legislative redistricting plan in Florida was improper because it was possible to draw additional districts in Dade County that would have Hispanic majorities. The Supreme Court focused on the "totality of the circumstances" as articulated in *Gingles* and rejected the argument that states are required to maximize majority-minority districts: "Failure to maximize cannot be the measure of Section 2."[134]

The Supreme Court also rejected an absolute rule that would bar Section 2 claims if the number of majority-minority districts is proportionate to the minority group's share of the relevant voting-age population. The Court found that offering states a "safe harbor" might lead to other misuses, such as creating a majority-minority district in an area in which racial bloc voting was not present so that one would not have to be drawn in an area that needed one. Rather, the Court considered the totality of the circumstances, and by doing so, the Court found that, since Hispanics and blacks could elect representatives of their choice in proportion to their share of the voting-age population and since there was no other evidence of either minority group having less opportunity than other members of the electorate to participate in the political process, there was no violation of Section 2.

➔ *Can a State Draw Majority-Minority Districts Not Required by Section 2?*

In *Voinovich v. Quilter*,[135] the Supreme Court addressed the issue of whether Section 2 prohibits the "wholesale creation of majority-minority districts" unless necessary to remedy a Section 2 violation. A redistricting plan for Ohio included eight majority-minority districts, and plaintiffs contested that black voters were illegally packed into a few districts where they constituted a supermajority. They argued these voters should have been dispersed to create "influence" districts in which they would not constitute a majority, but could, with white crossover votes, elect candidates of their choice. The Supreme Court held that a state is free to draw districts however it wants, so long as it does not violate the U.S. Constitution or the VRA, and that, absent a Section 2 violation, the section does not prohibit creation by the state of majority-minority districts. In *Voinovich*, the Court found that the

Gingles preconditions were not met because Ohio did not suffer from racially polarized voting; thus the plaintiffs could not prove a violation of Section 2 of the VRA.

➔ *What Type of Statistical Techniques Can Be Used to Measure Racial Polarization?*

Under *Gingles*' three-part test, proof of legally significant racially polarized voting is an indispensable element of a Section 2 vote dilution claim. Racially polarized voting (also referred to as racial bloc voting) exists when the race of a candidate determines how a voter votes.[136] Since it is generally unknown how members of each race vote for particular candidates, parties to a Section 2 claim and courts are forced to rely on various statistical techniques to estimate how minority voters and majority voters voted in a challenged electoral district. Testimony by witnesses who are familiar with local politics and voting behavior generally is presented in conjunction with statistical evidence to corroborate or contradict statistical findings.[137]

The most commonly employed statistical techniques for measuring racially polarized voting are homogeneous precinct analysis[138] and bivariate regression analysis.[139] These two statistical measurements were endorsed, but not mandated, by the Supreme Court in *Gingles*.[140]

Homogeneous precinct analysis: A "homogeneous precinct" is defined as a precinct that has at least a 90% minority group population or at least a 90% majority population.[141] This analysis isolates racially segregated precincts, determines how members of the predominant race in each of these precincts voted, and uses the results to estimate the voting behavior of other members of that race throughout the challenged electoral district. Although popular in vote dilution cases as an easily comprehensible statistical technique, homogeneous precinct analysis is rarely used alone to estimate racially polarized voting.[142] Among the disadvantages cited for exclusive reliance on homogeneous precinct analysis is that it depends on small samples that may underrepresent the makeup of the precinct. Another disadvantage is the underlying assumption that majority and minority voters who live in racially mixed, or nonhomogeneous, precincts will vote the same way as members of their race in the homogeneous precincts voted.[143]

Bivariate regression analysis: Bivariate regression analysis often is used to complement the results of a homogeneous precinct analysis.[144] This analysis examines the relationship between the racial composition of a precinct and the percentage of votes a candidate receives from that precinct. The resulting correlation derived from the aggregated precinct data is used to estimate the voting behavior of individual voters throughout the challenged electoral district. Bivariate regression analysis relies on both homogeneous and racially mixed precincts for its data. Unlike homogeneous precinct analysis, bivariate regression analysis takes into account the potential of minority voters in racially mixed precincts to vote differently from minority voters in homogeneous precincts.[145]

The *Gingles* Court avoided establishing any mathematical formula for determining when racial polarization exists. According to the Court, the amount of white bloc voting necessary to defeat the minority bloc vote plus white crossover votes will vary from district to district, depending on factors such as the percentage of registered voters in the district who are minorities, the size of the district, the number of seats open and the candidates running in a multi-member district, the presence of majority vote requirements, designated posts, and prohibitions against bullet voting.[146]

The Court made clear that each challenged district must be individually evaluated for racially polarized voting, and that it is improper to rely on aggregated statistical information from all challenged districts to show racial polarization in any particular district.[147] The Court also noted that showing a pattern of bloc voting over a period of time is more probative of legally significant racial polarization than are the results of a single election.[148] The number of elections that must be studied varies, depending primarily upon how many elections in the challenged district fielded minority candidates.[149] Studies of elections involving almost exclusively white candidates, even where those studies show that a majority of blacks usually vote for winning candidates, have been rejected in favor of studies of elections involving head-to-head candidacies between minorities and whites.[150]

In determining whether voters can establish a violation of Section 2 of the VRA, courts have employed several different terms. Among the most-frequently used are "majority-minority districts," "effective minority districts," "crossover districts," "coalitional districts," and "influence districts." Brief explanations follow of each term, as well as holdings related to the application of Section 2 to those districts. See Exhibit 3.1.

EXHIBIT 3.1 **Vocabulary for Analyzing Districts for Potential Section 2 (VRA) Violations**

DISTRICT TYPE	DEFINITION	SECTION 2 APPLICATION
Majority-Minority District	A district in which the majority of the population is a minority race, ethnicity, or language group, such as African-American, Hispanic, Asian, Pacific Islander or Native American.	Section 2 does not require drawing a majority-minority district in which the minority group is *less than* 50% of the district's voting-age population.[151]
Effective Minority District	A district containing sufficient population to provide the minority community with an opportunity to elect a candidate of its choice. The minority percentage that is necessary to provide minorities an opportunity to elect their candidate of choice varies by jurisdiction and minority group.[152]	Section 2 does not apply if minority voters *are* able to elect candidates of their choice from a district, as plaintiffs would be unable to establish legally significant racial bloc voting that usually defeats the minority's preferred candidate.[153]

Crossover Districts	A type of effective minority district in which the minority group is not a numerical majority of the voting-age population, but is potentially large enough to elect its preferred candidate by persuading enough majority voters to cross over to support the minority's preferred candidate.	Section 2 does not apply if minority voters *are* able to elect candidates of their choice from a district (see above).
Coalitional Districts	Another type of effective minority district in which more than one minority group, working in coalition, can form a majority to elect their preferred candidates.	Section 2 does not apply if minority voters *are* able to elect candidates of their choice from a district (see above).
Influence Districts	A district in which the minority community, although not sufficiently large to elect a candidate of its choice, is able to influence the outcome of an election and elect a candidate who will be responsive to the interests and concerns of the minority community.	Section 2 does not apply when the minority community *is* able to elect a candidate of its choice.[154]

Source: NCSL, 2019

CONCLUSION

Although the 14th and 15th amendments of the U.S. Constitution have prohibited the denial of the right to vote by citizens based on race and color since 1868 and 1870, respectively, vote disenfranchisement continued in many jurisdictions, leading to passage of the Voting Rights Act of 1965. The VRA provided robust enforcement mechanisms and went further to prohibit all voting practices or procedures that discriminate on the basis of race, color or membership in certain language minority groups.

Both the 14th Amendment and the VRA have been used to protect voters against discriminatory practices in the redistricting process. The 14th Amendment prohibits racial gerrymandering. Section 2 of the VRA prohibits minority vote dilution in situations where significant racially polarized voting is prevalent.

Section 5 of the VRA had been designed to prevent the dilution of voting power of minorities by requiring preapproval of redistricting maps (or any changes to election procedures) in specified states or jurisdictions before being used in an election. The Supreme Court rendered this provision unenforceable when it ruled in 2015 in *Shelby County v. Holder* that the coverage formula used for determining what jurisdictions would have to preclear their maps was outdated. Section 2 of the VRA, which prohibits dilution of minority voting power nationwide, remains in effect.

These constitutional and statutory protections against racial discrimination in redistricting together require that race be considered in the redistricting process in order to ensure that a map does not have the effect of discriminating against any group of voters based on race. At the same time, however, race cannot be the predominant consideration when drawing electoral districts (unless compliance with the VRA is required).

CASES RELATING TO RACIAL AND LANGUAGE MINORITIES (IN CHRONOLOGICAL ORDER)

City of Mobile v. Bolden[155]

Minority citizens sued the city and its commissioners, alleging the practice of electing the city commissioners at-large unfairly diluted the voting strength of black citizens and violated their constitutional rights and Section 2 of the Voting Rights Act of 1965. The Supreme Court ruled that to show a violation of the 15th Amendment requires showing not only a discriminatory effect, but also a discriminatory purpose. The Court noted that the 15th Amendment had language equivalent to Section 2 of the Voting Rights Act. Following the 1982 amendments to the VRA, discriminatory effects now are sufficient to establish a claim under Section 2.

Thornburg v. Gingles[156]

In 1982, a legislative redistricting plan for the North Carolina General Assembly was enacted that created seven new districts. It was argued that the state had diluted black voting strength in violation of Section 2 of the Voting Rights Act of 1965 by enacting a redistricting plan consisting of one single-member and six multi-member districts. The Supreme Court interpreted the new language of Section 2 concerning discriminatory effects. The Court enunciated that Section 2 requires the breakup of multi-member districts into minority single-member districts when three preconditions are met: 1) That the minority group is sufficiently large and compact that it can be drawn as a majority of a single-member district; 2) That the minority group is politically cohesive; and 3) That the majority usually votes as a bloc so as to defeat the minority's choices for representative. When the three preconditions are met, the court's task then is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters.

Growe v. Emison[157]

The Court ruled that the *Gingles* preconditions for a vote dilution claim apply to single-member districts as well as to multi-member or at-large districts. The Court found that it would be peculiar to hold challenges to the more dangerous multi-member districts to a higher threshold than challenges to single-member districts. Therefore, the Supreme Court held that the *Gingles* requirements for breakup of a multi-member district apply as well to a Section 2 claim against a single-member district.

Voinovich v. Quilter[158]

Pursuant to the Ohio Constitution, a reapportionment board proposed a plan that included eight majority-minority districts. It was alleged that the plan illegally packed black voters into a few districts where they constituted a supermajority. The Supreme Court said a state is free to draw majority-minority districts, if doing so does not otherwise violate the law. Further, plaintiff's Section 2 claims failed because they did not satisfy the third prong of the *Gingles* test: sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice.

Shaw v. Reno[159]

North Carolina gained an additional congressional seat and a new district was created after the 1990 census. The new district was extremely narrow and over 150 miles long. Plaintiffs argued that a North Carolina congressional district was so bizarrely shaped that it amounted to a "racial gerrymander," which they claimed violated the Equal Protection Clause. The Court rejected the state's defense that the district was justified as a so-called "majority-minority district," holding that the Voting Rights Act required no such district to be drawn where one did not previously exist. The Supreme Court recognized a right to participate in a color-blind electoral process and a new claim of "racial gerrymandering." The Court said it is a legitimate Equal Protection claim to assert that a district is so extremely irregular on its face that it could rationally be viewed only as an effort to segregate races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification.

Johnson v. De Grandy[160]

In Florida, plaintiffs objected to a legislative redistricting plan because it was possible to draw additional districts in Dade County that would have Hispanic majorities. The state argued that, because the number of majority-minority districts was proportionate to the number of minorities in the population, there could be no vote dilution. The Supreme Court upheld the plan where minority voters had formed effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population, even though more minority districts could have been drawn. The Court said Section 2 did not require maximization of minority districts. However, the Court issued caveats about the role of proportional representation: dilution. While proportionality is an indication that minority voters have equal political and electoral opportunity in spite of racial polarization, it is no guarantee, and it cannot serve as a shortcut to determining whether a set of districts unlawfully dilutes minority voting strength.

United States v. Hays[161]

The state of Louisiana created a new congressional districting plan that contained two majority-minority districts. One of the two districts, District 4, was of irregular shape and contained all or part of 28 parishes and five of Louisiana's largest cities. A group of District 4 voters challenged the districting plan as being a racial gerrymander under the state and federal constitutions and the Voting Rights Act. While an appeal was pending, the Louisiana Legislature repealed the districting plan and enacted

a new one. The new plan still contained two majority-minority districts, but changed the boundaries of District 4. As a result of the new plan, the plaintiffs resided in District 5 instead of in District 4. The Supreme Court said standing equals injury in fact, causal connection, and likely redress by the remedy sought. For a racial gerrymandering claim against a district, those criteria can be met only by a resident in the district.

Miller v. Johnson[162]

After the 1990 decennial census, Georgia was entitled to an additional congressional seat, which prompted the Georgia General Assembly to redraw the state's congressional districts. The General Assembly created a majority-black district, but it extended from Atlanta to the Atlantic, covered 6,784.2 square miles, and split eight counties and five municipalities along the way. The Supreme Court said that, even absent a bizarrely shaped district, an allegation that race was the General Assembly's dominant and controlling rationale in drawing district lines was sufficient to state a racial gerrymandering claim. The Court affirmed a decision that invalidated the congressional redistricting plan because race predominated in drawing district lines. Districts with a substantially odd shape are subject to strict scrutiny under the Court's Equal Protection analysis.

Bush v. Vera[163]

This Texas case involved racial gerrymandering challenges to state redistricting efforts following the 1990 census. The Supreme Court said the drawing of a district in which race was the predominant motivating factor is subject to strict scrutiny as racial gerrymandering. The Court stated the districts were highly irregular in shape and neglected traditional districting criteria such as compactness. Three districts were subject to strict scrutiny, since race predominated in their creation. The Court found that districts could not be justified by Section 2 unless there is a strong basis in evidence that the district was reasonably necessary to avoid the result of denial or abridgments of equal right to vote. Further, a district could not be justified by Section 5 unless it was reasonably necessary to prevent retrogression. Increasing a minority percentage in a district is not justified as prevention of retrogression. From the beginning, the predominant factor in creating majority-minority district plans was based on racial data for the three additional congressional seats. The redistricting plans violated the Equal Protection Clause of the 14th Amendment.

Easley v. Cromartie[164]

After the Supreme Court found that the North Carolina General Assembly violated the Constitution by using race as the predominant factor in drawing its 12th Congressional District's 1992 boundaries, the state redrew these boundaries. The revised plan included a majority-black district that was highly irregular in shape and geographically not compact. The Supreme Court upheld a minority district against a racial gerrymandering claim, saying that, where racial identification correlates highly with political affiliation, the plaintiff in a racial gerrymandering case must show that the General Assembly could have achieved its legitimate political objectives in alternative ways that were comparably

consistent with traditional districting principles and yet would have brought about significantly greater racial balance.

League of United Latin Am. Citizens v. Perry[165]

In 2006, the Supreme Court demonstrated how compactness is used differently when analyzing minority vote dilution claims versus analyzing racial gerrymandering claims. Texas Congressional District 23, as drawn by a federal court in 2001, had included a Latino majority of the citizen voting-age population. The Texas Legislature's mid-decade redistricting had modified District 23 to include a Latino majority of the voting-age population, but not of the citizen voting-age population. To comply with Section 2 of the Voting Rights Act, the Legislature's plan created a new District 25 from two far-flung Latino communities—one in the central part of Texas touching Austin, and another on the southern border with Mexico. The Court found that creating a Latino-majority district from two Latino populations that were not "compact" did not compensate for dismantling District 23, where the Latino population was compact. The Court noted that the compactness analysis in a Section 2 Voting Rights Act vote dilution case is more involved than in the Equal Protection context, which considers the relative compactness of the contours of a district. In the context of vote dilution under Section 2, however, the analysis must include the social and demographic characteristics of the minority populations within it. "[I]t is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 non-compact for Section 2 purposes."[166]

Bartlett v. Strickland[167]

The North Carolina Constitution's "Whole County Provision" prohibited the General Assembly from dividing counties when drawing its own legislative districts, and in 1991 the General Assembly drew House District 18 to include portions of four counties. In 2003, the district was redrawn, and the African-American voting-age population in District 18 had fallen below 50%. Legislators split portions of Pender County and another county. District 18's African-American voting-age population was now 39.36%, and if Pender County was kept whole, it would have resulted in an African-American voting-age population of 35.33%. The Supreme Court ruled that the compactness precondition of *Gingles* requires that the minority group must be drawable into a numerical majority—more than 50% of voting-age population—in the district. Section 2 does not mandate drawing "crossover" districts, in which the minority can elect its preferred candidate with the help of some white voters. The Court did not discuss the question of citizenship in the context of an African-American minority.

Shelby County v. Holder[168]

Shelby County, Alabama, challenged sections 4(b) and 5 of the Voting Rights Act of 1965, claiming that the act was unconstitutional because it required some, but not all, states and counties to obtain preclearance from federal authorities—either the attorney general or a three-judge court—before they changed voting procedures. The Supreme Court held that Section 4 of the Voting Rights Act, which

created a coverage formula determining if jurisdictions were subject to Section 5, was unconstitutional in light of current conditions related to voting and could no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5.

Alabama Legislative Black Caucus v. Alabama[169]

The Alabama Legislative Black Caucus and others filed suit, claiming that the Alabama Legislature violated the Equal Protection Clause of the 14th Amendment by drawing the 2012 state legislative map with race as their predominant motivation. When racial considerations predominate, the reason for this predominance must be narrowly tailored to a compelling governmental interest. The Supreme Court held that racial gerrymandering claims must be analyzed district–by-district, and not with respect to the state as an undifferentiated whole. The Supreme Court also held that equal population is not a traditional factor to be weighed against the use of race when calculating if race was a predominant factor in analyzing a racial gerrymandering claim.

Wittman v. Personhuballah[170]

Plaintiffs alleged that their rights under the Equal Protection Clause of the U.S. Constitution were violated by the racial gerrymander of Virginia Congressional District 3 during the 2011-12 redistricting cycle. A three-judge court struck down Congressional District 3 as a racial gerrymander because the use of race in drawing district lines was not narrowly tailored to serve a compelling governmental interest. The U.S. Supreme Court vacated and remanded the decision for further consideration in light of *Alabama Legislative Black Caucus v. Alabama.* The federal district court again found Congressional District 3 was a racial gerrymander. When the Virginia General Assembly failed to enact a remedial plan, the district court ordered Virginia to implement a plan drawn by a special master for elections in 2016.

Bethune-Hill v. Va. State Bd. of Elections[171]

Voters in Virginia filed suit in federal district court, alleging that the Virginia General Assembly violated the Equal Protection Clause when it drew state House districts in 2011. The General Assembly drew new lines for 12 state House districts that ensured that each of these districts would have a black voting-age population (BVAP) of at least 55%. The General Assembly claimed it did so to comply with the Voting Rights Act. The Supreme Court held that an actual conflict between the enacted plan and traditional redistricting principles does not have to be established as a prerequisite to a racial gerrymandering claim. The Supreme Court also held that a racial gerrymandering claim must review the General Assembly's predominant motive for the district's design as a whole, not only for those portions of the lines that deviate from traditional redistricting principles.

Cooper v. Harris[172]

Plaintiffs alleged that North Carolina's First and 12th congressional districts, as drawn by the General Assembly in 2011, violated the Equal Protection Clause of the 14th Amendment. They argued that race was the predominant motive in drawing the challenged districts. There was enough evidence in the

record to prove that the General Assembly acted with race-based redistricting intentions in mind. In addition, there was circumstantial evidence that supported the claims that race was the predominant motive in drawing the districts. The Supreme Court held that, when a state invokes the Voting Rights Act to justify race-based districting, it must show that it had good reasons for concluding the statute required its action to meet the narrow tailoring requirement. The Supreme Court also held that there is no requirement that plaintiffs must introduce an alternative map demonstrating that a state's asserted political goals can be achieved while improving a racial balance when race and politics are competing explanations of a district's lines.

Abbott v. Perez[173]

Voters in Texas challenged the 2011 congressional, state House and state Senate plans. Plaintiffs alleged that the Legislature intentionally diluted Latino and African-American voting strength based on violation of Section 2 of the Voting Rights Act. The Supreme Court held that a finding of past discrimination does not change either the challenger's burden of proof in a claim that a state law was enacted with discriminatory intent or the presumption of legislative good faith in redistricting cases. The Court held that a finding of past discrimination is only one source relevant to the question of intent, and the state does not bear the burden to demonstrate that a deliberative process was used to cure the taint from prior plans.

North Carolina v. Covington[174]

In 2011, plaintiffs claimed that the General Assembly used a race-based proportionality policy for state House and Senate plans. They argued that approximately 10 of the state's 50 Senate districts and approximately 24 of the state's 120 House districts should be black-majority districts. The three-judge federal district court agreed with the plaintiffs and ordered a new map to be drawn for a 2017 special election. The General Assembly drew new plans, but the trial court appointed a special master in light of concerns about the General Assembly's remedy. The special master drew new plans adopted by the court. The Supreme Court upheld a claim of racial gerrymandering based on significant circumstantial evidence that four legislative districts were shaped predominantly by race, and this sort of evidence was just as acceptable as more direct legislative evidence. The court's remedial authority was limited to ensuring that the racial gerrymanders at issue were cured, and did not extend into other decisions made by a state legislature in a remedial plan.

CHAPTER NOTES

1. U.S. Const. Amend. XIV, § 1.

2. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

3. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (internal citations omitted).

4. *Shaw v. Reno*, 509 U.S. 630, 640 (1993) ("*Shaw I*") (quoting *Davis v. Bandemer*, 478 U.S. 109, 164 (1986)).

5. *Shaw I* at 640.

6. *Ibid.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

7. *Ibid.* at 643.

8. *Ibid.* (internal citations and quotations omitted).

9. U.S. Department of Justice, "Introduction to Federal Voting Rights Laws" webpage, https://www.justice.gov/crt/introduction-federal-voting-rights-laws.

10. *Ibid.*

11. *Ibid.*

12. U.S. Const. Amend. XV, § 1.

13. *Beer v. United States*, 425 U.S. 130, 147 (1976) (White, J., dissenting).

14. *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

15. *Ibid.* at 313.

16. *Ibid.* at 314.

17. Before passage of the VRA in 1965, only 29% of blacks were registered to vote in Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia, compared to 73.4% of whites. In Mississippi, only 6.7% of blacks were registered. By 1967, two years after passage of the Voting Rights Act, more than 52% of blacks were registered to vote in these states. Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (New York: Cambridge University Press, 1992).

18. 42 U.S.C. § 1973(a) (recodified as amended at 52 U.S.C. §10301).

19. The VRA was amended in the following years:
1970: Act of June 22, 1970, Pub. L. No. 91-285, 84 Stat. 314,
975: Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400,
1982: Act of June 29, 1982, Pub. L. No. 97-205, 96 Stat. 131, and
2006: Act of July 27, 2006, Pub. L. No. 109-246, 120 Stat. 577.

20. See 52 U.S.C. § 10301(a).

21. 52 U.S.C. § 10301(b).

22. U.S. Department of Justice, "Section 2 of the Voting Rights Act" webpage, https://www.justice.gov/crt/section-2-voting-rights-act.

23. 42 U.S.C. § 1973(c) (recodified as amended at 52 U.S.C. §10304).

24. *South Carolina v. Katzenbach,* 383 U.S. 301, 308 (1966).

25. U.S. Department of Justice, "Section 5 of the Voting Rights Act" webpage, https://www.justice.gov/crt/about-section-5-voting-rights-act.

26. See note 19.

27. Pub. L. No. 109-246, § 4, 120 Stat. 577, 580 (2006).

28. 42 U.S.C. § 1973b(b) (recodified as amended at 52 U.S.C. § 10303(b)).

29. Section 5 applied to jurisdictions that, as of Nov. 1, 1964, Nov. 1, 1968, or Nov. 1, 1972, 1) maintained a test or device as a precondition for registering or voting, and 2) had (i) less than 50 percent of the voting age population residing in that jurisdiction registered to vote, or less than 50 percent of the voting age population actually vote in that presidential election. See 52 U.S.C. § 10301(b).

30. See 52 U.S.C. § 10303(b).

31. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

32. *Ibid.*

33. *Ibid.* at 546 (quoting *Katzenbach*, 383 U.S. at 335).

34. *Ibid.* at 545 (quoting *Katzenbach*, 383 U.S. at 334).

35. *Ibid.* at 556-57.

36. *Ibid.* at 557.

37. *Ibid.* at 534.

38. 42 U.S.C. § 1973a(c) (recodified as amended at 52 U.S.C. § 10302).

39. 52 U.S.C. § 10302(a), (b), (c).

40. Abby Rapoport, "Get to Know Section 3 of the Voting Rights Act," *The American Prospect* (blog) Aug. 19, 2013, http://prospect.org/article/get-know-section-3-voting-rights-act.

41. *Ibid.* (citing Travis Crum, "The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance," *Yale Law Journal* 119 (2010): 1992).

42. Up until 2013, 18 cases authorized bail-in (Rapoport, "Get to Know Section 3"). After 2013, there have been two additional cases: *Allen v. City of Evergreen*, No. 13-0107-CG-M, 2014 U.S. Dist. LEXIS 191739 (S.D. Ala. Jan. 13, 2014), and *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

43. *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984).

44. *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. May 16, 1990), *appeal dismissed*, 498 U.S. 1129 (1991).

45. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

46. *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

47. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (2014).

48. Rapoport, "Get to Know Section 3."

49. *United States v. Hays*, 515 U.S. 737, 742-43 (1995) (footnotes, citations and internal quotation marks omitted).

50. *Ibid.* at 744-45.

51. *Ibid.* at 745.

52. *Ibid.*

53. *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

54. *Ibid.*

55. *Ibid.*

56. *Va. House of Delegates v. Bethune-Hill*, No. 18-281, 587 U.S. ___ (2019).

57. See *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268 (2015) (citations and quotations omitted).

58. *Ibid.* at 1267 (emphasis added).

59. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

60. *Shaw I*, 509 U.S. at 642.

61. *Ibid.*; see also *Bethune-Hill*, 137 S. Ct. at 797; *Miller v. Johnson*, 515 U.S. 900, 916 (1995) ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process.") (internal quotation marks, footnotes and citation omitted).

62. *Ala. Legis. Black Caucus*, 135 S. Ct. at 1262.

63. *Ibid.* at 1270 (internal citations omitted).

64. *Bush v. Vera*, 517 U.S. 952, 959 (internal citations omitted).

65. *Bethune-Hill*, 137 S. Ct. at 799 (internal citations omitted).

66. *Alabama Legislative Black Caucus*, 135 S. Ct. at 1270.

67. *Ibid.*

68. *Ibid.* at 1265.

69. *Ibid.*

70. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (internal citations omitted). However, the Court noted: "This is not to suggest that courts evaluating racial gerrymandering claims may not consider evidence pertaining to an area that is larger or smaller than the district at issue. . . . Districts share borders, after all, and a legislature may pursue a common redistricting policy toward multiple districts. Likewise, a legislature's race-based decisionmaking may be evident in a notable way in a particular part of a district. It follows that a court may consider evidence regarding certain portions of a district's lines, including portions that conflict with traditional redistricting principles."

71. *Cooper v. Harris,* 137 S. Ct. 1455, 1463-64 (2017) (internal quotation marks omitted).

72. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*).

73. *Shaw v. Hunt*, 517 U.S. 899, 910-16 (1996) (*Shaw II*).

74. *Miller v. Johnson*, 515 U.S. 900 (1995).

75. *Bush v. Vera,* 517 U.S. 952 (1996).

76. *Miller v. Johnson*, 515 U.S. 900, 905 (1995) (internal quotation marks and citation omitted).

77. *Ibid.* at 913.

78. *Bethune-Hill*, 137 S. Ct. at 798.

79. *Cooper*, 137 S.Ct. at 1473 (internal citations omitted).

80. *Shaw v. Hunt*, 517 U.S. 899, 910-16 (1996) (*Shaw II*).

81. *Bush v. Vera,* 517 U.S. 952, 959 (1996).

82. *Ibid.* at. 962.

83. *Miller v. Johnson*, 515 U.S. 900, 917 (1995).

84. *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015).

85. *Bethune-Hill v. Virginia State Bd. of Elections s,* 137 S. Ct. 788 (2017).

86. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

87. *Bush v. Vera,* 517 U.S. at 961 (1996).

88. *Ibid.* at 962.

89. *Ibid.* at 962-63.

90. *Easley v. Cromartie*, 532 U.S. 234, 258 (2001).

91. *Ibid.*

92. *Ibid.*

93. *Cooper*, 137 S.Ct. at 1480.

94. See *Bethune-Hill*, 137 S. Ct. at 801 (citation omitted).

95. *Ibid.* ("As in previous cases, therefore, the Court assumes, without deciding, that the State's interest in complying with the VRA was compelling.").

96. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) (internal quotation marks and citation omitted).

97. *Ibid.* at 910 (internal citations omitted).

98. *Shaw II*, 517 U.S. at 908 (internal quotation marks and citation omitted).

99. *Ibid*. at 1470 (internal citations omitted).

100. *Ibid.* at 916.

101. *Shaw I*, 509 U.S. at 655.

102. *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993).

103. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

104. See *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam sub nom.*, *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

105. *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546 (11th Cir. 1984); *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); *Rybicki v. State Bd. of Elections,* 574 F. Supp. 1082 (N.D. Ill. 1982); 574 F. Supp. 1147 (N.D. Ill. 1983).

106. *Marengo Cty. Comm'n*, 731 F.2d 1546; *Jones v. City of Lubbock*, 727 F.2d 364; *Ketchum*, 740 F.2d 1398.

107. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

108. *Ibid*. at 46.

109. *Ibid.* at 44 (quoting S. Rep. No. 417, 97th Cong. 2nd Sess. 28 (1982)).

110. *Ibid*.

111. *Ibid.* at 36-37.

112. *Ibid*. at 50-51.

113. *Ibid.* at 80.

114. *Ibid*. at 77.

115. *Growe v. Emison*, 507 U.S. 25 (1993).

116. For the procedural history of *Growe*, see Chapter 8 on Federalism.

117. *Gingles*, 478 U.S. at 47.

118. *Growe*, 507 U.S. at 40.

119. This holding was reinforced as recently as 2018 in *Abbott v. Perez*, 138 S.Ct. 2305, 2331 (2018) ("If a plaintiff makes [the '*Gingles* factors'] showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group." (citing *Gingles*, 478 U.S. at 425-26)).

120. *Growe*, 507 U.S. at 41.

121. *Bartlett v. Strickland*, 556 U.S. 1 (2009).

122. *Ibid.* at 6.

123. *Ibid*. at 14.

124. *Ibid*. at 20.

125. *Ibid*. at 24.

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

127. *Ibid*. at 432

128. *Ibid*. at 433.

129. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

130. *Ibid.* at 1469.

131. *Ibid.* at 1472.

132. *Ibid.*

133. *Johnson v. De Grandy*, 512 U.S. 997 (1994).

134. *Ibid.* at 1017.

135. *Voinovich v. Quilter*, 507 U.S. 146 (1993).

136. *Thornburg v. Gingles*, 478 U.S. 30, 52 (1986).

137. See, e.g., *Jackson v. Edgefield Cty., South Carolina Sch. Dist.*, 650 F. Supp. 1176, 1198 (D. S.C. 1986).

138. Homogenous precinct analysis also is known as extreme case analysis.

139. *Gingles*, 478 U.S. at 52-53 n.20; see also, Richard L. Engstrom and M. D. McDonald, "Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting," *Urban Lawyer* 17 (1985): 369, 371.

140. *Gingles*, 478 U.S. at 53 n.20.

141. See, e.g., *Romero v. City of Pomona*, 665 F. Supp. 853, 866 (C.D. Cal. 1987); *cf., McNeil v. City of Springfield*, 658 F. Supp. 1015, 1028 (C.D. Ill. 1987) (65% black precincts are homogeneous).

142. See, e.g., *Gingles v. Edmisten*, 590 F. Supp. 345, 367-68 n.29. See also, Engstrom, *supra* note 138, at 372.

143. Paul W. Jacobs and T.G. O'Rourke, "Racial Polarization," *Journal of Law and Politics* 3 (Fall 1986): 295-323; Engstrom, *supra* note 138, at 372.

144. Bivariate regression analysis also is referred to as ecological regression, linear regression, correlation and regression, and various other names.

145. Richard L. Engstrom and M. D. McDonald, "Definitions, Measurements, and Statistics: Weeding Wildgen's Thicket," *Urban Lawyer* 20, no. 1 (1988): 175, 184-85.

146. *Gingles*, 478 U.S. at 56 n.24 and accompanying text. Subsequent attempts in lower courts to mathematically quantify the existence of racially polarized voting also have been rejected. *See, e.g.*, *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1029 (C.D. Ill. 1987) (rejecting expert opinion that racial polarization exists only where 90% or more of a population votes consistently for candidates of a particular race). For additional information on bullet voting, voting for only a few preferred candidates and withholding any remaining votes for white candidates, see Angelo N. Ancheta & Kathryn K. Imahara, "Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color," *University of San Francisco Law Review 27*, (1993): 815-843.

147. *Gingles*, 478 U.S. at 59 n.28.

148. *Ibid.* at 57.

149. *Ibid.* at 57 n.25. The lower court in *Gingles* relied on statistical evidence from 53 primary and general elections covering the 1978, 1980 and 1982 elections, in which black candidates ran for seats in the challenged House and Senate districts.

150. *McNeil v. Springfield*, 658 F. Supp. at 1029-30; *Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987); *League of United Latin American Citizens* (*LULAC*) *v. Midland Indep. Sch. Dist.*, 648 F. Supp. 596, 607 (W.D. Tex. 1986), *aff'd*, 829 F.2d 546 (5th Cir. 1987). But see *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998).

151. *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009).

152. See *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss. 1984), *aff'd sub nom. Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984); *Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D. Pa. Aug. 13, 1992).

153. *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993).

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

155. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

156. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

157. *Growe v. Emison,* 507 U.S. 25 (1993).

158. *Voinovich v. Quilter*, 507 U.S. 146 (1993).

159. *Shaw v. Reno*, 509 U.S. 630 (1993).

160. *Johnson v. De Grandy*, 512 U.S. 997 (1994).

161. *United States v. Hays*, 515 U.S. 737 (1995).

162. *Miller v. Johnson*, 515 U.S. 900 (1995).

163. *Bush v. Vera*, 517 U.S. 952 (1996).

164. *Easley v. Cromartie*, 532 U.S. 234 (2001).

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

166. *Ibid*. at 435.

167. *Bartlett v. Strickland*, 556 U.S. 1 (2009).

168. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

169. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

170. *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016).

171. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

172. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

173. *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

174. *North Carolina v. Covington*, 138 S. Ct. 2548 (2018).

4 | Redistricting Principles and Criteria

INTRODUCTION

Although the legal requirement that districts be equally populated drives the redistricting process, states must comply with various other legal requirements—such as the Voting Rights Act and other state and federal constitutional laws—when redrawing legislative and congressional district boundaries.

While federal requirements have the highest priority, mapmakers also are guided by geographic and other principles or criteria, often based on state law. These principles are akin to "best practices" or "standard methods" for redistricting.

All states employ several of these state-based principles or criteria for legislative districts, and most apply them to congressional districts as well. It also is common for a legislature or other entity responsible for redistricting to adopt policy that specifies criteria upon starting the redistricting process.

Because many ways exist to draw equally populated districts, state-specific criteria provide guidance on what goals beyond equal population are to be pursued in each state.

In addition, courts may use some of the geographic and other principles as a way to determine intent in litigation. Maps that appear to lack consistent use of required or generally accepted traditional principles may signal to a court that line-drawers may have drawn boundaries with impermissible motives (such as to discriminate against a racial or language minority) and that a map—or one or more of its districts—violates a constitutional or statutory requirement.

This chapter discusses long-standing traditional redistricting principles and emerging criteria and how these operate in practice, and how states prioritize criteria in the following order:

- Federal requirements, including equal population and prohibition on racial discrimination
- Traditional redistricting principles, including geographic principles, the role of geographic criteria in courts, other state principles, and emerging criteria
- Prioritizing principles

FEDERAL REQUIREMENTS

Equal population, otherwise known as the one-person, one-vote principle

Redistricting is based on the need to rebalance districts to ensure that they are equal in population. This legal rule, known as the one-person, one-vote rule, was established by the Supreme Court based on its interpretation of the Apportionment Clause of Article I, Section 2 (for congressional districts) and the 14th Amendment of the U.S. Constitution (for state and local districts).[1] "One person, one vote" requires that districts be as nearly equal in population as practicable.[2] For congressional districts, "as practicable" has been interpreted to mean *exactly* equal based on census data available at the time of redistricting.[3]

For state legislative districts, however, Supreme Court case law permits greater population deviation from the ideal size.[4] ("Population deviation" is the measure of how much districts or plans vary from the ideal population.) State plans must be *substantially* equal, as opposed to as equal "as practicable,"[5] based on the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

Courts have held that a 10% overall deviation in population from one district to the next at the time a map is adopted is generally acceptable.[6] Even so, a 10% deviation is not a safe harbor from court scrutiny. If it can be shown that a map has purposefully allowed deviations, even if below 10%, for reasons that conflict with other federal or state law, the plan still can be found to be unconstitutional.[7]

Other than the 10% standard (or guideline), there is no specific nationwide standard for population deviation for legislative maps; several states provide their own lower deviation standard.

When it comes to the question of how often districts should be rebalanced, the Supreme Court has recognized that doing so every 10 years, following the decennial census, meets the "minimal requirements for maintaining a reasonably current scheme of legislative representation."[8]

See Chapter 2, Equal Population, for more information.

Prohibition on Racial Discrimination

The second major constitutional requirement is based on the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act of 1965 (as amended).[9] Section 2 applies to

redistricting as well as to all election-related practices and procedures and prohibits the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[10] The law defines "denial or abridgment" to include any procedure that diminishes the ability of any citizen to elect their preferred candidate on account of race, color or membership in a language minority. Applied to redistricting, this prohibits vote dilution on the basis of race.

While the Supreme Court has expressed many concerns over the use of race in redistricting, it also has recognized the difficulty of prohibiting racial considerations altogether.[11] While Section 2 guards against vote dilution, the Equal Protection Clause limits redrawing district boundaries strictly on the basis of race, even if the districts are drawn to favor a particular racial group.

Race is a valid consideration when it is one of many factors, but it cannot be the predominant motive for a redistricting plan. Where it can be shown that other redistricting principles—such as those outlined in this chapter—were "subordinated" to considerations of race, strict scrutiny will apply.[12]

In short, redistricting cannot be carried out with the intent—or the effect—of discriminating on the basis of race, color or language minority for groups that are covered by the Voting Rights Act.

See Chapter 3, Racial and Language Minorities, for more information.

TRADITIONAL REDISTRICTING PRINCIPLES

In addition to the mandatory principles derived from the U.S. Constitution and the Voting Rights Act, states often adopt their own redistricting criteria or principles for drawing plans. These may be found in state constitutions, statutes or guidelines adopted by a legislature, legislative chamber, commission or committee. These state-specific criteria are intended to ensure that districts are designed with consistency and with attention to agreed-upon values.

Traditional criteria can be separated into objective or geographic criteria and other state-specific criteria, some of which are long-standing principles or practices and others that are newly emerging.

Appendix D, Redistricting Principles and Criteria, provides a summary of the principles that are in place in each state. Citations can be found in Appendix E, Citations for Redistricting Principles and Criteria. NCSL's webpage, "Redistricting Criteria," has more details as well.

These principles can and do overlap, and a focus on one principle is likely to compromise other principles. Such overlap highlights why each state has uniquely different principles. Balancing them or prioritizing among them is addressed in the descriptions that follow.

Geographic Principles

Compactness, contiguity and preservation of county and other political subdivisions are three principles that are based in geography. Each can be viewed through a policy lens as well. Because these are geography-based, they are measurable, but doing so is not easy. As with other criteria, these criteria can be deemed to be subordinate to one another and are all subordinate to federal rules such as population equality and the prohibition on racial discrimination.

Compactness (***40 states include this criterion for congressional, legislative or both kinds of maps***)

In *Shaw v. Reno* (1993, also known as *Shaw I*), the Supreme Court said, "reapportionment is one area in which appearances do matter."[13] Some scientific measures describe compactness as the extent to which a district's geography is dispersed around its center.[14] In practice, compactness is considered in the context of the actual geography of the jurisdiction being redistricted, and many judges use the "eyeball test."[15] Thus, formal measures of compactness have had limited evidentiary value in courts.

While a legislature is not required to adopt the most compact map possible, compactness must be a consideration.[16] In *Bush v. Vera*, the Supreme Court used an "eyeball approach" when measuring the plan's compactness[17] and noted when a district has a "dramatically irregular shape," it is evidence that the legislature may have acted impermissibly in drafting and adopting a redistricting plan.[18] Measuring compactness is useful because it can provide objective evidence to a reviewing court that the legislature did concern itself with the level of compactness in its redistricting plan.[19]

How compactness is used to analyze a plan depends on the type of challenge before a court. Compactness is used in 14th Amendment Equal Protection cases (racial gerrymandering) to determine whether race predominated in the drawing of district lines.[20] Alternatively, compactness is used in Section 2 cases to ensure that minority voters have an opportunity to elect their preferred representatives.[21]

In an Equal Protection case, compactness refers to the shape of a district.[22] A bizarrely shaped district could be evidence of a legislative intent to discriminate against voters by packing them into a single district.[23] In *Shaw v. Reno*, the Supreme Court explained that "dramatically irregular shapes may have sufficient probative force to call for an explanation."[24] More recently, the Court acknowledged that a regularly shaped, compact district could also be a racial gerrymander.

On the other hand, in Section 2 vote dilution cases, compactness refers to the geographic compactness of the group whose vote is being diluted as opposed to the compactness of the district lines. In *League of United Latin American Citizens v. Perry* (LULAC),[25] the Texas Legislature combined two disparate Latino communities at the northern and southern ends of the state. Applying the factors established in *Thornburg v. Gingles*,[26] the Supreme Court found that the district failed to comply with the first

factor—that the minority group be large and compact enough to constitute a majority in a single member district.

> *"Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations. 'The first* Gingles *condition refers to the compactness of the minority population, not to the compactness of the contested district.'"*[27]

***Contiguity** (**50 states include this criterion for congressional, legislative or both kinds of maps**)*

A contiguous district requires that all parts of the district be connected. This is usually measured by whether it is possible to travel to all parts of a district without ever leaving it. Contiguity for congressional districts was one of the first requirements established by federal statute. It was enacted in the 1842 Act of Apportionment (5 Stat. 491), in the Reapportionment Act of 1901 (31 Stat. 733) and in the Reapportionment Act of 1911 (37 Stat. 13). However, the requirement expired with enactment of the Apportionment Act of 1929 (46 Stat. 26), which did not include a contiguity (or any other districting) requirement. Congress has not enacted a contiguity requirement since. Many states, however, include a contiguity requirement for congressional and legislative districts in their constitutions.

While all parts of a district must be connected at some point with the rest of the district, some jurisdictions are naturally not contiguous, and states account for this accordingly. The best example is in Hawaii, where districts may include more than one island. Districts that link coastal islands in Virginia and North Carolina also have been upheld. In practice, roads have regularly been used to connect districts, as have rivers,[28] bridges,[29] ferries and tunnels.

***Preservation of counties and other political subdivisions** (**44 states include this criterion for congressional, legislative or both kinds of maps**)*

The principle of preserving counties and other political subdivisions refers to avoiding division of counties, cities or towns among different districts. While it may be impossible to include only whole jurisdictions within districts and also maintain equal population, states often include the goal of minimizing "splits" for existing political jurisdictions.[30] Unlike some other criteria, preservation of counties and other political subdivisions can be quantified by measuring the number of counties or towns that are split between two or more districts.

Role of Geographic Criteria in Courts

Redistricting criteria played a key role in the 2010 decade in *Cooper v. Harris*,[31] where the Supreme Court struck down two of North Carolina's congressional districts as racial gerrymanders. The claim involved two districts in which African-Americans comprised less than a majority of voters but had

consistently been able to elect their preferred candidates due to crossover voting—when a sufficient number of white voters align with the choices of African-American voters. Evidence in the case indicated the General Assembly had intended to redraw these districts with a black voting-age majority of over 50%, despite the historical success of black voters to elect their candidates of choice even though these voters did not have a voting majority. The racial gerrymandering challenge claimed that these districts were packed unnecessarily. In concluding that race predominated in drawing the districts, the Court pointed out the failure of the districts to comport with at least two traditional principles; one district failed to respect county or precinct lines,[32] and the Court referred to the second district's lack of compactness as "knobs [on a] snakelike body." See Appendix D for summary information about redistricting principles and criteria in all the states, and see Appendix E for complete citations.

Other State Principles

The next category of principles is based not on geography but, rather, on state policy objectives. Thus, these criteria are more subjective. Courts have been wary of arguments—sometimes created after the fact—to justify a district's shape that are based on one or more of these principles. Even so, these criteria, when supported by evidence, have been recognized as traditional districting principles.

Preservation of communities of interest **(*26 states include this criterion for congressional, legislative or both kinds of maps*)**

Generally, "communities of interest" (COI) are geographic areas, such as neighborhoods of a city or regions of a state, where the residents have common political interests. While there is no single definition of a "community of interest" due to varying geographic features, populations and histories, states attempt to define them according to local circumstances. Geography, socio-economic status[33] and economic activity are likely to be among the strongest bases for defining communities of interest.

While COI do not necessarily coincide with the boundaries of political subdivisions such as cities or counties, they generally identify with economic, social, school district, community or housing commonalities.

The Supreme Court has provided scant guidance to define communities of interest. However, when a community of interest aligns along racial boundaries, a court may find that the COI was used as a proxy for race. In these cases, the Court requires heightened scrutiny to determine if the claim of preserving a COI was to circumvent rules against racial gerrymandering or other legal requirements.[34] In addition, to defend a redistricting plan by claiming to preserve communities of interest, a legislature must have evidence that it considered communities of interest before adoption, and that it is not using communities of interest as a post-hoc justification. Pointing to the district's "urban character, and its shared media sources and transportation line," Texas argued in *Bush v. Vera* in 1996 that it used

communities of interest to develop its congressional plan.[35] While the Supreme Court did not reject the reasons offered by Texas, the plan was ultimately rejected because Texas had no information on communities of interest at the time it acted, whereas it had a large amount of data pertaining to race.[36]

Other states, however, have successfully used the same criterion for communities of interest that were rejected in Texas. In 1973, California hired special masters to redraw their maps.[37] In defining communities of interest, the special masters relied on the type of area involved, such as urban, agricultural, industrial, etc.; "similar living standards;" "similar work opportunities;" and "use of the same transportation system."[38] While the special masters did not recognize shared media outlets in their 1973 plan, the Supreme Court implicitly recognized it as a valid consideration in *Bush v. Vera*.

Communities of interest are not always distinct from racial considerations, and legislatures should take care to ensure that they have evidence that they considered the shared interests of a community, instead of grouping a community together based solely upon race. Furthermore, when a community of interest coincides with race or ethnicity, then compliance with Section 2 of the Voting Rights Act is required.

Preservation of cores of prior districts **(*11 states include this criterion for congressional, legislative or both kinds of maps*)**

Several states explicitly list as a criterion that prior districts will be preserved or maintained in new plans, to the extent possible. The concept is that continuity of districts leads to continuity of representation for citizens. This criterion may lead mapmakers to start the process with the existing map and make changes as needed to achieve equal population or other goals, rather than starting with a blank slate.

While redistricting by its very nature requires changing boundaries, the goal of preserving the cores of existing districts is to minimize changes.

In 1997, when reviewing a Georgia court-drawn plan, the U.S. Supreme Court, in *Abrams v. Johnson*, recognized preserving cores of prior districts as a legitimate race-neutral districting principle, along with preserving the four corner districts (a configuration Georgia used for many years), not splitting political divisions, keeping an urban majority black district, and protecting incumbents.[39] The Court added, however, that the goal of protecting incumbents should be subordinated to other goals because it is inherently more political and therefore subjective and difficult to measure.[40]

Avoiding pairing incumbents **(*12 states include this criterion for congressional, legislative or both kinds of maps*)**

A few states explicitly require that maps should be drawn to avoid pairing incumbent elected officials against each other. This, too, is intended to promote continuity of representation for residents. This is also known as "incumbent protection."

Traditional Redistricting Principles

Six criteria are sometimes referred to as "traditional districting principles" or even "traditional race-neutral districting principles." These were first referenced in *Shaw v. Reno*[41] in 1993. *Shaw* specifically recognized compactness and contiguity as "traditional" principles. Since then, subsequent case law expanded the list of traditional principles building on *Shaw*. The six principles are: 1) compactness,[42] 2) contiguity,[43] 3) preservation of counties and other political subdivisions,[44] 4) preservation of communities of interest,[45] 5) preservation of cores of prior districts,[46] and 6) protection of incumbents.[47]

While these are referred to as "traditional," by no means does that word indicate that all the criteria are observed in a majority of states or that they are inherently desirable. Instead, the label simply indicates that some states have had the principles in place for many decades. The Court has stated that the geographic principles are not constitutionally required, but they are useful in that "they are objective factors that may serve to defeat a claim that a district has been gerrymandered along racial lines."[48] Additional principles may be considered as well, so long as they are race-neutral.

Emerging Criteria

In the last two decades, several states have added new criteria to the traditional ones. Many of the new criteria relate to political considerations and are listed below.

Prohibition on favoring or disfavoring an incumbent, candidate or party **(*18 states include this criterion for congressional, legislative or both kinds of maps*)**

In 2010, Florida voters adopted an amendment to the state's constitution that includes the phrase, "No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent…" Fla. Const. Art. III, §§20, 21.[49]

Since 2010, Florida courts have been asked to interpret the meaning of that language in *Fla. House of Representatives v. League of Women Voters of Florida*[50] and *League of Women Voters of Florida v. Detzner* (2015).[51]

Twelve other states (see Appendix C) have begun to adopt the "neither favoring nor disfavoring" phrase in regard to incumbents, candidates or parties. The prohibition in any given state may be narrower or broader, covering any person or group, or it may be limited to intentionally or unduly favoring a person or group.

This criterion often is subordinate to others.

Use of partisan data (***Four states include this criterion for congressional, legislative or both kinds of maps***)

In most states, data from election results, voter registration files or other sources are front and center when it comes time to redistrict. Yet, for four decades, Iowa has prohibited its mapmakers (legislative staff) to consider data that relates to party affiliation, election results or other partisan-related data. California, Montana and Nebraska have adopted similar prohibitions. These prohibitions also may include not using data relating to incumbents' residential addresses. (This prohibition means it also would be impossible to avoid pairing incumbents.)

Competitiveness (***Five states include this criterion for congressional, legislative or both kinds of maps***)

Five states require "competitiveness" among their criteria, although it often is subordinated to other goals. For instance, the Arizona Constitution states that "[t]o the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals."[52]

However, it is not always easy to draw competitive districts, even when that is the goal. To create either safe districts or competitive districts requires using data on party affiliation, election results and other partisan-related data. The distribution of Democratic and Republican voters is by no means equal across any state, with the likelihood that Democratic voters are concentrated in urban areas and Republicans are spread out throughout the rest of the state. Therefore, in practice, states may find themselves creating safe Democratic seats, safe Republican seats and a certain number of seats that are expected to be competitive.

Proportionality (***One state includes this criterion for congressional, legislative or both kinds of maps***)

In 1973, the U.S. Supreme Court, in *Gaffney v. Cummings*, recognized that partisan balance can be a permissible factor, but by no means indicated it was required.[53] In 2015, Ohio became the first state

to explicitly adopt a criterion that calls for an attempt to draw its legislative districts based on the historical preferences of the state's voters.[54] Ohio's provision is intended to create legislative districts that correspond closely to statewide voter preferences. It will do so based on statewide state and federal general election results during the previous 10 years. The 2021 cycle will be the first in which this criterion is used.

PRIORITIZING PRINCIPLES

As noted earlier, criteria and principles can and do conflict. For instance, seeking to preserve the core of an existing district may conflict with the separate goal of preserving newly developing communities of interest. In another example, districts drawn to avoid pairing incumbents may be oddly shaped and no longer compact, or the goal to minimize splitting existing jurisdictions may conflict with the goal to draw competitive districts.

These conflicts exemplify the nuances that all states must deal with during the redistricting process. Typically, they are resolved as maps are proposed and considered by states. The end result may be that all criteria are honored in part, or that some criteria are followed and others are ignored. While mathematical models and algorithms can provide some guidance, using multiple legitimate principles like the ones described above requires policy choices made by human beings.

A few states have prioritized their criteria. For example, Ohio's newly adopted constitutional amendment ranks the state's criteria for its legislative districts.[55] Colorado and Michigan also prioritize their criteria, based on constitutional amendments adopted in 2018. One important benefit to expressly clarifying prioritization is that it takes the guesswork out of the process and can help avoid legal disputes. In effect, though, prioritization can mean that criteria lower on the list are not used. Yet, by prioritizing, a state gives greater clarity to its priorities.

CONCLUSION

When redistricting, two fundamental federal law principles apply: 1) the 14th Amendment's Equal Protection Clause, and 2) the Voting Rights Act. Beyond these federal requirements, each state sets out its own principles, or criteria, in its constitution, statutes and guidelines. Depending on the state, these may apply to legislative redistricting, congressional redistricting, or both. Longstanding common principles include contiguity, compactness and preservation of counties or other local jurisdictions. In recent years, new criteria have emerged relating to competitiveness or neither favoring nor disfavoring parties or candidates. Before beginning the redistricting process, legislators and staff would be well-advised to understand their state's specific requirements.

CASES RELATING TO PRINCIPLES AND CRITERIA (IN CHRONOLOGICAL ORDER)

Reynolds v. Sims[56]

Two counties challenged the validity of the existing apportionment provisions for the Alabama Legislature, which created a 35-member state Senate from 35 districts varying in population from 15,417 to 634,864, and a 106-member state House of Representatives with population variances from 6,731 to 104,767. The Supreme Court held that the Equal Protection Clause of the 14th Amendment requires states to construct legislative districts that are substantially equal in population. Legislative districts may deviate from strict population equality only as necessary to give representation to political subdivisions and provide for compact districts of contiguous territory. Legislative districts should be redrawn to reflect population shifts at least every 10 years.

Wesberry v. Sanders[57]

Voters in Georgia's Fifth Congressional District—which had a population of 823,680 in contrast to the average congressional district population of 394,312—alleged that this imbalance denied them the full benefit of their right to vote. The Supreme Court held that the population of congressional districts in the same state must be as nearly equal in population as practicable. Congressional districts must be drawn so that, as nearly as is practicable, one person's vote in a congressional election is worth as much as another's vote.

Karcher v. Daggett[58]

This equal population case set aside a New Jersey congressional plan because the districts violated the two-pronged *Kirkpatrick*[59] test for judging whether a population variance in a congressional plan was justifiable. The case also included an allegation of possible political gerrymandering of the districts. Of particular note, Justice Stevens wrote a prescient concurrence focusing on the importance of compactness. He said that geographic compactness is a guard against all types of gerrymandering and that it serves "independent values; it facilitates political organization, electoral campaigning, and constituent representation."[60]

Davis v. Bandemer[61]

Democrats challenged Indiana's 1981 state legislative redistricting plan, claiming it was a political gerrymander and the redistricting plan unconstitutionally diluted their votes in important districts, violating the Equal Protection Clause of the 14th Amendment. The Supreme Court found that the sole item of evidence shown—lack of proportional representation—was insufficient to prove unconstitutional discrimination. Plaintiffs had relied on the results of a single election to prove unconstitutional discrimination, which the Court stated was unsatisfactory. Instead, the Court restated its previous findings that unconstitutional discrimination occurs only when the electoral system operates as a whole to consistently prevent or disadvantage effective participation by a voter or group of voters.

Miller v. Johnson[62]

After the 1990 decennial census, Georgia was entitled to an additional congressional seat, which prompted the Georgia General Assembly to redraw the state's congressional districts. The General Assembly created a majority-black district, but it extended from Atlanta to the Atlantic Ocean. The district covered 6,784.2 square miles and split eight counties and five municipalities. The Court affirmed a decision that invalidated the congressional redistricting plan because race predominated the drawing of district lines. Districts with a substantially odd shape are subject to strict scrutiny under the Court's equal protection analysis.

Bush v. Vera[63]

This Texas case involved racial gerrymandering challenges to state redistricting efforts following the 1990 census. The Supreme Court said the drawing of a district in which race was the predominant motivating factor is subject to strict scrutiny as racial gerrymandering. The Court stated the districts were highly irregular in shape and neglected traditional districting criteria such as compactness. From the beginning, the predominant factor in creating majority-minority district plans was based on racial data for the three additional congressional seats. The redistricting plans violated the Equal Protection Clause of the 14th Amendment.

Abrams v. Johnson[64]

In a challenge to Georgia's court-drawn plan, the Supreme Court recognized preserving cores of prior districts as a legitimate race-neutral districting principle, along with preserving the four corner districts (a configuration Georgia used for many years), not splitting political subdivisions, keeping an urban majority black district and protecting incumbents. The Court added, however, that the goal of protecting incumbents should be subordinated to the other principles because it is inherently more political and therefore suspect and is more difficult to measure. The Court held that the district court was justified in making substantial changes to the existing plan consistent with Georgia's traditional districting principles and in considering race as a factor but not allowing it to predominate.

Larios v. Cox[65]

In 2004, Plaintiffs challenged the 2001 congressional and House plans and the 2001 and 2002 Senate plans. A three-judge panel upheld the congressional plan but struck down the legislative plans as violations of the Equal Protection Clause of the 14th Amendment. The overall range of both the 2001 House plan and the 2002 Senate plan was 9.98%, but the court found that the General Assembly had systematically under-populated districts in rural southern portion of Georgia and inner-city Atlanta and over-populated districts in the suburban areas north, east, and west of Atlanta in order to favor Democratic candidates and disfavor Republican candidates. The plans also systematically paired Republican incumbents, while reducing the number of Democratic incumbents who were paired. 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.

League of United Latin Am. Citizens v. Perry[66]

In 2006, the Supreme Court demonstrated how compactness is used differently when analyzing minority vote dilution claims than when analyzing racial or partisan gerrymandering claims. Texas Congressional District 23, as drawn by a federal court in 2001, had included a Latino majority of the citizen voting-age population. The Texas Legislature's mid-decade redistricting had modified District 23 to include a Latino majority of the voting-age population, but not of the citizen voting-age populations. The Legislature's plan created a new District 25 from two far-flung Latino communities—one in the central part of Texas touching Austin, and another on the southern border with Mexico. The Court found that creating a Latino-majority district from two Latino populations that were not compact did not compensate for dismantling District 23, where the Latino population was compact. The Court noted that compactness analysis in a Section 2 VRA vote dilution case considers "the compactness of the minority population, not … the compactness of the contested district." A district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact.

Fla. House of Representatives v. League of Women Voters of Fla.[67]

In 2010, Florida voters adopted an amendment to Florida's Constitution that stated no redistricting plan or individual district shall favor or disfavor an incumbent, candidate or party. In this case, the Legislature challenged an action filed in circuit court and alleged that the only permissible judicial review of plans adopted was in the Supreme Court 30 days following adoption of the plan. Declaratory judgments adopted following this review would be binding on all parties, precluding further judicial review of redistricting plans. The Florida Supreme Court rejected the Legislature's argument, stating that it never interpreted art. III, §16(d) of the Florida Constitution, which provides that the Supreme Court's judgment determining an apportionment to be valid is "binding upon all the citizens of the state," as granting the Supreme Court exclusive jurisdiction over all claims relating to legislative apportionment. The Court held that the lower court did have subject matter jurisdiction to hear the case. That litigation continued until the circuit court adopted the plaintiffs' Senate plan in *League of Women Voters of Florida v. Detzner*.

League of Women Voters of Fla. v. Detzner [68]

The Florida Supreme Court found that the 2012 congressional plan was drawn with the intent to favor a party or incumbent. This case involved the application of the Florida Fair Districts Amendment.

This amendment sought to bar political gerrymanders that were the products of partisan intent, matters that the federal courts had been reluctant to address. The court noted that "there is no acceptable

level of improper intent," and that the amendment applies to "both the apportionment plan as a whole and to each district individually" and does not "require a showing of malevolent or evil purpose." [69]

Further, the court noted, "Florida's constitutional provision prohibits intent, not effect," which is to say that a map that has the effect or result of favoring one political party over another is not per se unconstitutional in the absence of improper intent. "Thus, the focus of the analysis must be on both direct and circumstantial evidence of intent.[70]

Cooper v. Harris[71]

Plaintiffs alleged that North Carolina's First and 12th congressional districts, as drawn by the General Assembly in 2011, violated the Equal Protection Clause of the 14th Amendment. They argued that race was the predominant motive in drawing the challenged districts. There was enough evidence in the record to prove that the General Assembly acted with race-based redistricting intentions in mind. This included direct evidence of the General Assembly's intent behind the creation of the 12th District, including hours of testimony, specifically testimony from the chairs of two committees who prepared the plan. In addition, there was circumstantial evidence that supported the claims that race was the predominant motive in drawing the districts.

CHAPTER NOTES

1. *Reynolds v. Sims,* 377 U.S. 533 (1964).

2. *Ibid*. at 568.

3. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

4. *Reynolds*, 377 U.S. 533.

5. *Ibid*. at 577-81.

6. *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973); Dicta in later Supreme Court decisions in *Chapman v. Meier*, 420 U.S 1, 24-27 (1975), *Connor v. Finch*, 431 U.S 407, 418 (1977), and *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

7. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1341-42 (N.D. Ga. 2004), *aff'd* 542 U.S. 947 (2004).

8. *Reynolds*, 377 U.S. at 583-84 (1964).

9. 52 U.S.C. §§ 10301-10314 (formerly 42 U.S.C. § 1973).

10. *Ibid*. § 10301.

11. *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

12. *Bush v. Vera*, 517 U.S. 952, 959 (1996).

13. *Shaw*, 509 U.S. at 647.

14. Popular metrics are the Polsby-Popper ratio and the Schwartzberg ratio, which measure the perimeter and indentation of a district to compare how closely an area resembles a circle to determine compactness. See also "Congressional District Compactness, Gerrymandering By State," *Governing* (blog), (https://www.governing.com/gov-data/politics/gerrymandered-congressional-districts-compactness-by-state.html). Other measures include the Convex Hull and Reock ratios.

15. *Bush*, 517 U.S. at 960 (1996).

16. *Shaw*, 509 U.S. at 647; *Bush*, 517 U.S. at 960; *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170 (1995).

17. *Bush*, 517 U.S. at 960.

18. *Shaw*, 509 U.S. at 647 (*quoting* Karcher v. Daggett, 462 U.S. 725, 755 (1983)).

19. *Stone v. Hechler*, 782 F. Supp. 1116, 1127 (N.D. W.Va. 1992).

20. *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995).

21. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429-36 (2006).

22. *Ibid.* at 433.

23. *Shaw*, 509 U.S. at 646-47.

24. *Ibid*. at 647 (quoting *Karcher v. Daggett*, 462 U.S. 725, 755 (1983)).

25. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("LULAC").

26. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

27. *LULAC*, 548 U.S. at 433 (quoting *Bush*, 517 U.S. at 997).

28. *Lawyer v. Dep't of Justice,* 521 U.S. 567, 581-82 (1997) (recognizing a Florida state court's holding that a body of water did not violate contiguity); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (N.Y. 1972) (noting that New York courts have long held that a body of water bisecting a district does not necessarily violate a state's contiguity standard); *Bethune-Hill v. Virginia State Bd. of Elections*, 141 F. Supp. 3d 505, 536-37 (E.D. Va. 2015) ("A district split by water has not 'violated' contiguity for the purposes of a racial sorting claim any more than a district connected by a single point on land has 'respected' contiguity"); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1332 (N.D. Ga. 2004) ("[W]ater contiguity . . . is predicated on the assumption of line-of-sight across a lake or other body of water"); *Ibid.* "[T]ouch-point contiguity . . . is predicated on facing corners in a checker-board like fashion").

29. *Holmes v. Farmer*, 475 A.2d 976, 986-87 (R.I. 1984) (holding a district to be contiguous where its portions were connected only by a bridge over water); *Miller v. Johnson*, 515 U.S. 900, 908, 917 (1995) (holding a district to be contiguous where its portions were connected only by small land bridges).

30. *Miller*, 515 U.S. at 917-19 (1995); *Bush v. Vera*, 517 U.S. 952, 977-78 (1996); *Mahan v. Howell,* 410 U.S. 315, 328 (1973); *Bethune-Hill*, 141 F. Supp. 3d at 537-38 (2015).

31. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

32. The evidence recounted . . . indicates that District 1's boundaries *did* conflict with traditional districting principles—for example, by splitting numerous counties and precincts. *Ibid.* at n.3.

33. *LULAC*, 548 U.S. at 424, 432 (2006).

34. In *Miller v. Johnson*, 515 U.S. 900 (1995), the Supreme Court held that, in some instances, a redistricting plan may be so highly irregular in shape that it cannot be understood as anything other than an effort to segregate voters based on race—even if the stated goal is to preserve a community of interest. Applying the rule laid down in *Shaw v. Reno*, the Court required that strict scrutiny applies whenever race is the "overriding, predominant force" in redistricting.

35. *Bush v. Vera*, 517 U.S. 952 (1996).

36. *Ibid.* at 972-76.

37. *Legislature of Cal. v. Reinecke*, 10 Cal. 3d 396, 401 (1973).

38. *Ibid*. at 412.

39. *Abrams v. Johnson*, 521 U.S. 74, 91-100 (1997).

40. *Ibid*. at 84.

41. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

42. *Ibid*.

43. *Ibid*.

44. *Ibid*.

45. *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

46. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

47. *Ibid.*

48. *Shaw*, 509 U.S. at 647.

49. Fla. Const. art. III, §§ 20, 21.

50. *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So. 3d 198 (Fla. 2013).

51. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

52. Ariz. Const. art. 4, pt. 2, § 1(14)(F).

53. *Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973).

54. Oh. Const. art. XI, § 6(B) (effective 1/1/2021).

55. Oh. Const. art. XI, § 3 (effective 1/1/2021).

56. *Reynolds v. Sims*, 377 U.S. 533 (1964).

57. *Wesberry v. Sanders,* 376 U.S. 1 (1964).

58. *Karcher v. Daggett*, 462 U.S. 725 (1983).

59. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

60. *Ibid.* at 755-56.

61. *Davis v. Bandemer*, 478 U.S. 109 (1986).

62. *Miller v. Johnson*, 515 U.S. 900 (1995).

63. *Bush v. Vera*, 517 U.S. 952 (1996).

64. *Abrams v. Johnson*, 521 U.S. 74 (1997).

65. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

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

67. *Fla. House of Representatives v. League of Women Voters of Fla.*, 118 So. 3d 198 (Fla. 2013).

68. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

69. *Ibid.* at 375.

70. *Ibid.* at 375-76.

71. *Cooper v. Harris*, 137 S. Ct. 1455 (2017).

5 | Redistricting Commissions

INTRODUCTION

Although state legislatures traditionally have had responsibility for redistricting, each decade one or two states have moved away from this approach, and instead created commissions to either draw the maps or recommend plans to the legislature. In the 2010 decade, and particularly in 2018, this trend accelerated.

Commissions vary in many ways. To better understand these differences, and how commissions generally work, the following topics are addressed in this chapter:

- Types of commissions (primary, advisory or back-up)
- How commissions are created
- Scope of responsibility for congressional, legislative or both types of maps
- Eligibility to serve on a commission
- Method of selection for commissioners
- Composition of commissions
- Vote requirement to pass a plan
- Public input requirements
- Criteria

TYPES OF COMMISSIONS

Three types of commissions can be distinguished based on their level of authority.

1. **Commissions that have primary authority** to create and adopt maps that become law. These maps, once adopted by the commission, are not reviewed by the legislature. At publication, 14 states have commissions with primary responsibility for legislative maps, and eight have commissions with primary responsibility for congressional maps.

2. **Advisory commissions** that make recommendations—including submitting initial plans—to the legislature. The legislature retains authority to adopt the plans that become law, and the legislature can use, modify or ignore the work of the advisory commission. The initial plans developed by a commission can be important in establishing the overall architecture of a redistricting plan, even if they are not adopted. Six states have advisory commissions for legislative plans, five of which also advise on congressional plans.

3. **Back-up commissions** that become active only if the legislature is either unable to agree on a redistricting plan or misses the deadline to do so. In most cases, these commissions are appointed by the legislature, although in Ohio some members are constitutionally designated.

See Exhibit 5.1 for details on commissions.

In Maryland, the governor has a constitutional mandate to deliver a state legislative map to the General Assembly. To do this, longstanding practice has involved forming an advisory commission for the governor. The Maryland governor's advisory commission is not included in the NCSL list of commissions because its existence is not specifically required by law, but is voluntarily formed each decade to satisfy the state constitutional requirement that Maryland conduct public hearings on the map.

EXHIBIT 5.1 Redistricting Commissions in Effect for the 2020 Cycle

REDISTRICTING COMMISSIONS	LEGISLATIVE DISTRICTS	CONGRESSIONAL DISTRICTS
Commissions that have primary responsibility	Alaska,* Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Michigan, Missouri,** Montana,* New Jersey, Ohio, Pennsylvania, Washington	Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, Washington
Advisory commissions (that submit their plans to the legislature for approval)	Maine, New York, Rhode Island, Vermont,* Virginia, Utah	Maine, New York, Rhode Island, Virginia, Utah
Back-up commissions (that come into being only if the legislature is unable to complete its work)	Connecticut, Illinois, Mississippi, Oklahoma, Texas	Connecticut, Indiana, Ohio

*Alaska, Montana and Vermont have had only one congressional seat through the 2010 cycle; therefore, they are not addressed in the congressional column.

**Missouri has two legislative commissions, one for the Senate and one for the House.

Source: NCSL, 2019

Many observers mistakenly believe Iowa has a commission, but that is inaccurate. In Iowa, legislative staff draw the maps for the General Assembly's consideration. The General Assembly may approve or reject plans but not modify them. If it votes the first set down, the staff submit revised plans. If those are rejected, staff submit a third set, and these can be modified by the General Assembly if it so desires. See NCSL's webpage on Iowa's redistricting method, www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx.

HOW COMMISSIONS ARE CREATED

Three methods exist for creating a commission. The first is by a legislature crafting a constitutional amendment to create a commission and referring it to the voters for approval. The second is through statute, which has been used in the case of some advisory or back-up commissions but for no commissions with primary authority. The third is through a citizens' initiative, which 24 states permit. Rules for how this is done are state-specific.

- The majority of commissions with primary authority to create legislative and/or congressional maps were established through a legislative referral, also known as a legislative referendum. Ohio and Colorado used this avenue most recently. In 2015, Ohio voters approved a

legislatively referred constitutional amendment to create its legislative commission, and in 2018 voters approved another legislatively referred constitutional amendment that created a hybrid model for congressional redistricting that employs a mix of legislative authority and a commission to assist if needed, should strict standards for bipartisan approval not be met. In 2018, Colorado voters approved two amendments to create commissions to undertake congressional and legislative redistricting.

- Commissions with primary responsibility have been established in four states via a citizens' initiative, in which citizens gathered signatures to put the idea to a vote of the people. See Appendix G, Redistricting Commissions, for details.

Twice, courts have addressed the use of citizens' initiatives in regard to redistricting. In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' referendum that was filed in response to the Ohio General Assembly's enactment of a plan for congressional districts.[1] In supporting a lower court's decision allowing the referendum to go forward, the Court noted that Congress had specifically authorized states to adopt plans for districts "in the manner provided by the laws [of each state]...."[2] Because a referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state.[3]

Whether a state can empower a commission to draw its congressional districts was decided by the U.S. Supreme Court in 2015 in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. In that case, the Arizona Legislature maintained that the Arizona commission could not have authority over its congressional district lines on the basis that the Elections Clause of the U.S. Constitution empowered state legislatures only with the authority to draw congressional districts. The Court rejected the Arizona Legislature's argument and held that a state's legislative power to regulate the time, place and manner of federal elections—such as creating a commission—includes alternate legislative processes outlined in a state's constitution such as the citizen's initiative: "We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process."[4]

SCOPE OF RESPONSIBILITY FOR CONGRESSIONAL, LEGISLATIVE OR BOTH TYPES OF MAPS

Most commissions are charged with drawing state and congressional districts, but several are charged only with legislative districts. The Alaska and Montana commissions have not drawn congressional districts since, to date, both states have had only one district. Should Montana receive a second congressional seat after the 2020 census and reapportionment, its commission will draw those districts as well.

In Missouri, separate commissions draw state Senate and state House lines. With the passage of a citizens' initiative in 2018, a state demographer will provide maps to these two existing commissions for their approval.

Some commissions have responsibility for other state entities. California's commission is also responsible for the state's Board of Equalization, and Utah's commission will be responsible for its state Board of Education.

ELIGIBILITY TO SERVE ON A COMMISSION

The eligibility requirements to serve on a redistricting commission vary considerably among the states. Many commissions permit the appointing authority to select anyone who is a registered voter in the state. In these states it would not be uncommon to have legislators selected to serve.

Several commissions are specific about who can and cannot serve based on potential conflicts of interest. Most frequently, this prohibition applies to anyone who has held an elected office. Arizona, for example, specifies that anyone who has held elected office in the previous three years does not qualify to serve on the commission. In California, that limit is set at 10 years. Both states also specify that a commissioner may not run for any public office in their respective state for a period of three and 10 years after redistricting, respectively.

States also may stipulate that commissioners cannot be a political party officer, lobbyist or a family member of anyone who falls into these categories. Some applicants are asked to disclose campaign contributions above a certain amount during a specific timeframe preceding the selection process.

California adds a list of attributes it seeks in its applicants, such as an appreciation of the diversity of the state and analytical ability. Other more newly created commissions do so as well.

See individual state laws and constitutions for the varying eligibility requirements, or Appendix G for a summary of membership requirements and prohibitions.

METHOD OF SELECTION FOR COMMISSIONERS

The most common selection method is by appointment, typically by legislative leaders, although governors and political parties can have responsibility for some appointments. In recent years, the state auditor or other state officials also may have a role.

It also is common for certain office holders to be designated as ex officio members. Ohio's commission designates the governor, state auditor and secretary of state as members, along with others. In Arkansas, the governor, secretary of state and attorney general are the sole members of its commission.

In Arizona and California, the selection process includes initial vetting by state agencies.

- In Arizona, the Commission on Appellate Court Appointments is responsible for soliciting and reviewing applications for the redistricting commission. It is made up of five attorneys, 10 members of the public and the chief justice of the Arizona Supreme Court, who serves as chair. The five attorney members are nominated by the board of governors of the state bar of Arizona and appointed by the governor, with the advice and consent of the Senate. The members of the public are appointed by the governor, with the advice and consent of the Senate.

  The commission winnows the applicants down to a pool of 25 qualified applicants, including 10 from each of the two largest parties and five who are unaffiliated. That applicant pool then is sent to the Arizona Legislature, where each of the four legislative leaders chooses a commission member. These four appointed commissioners then select a fifth member from the unaffiliated pool of applicants, who serves as chair of the commission.

- California's process is more complex. The selection process starts with the state auditor, which is a quasi-executive position appointed by the governor. California's constitution then requires the auditor to eliminate applicants with obvious conflicts of interest from the initial pool. The remaining applicants are invited to fill out a detailed supplemental application and document their qualifications on three major selection criteria: their ability to be impartial, appreciation for California's diverse demographics and geography, and relevant analytical skills.

  Three independent auditors from the Bureau of State Audits review the applications and select 120 of the most qualified applicants from three sub-pools: 40 Democrats, 40 Republicans, and 40 who are not affiliated with a major party. These 120 applicants are interviewed in person. Following the interviews, the total pool is reduced to 60, again with equal sub-pools. These 60 names are sent to legislative leadership, where leaders from the majority and minority parties can remove up to 24 applicants from the pool.

  After the sub-pools are created, the state auditor randomly draws the names of three Democrats, three Republicans and two "Decline to State" or unaffiliated applicants to become the first eight members of the commission. These eight then select the final six commissioners, two from each group.

Newly created commissions in Colorado and Michigan will use similar selection processes for commission members. In Colorado, a panel of retired judges serves. In Michigan, the secretary of state's office serves this screening role.

COMPOSITION OF COMMISSIONS

The size of each commission is established in each state's constitution. Arkansas' is smallest, with three members, and Missouri's is largest, where a commission of 18 draws the state Senate lines, and a separate commission of 10 draws the House lines. California's commission has 14 members.

In some states, the two major political parties are assured an equal number of commissioners. For Idaho's six-member commission, majority and minority legislative leaders appoint the first four members, and the next two are appointed by the chairs of the state's two largest political parties, all but ensuring an equally divided bipartisan commission.

Several commissions explicitly include members who are unaffiliated with either party. In Arizona, for instance, each of the majority and minority leaders in both chambers select a member from a pool, and these four select an unaffiliated person as the chair of the commission. In California, of the 14 members, five are Republicans, five are Democrats and four are unaffiliated. Colorado's commission will have 12 members, including four Republicans, four Democrats and four commissioners who are unaffiliated with a major party.

Geographic diversity of commission members is required in Arizona, California and Colorado as well.

The term, "independent," is applied to some commissions; however, that term can have different meanings. For some, "independent commissions" are those on which members of the legislature cannot serve. For others, "independent commissions" have no elected officials, former elected officials, party officials or lobbyists. Ultimately, even in the states with commissions that are considered to be the most independent, independence is not absolute. In Arizona, California and Colorado, for example, legislative leaders can appoint or strike candidates from pools created by other entities. In New York, a court rejected the use of the term "independent" in its independent redistricting commission ballot description as misleading because the ultimate outcome was subject to control by the Legislature.[5]

VOTE REQUIREMENT TO PASS A PLAN

For most commissions, a simple majority is required to enact a plan. For some of the more recently adopted commissions however, a requirement for broader support has been adopted. For legislative plans in Ohio, a simple majority of the commission is required, but of that simple majority, two affirmative votes are required by commission members from each of the two largest political parties

in the General Assembly, thus assuring some measure of bipartisan support. In California, nine of the commission's 14 members must approve a map. In Colorado, an affirmative vote by eight of the 12 members is required, including at least two from the unaffiliated members.

PUBLIC INPUT REQUIREMENTS

For more recently adopted commissions, requirements for public input have been included in the constitutional amendments. These have included specifying the number of hearings to be held across the state, as well as any requirements for public comment avenues. Public input can be helpful in establishing what are communities of interest and where they are located.

In Colorado, a redistricting plan must be publicly available for at least 72 hours before the commission may vote on it. Other states have similar requirements.

CRITERIA

Commissions also must comply with their state's redistricting criteria and legal requirements. For commissions created since 2000, the plans have included amendments to criteria and emerging criteria related to competitiveness or not favoring or disfavoring incumbents, parties or candidates. Some states, such as California, have ranked their criteria in order of priority. More on principles and criteria is available in Chapter 4, Redistricting Principles and Criteria.

CONCLUSION

Traditionally, and still overwhelmingly, state legislatures are responsible for redistricting for congressional and legislative seats. And yet, in an increasing number of states, commissions have been delegated that responsibility. In the 2010 decade in particular, movement toward commissions picked up considerably. Commissions, like legislatures, must comply with federal standards and state laws.

Several commissions have been created by citizens' initiatives, but more have been created by legislative referrals. Although each commission is unique, they can be grouped into three categories: commissions with primary authority, advisory commissions, and back-up commissions.

How members are selected, who is eligible to serve, what criteria they must meet, and what vote is required to pass a plan are some of the many ways commissions can vary.

CASES RELATING TO COMMISSIONS (IN CHRONOLOGICAL ORDER)

Ohio ex rel. Davis v. Hildebrant[6]

In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' initiative. The citizens filed in response to the Ohio General Assembly's enactment of a plan for 22 additional congressional districts. The voters disapproved the redistricting act by a referendum vote. In supporting a decision that the referendum should go forward, the Court noted that Congress had specifically authorized states to adopt plans for districts in the manner provided by the laws of each state. The referendum law was part of the legislative power of the state, made so by the state constitution. Since the referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state. "For redistricting purposes, *Hildebrant* thus established, 'the Legislature' did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people."[7]

Arizona State Legislature. v. Arizona Independent Redistricting Commission[8]

In 2000, Arizona voters adopted an amendment to the Arizona Constitution via ballot initiative that removed the Legislature's authority to draw legislative and congressional districts. The amendment vested this power instead with the Independent Redistricting Commission (IRC). In 2012, the Arizona Legislature challenged the constitutionality of removing what they considered to be their constitutional powers and giving them to another entity. The argument was based on the Elections Clause of the U.S. Constitution, which gives this power to the legislatures to draw congressional districts. The Supreme Court held that the Constitution protects the IRC created by the Arizona public initiative vote. The Supreme Court held that the reference to the "Legislature" in the Elections Clause encompassed citizen initiatives in states like Arizona, where the state constitution explicitly includes the people's right to bypass the Legislature and make laws directly through such initiatives. Although "[t]he Framers may not have imagined the modern initiative … the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power."[9] The decision found that the initiative process adopted by the state allows for the commission's map to become the official map.

CHAPTER NOTES

1. *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565 (1916).

2. *Ibid.* at 568.

3. *Ibid.* at 570; U.S. Const. Art. 1, sec. 4. Interestingly, the Court cites the legislative history of Congress' addition, 1911, of the phrase "in the manner provided by the laws thereof" in the federal law authorizing states to establish procedures for redistricting, concluding that the phrase was inserted explicitly to ensure that redistricting plans could be subject to a state's initiative or referendum procedure. *Hildebrant*, 241 U.S. at 569-70.

4. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

5. *Leib v. Walsh, 992 N.Y.S.2d 637 (Sup. Ct. 2014).*

6. *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565 (1916).

7. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2666 (2015).

8. *Ibid.*

9. *Ibid.* at 2674.

6 | Partisan Redistricting

INTRODUCTION

Partisan redistricting, often called "partisan gerrymandering," refers to the practice of drawing electoral district lines to intentionally benefit one political party over others. While courts historically have recognized that politics is inherent in the act of redistricting, the question of when drawing district lines for partisan purposes violates federal or state law has persisted for decades. The question had always been whether there was a judicially manageable measurement or standard for a federal court to apply in these cases. Without a workable standard, partisan gerrymandering cases would not be justiciable by a court.

In June 2019, after several decades of searching for a standard with no success, the U.S. Supreme Court declared partisan gerrymandering to be a "political question" that is not appropriate for federal judicial action. This chapter reviews:

- Justiciability of electoral maps in federal courts
- Justiciability of partisanship in redistricting
- The U.S. Supreme Court decision that closes the door on justiciability for partisan redistricting under the U.S. Constitution
- The potential for partisanship challenges on state constitutional grounds

JUSTICIABILITY OF ELECTORAL MAPS IN FEDERAL COURTS

Up until 1962, the U.S. Supreme Court considered "apportionment issues" as generally a matter of policy for the legislative branch and thus "non-justiciable."[1] The intrinsically political nature of the redistricting process made the Court reticent to hear claims against redistricting maps; in 1946, the Court warned that it was a "political thicket"[2] into which courts should not enter. In light of this ruling, challenges to electoral maps generally were regarded as non-justiciable political questions until the 1960s.[3]

Equal population and voting rights concerns prompted the Court to acknowledge in 1962 in *Baker v. Carr* that Equal Protection challenges to electoral maps were justiciable. The Court began actively considering redistricting challenges after this,[4] resulting in a line of decisions regarding population equality (one person, one vote) and, after passage of the Voting Rights Act of 1965, minority voting rights. In these foundational cases, the Court had determined that protecting certain individual rights (the right to vote and the right to equal treatment regardless of race) limited a state's freedom to redraw (or in some cases decline to redraw) electoral lines, requiring a balance between the political prerogative of a legislature and the equal protection rights of individuals. See Chapters 2, Equal Population, and 3, Racial and Language Minorities, for detailed discussions of Equal Population and Voting Rights Act cases.

In many of these early cases adjudicating equal population and voting rights claims, the Court spoke (without deciding) on the question of whether redistricting plans could be impermissibly partisan or "minimize or cancel out the voting strength of racial or political elements."[5] Nevertheless, the Court always invalidated these maps on the basis of equal population or other voting rights concerns, despite the partisan undertones evident in many of the cases.

Partisanship in redistricting would not garner the full attention of the Court again for several decades.

JUSTICIABILITY OF PARTISANSHIP IN REDISTRICTING

In *Davis v. Bandemer*,[6] a majority of the justices agreed that, in order for the Court to adjudicate these claims, a reliable standard of measurement would be necessary. The case, brought by a group of Democrats, challenged Indiana's 1980-cycle legislative plans, arguing that the maps unconstitutionally diluted their votes on account of their party affiliation.[7] For a successful claim, the *Bandemer* majority required proof of intentional discrimination against an identifiable group and an actual discriminatory effect on that group. Unconstitutional partisan gerrymandering would occur when it "consistently degrades a voter's or group of voters influence on the political process as a whole."[8] The Court acknowledged that partisan gerrymandering claims were justiciable (in other words, they were not political questions outside of the purview of a court) with the caveat that justiciability rested on finding a workable standard to first, differentiate between constitutionally permissible and impermissible partisan line-drawing, and second, to measure the extent to which doing so disadvantaged a political group. Thus, the justiciability of partisan gerrymandering is connected to whether a workable standard can be found to adjudicate the claim.

Going forward, developing a workable legal standard proved difficult. The traditional partisan gerrymandering claims were based on the 14th Amendment, but for many years after declaring this category of cases justiciable, no federal court declared a map an unconstitutional partisan gerrymander,

mainly because no satisfactory legal standard or measurement presented itself for determining when the inherently political process of drawing maps became so excessive that it violated the Constitution.

Nearly two decades later, in *Vieth v. Jubelirer*,[9] after accepting the partisan gerrymander claim (or, as the Court called it in this case, the political gerrymandering claim) as a justiciable one, a plurality of justices gave up on finding a workable standard. The *Vieth* plurality opinion noted that lower courts applying the general discriminatory intent and effect test that was supported by a plurality in *Bandemer* all had failed to find a partisan gerrymander during the years between *Bandemer* and *Vieth*—the same result as if the claim had been nonjusticiable.[10]

> *"Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by* Bandemer *exists. . . . [n]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that* Bandemer *was wrongly decided."*[11]

The Court's difficulty stemmed from the fact that, unlike racial gerrymanders, partisan gerrymanders are not created based on a suspect class such as that of race. Under the 14th Amendment, minority voters are protected from unwarranted classifications based on race. In the political context, party affiliation has no equivalent protection under the 14th Amendment. Indeed, the Supreme Court has recognized legislatures' broad authority to redistrict with partisan motive.[12] Although the *Bandemer* plurality had previously recognized, in principle, that there is some limitation on this authority under the Equal Protection Clause, defining these limits proved difficult.

According to the *Vieth* plurality, because a "judicially manageable" standard for considering a partisan gerrymander had not been found to exist, this category of cases was not, after all, "justiciable" by any court. Justice Kennedy concurred in the Court's decision to reverse the lower court, but departed from the plurality on the justiciability issue. He held out the possibility that perhaps the First Amendment would be an effective vehicle for the Court's measurement problem when it came to the partisan gerrymander in future cases.

In his concurrence, Justice Kennedy cautioned the Court on two points: 1) suitable standards for measuring the burden a given partisan classification imposes on representational rights are critical to court intervention; and 2) "[because] no such standard ha[d] emerged in that case [it] should not be taken to prove that none will emerge in the future . . . in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation."[13]

Specifically, Justice Kennedy's concurrence outlined the possibility that a workable standard existed in the Court's free speech jurisprudence. In his view, the First Amendment was more appropriate for litigating partisan gerrymandering cases because it offered a more prospective and balanced approach to determining injury. Equal Protection theory under the 14th Amendment proved to be too categorical by requiring discriminatory intent and effect to be proved in election outcomes or potential outcomes. First Amendment theory offered the possibility of expanding the inquiry into every component of party activity with an eye on whether a particular map burdens the associational rights of individuals and political parties.

Kennedy's concept spurred a resurgence in partisan gerrymandering claims that featured a First Amendment claim. Many cases were filed under this evolving First Amendment framework, including cases in Maryland,[14] Michigan,[15] Ohio,[16] North Carolina[17] and Wisconsin.[18]

THE U.S. SUPREME COURT DECISION THAT CLOSES THE DOOR ON JUSTICIABILITY FOR PARTISAN REDISTRICTING UNDER THE U.S. CONSTITUTION

In June 2019, the Supreme Court's decision in two consolidated cases foreclosed partisan redistricting claims based on the First and 14th amendments, the Elections Clause, and Article 1, Section 2, of the Constitution.

The first case, *Rucho v. Common Cause* from North Carolina, involved a challenge against the state's congressional map drawn by a Republican-controlled legislature. The second case, *Benisek v. Lamone* from Maryland, involved a challenge to the state's Sixth Congressional District drawn by a Democratic-controlled legislature. In both cases, the lower federal district court held the challenged district(s) to be unconstitutional partisan gerrymanders under both the First and 14th amendments.

In the consolidated case, known as *Rucho*,[19] the Court set out its reasoning for why there is no workable standard under the U.S. Constitution from which a partisan gerrymandering claim can be adjudicated. Key to its analysis is the unique role that partisanship plays in redistricting and elections in general. The decision grappled with the adversarial role of parties inherent in our political system of government and how this is at odds with developing a coherent theory of fairness in redrawing election boundaries.

The Founding Fathers Intended for State Legislatures and Congress to Share Responsibility for Addressing Controversies in Redistricting

Since *Bandemer*, establishing a framework in the courts for distinguishing between constitutional and unconstitutional partisan gerrymandering has proved unsuccessful. The *Rucho* Court found that constitutional history confirms that controversies in drawing congressional electoral boundaries was an issue assigned to state legislatures in the first instance, with ultimate authority reserved for Congress. The Court explained that "[a]t no point was there a suggestion that the federal courts had a role to play."[20]

> *"The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961)."*[21]

Measuring Fairness Has Proven to Be a Political Question Beyond the Reach of Federal Courts

According to the *Rucho* Court, the fundamental difficulty with formulating a standard for adjudicating partisan gerrymandering claims is determining what is "fair" in a politically adversarial system of government. The Court pointed out that "there is a large measure of 'unfairness' in any winner-take-all system;" thus, "the initial difficulty in settling on a 'clear, manageable and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context."[22] The single-member district system and winner-take-all election format for electing representatives in the United States is a reflection of the nation's rejection of proportional representation for political parties, and the Court has on many occasions made clear that the U.S. Constitution does not guarantee proportional representation of political parties.[23] Without "proportionality" as a measure of fairness, the Court was unable to fashion any rational framework for making objective determinations of political fairness in districting.

Several possibilities for measuring fairness had been introduced in lower court proceedings and offered by dissenting Justices, but the Court found that "deciding among just these different visions of fairness . . . poses basic questions that are political, not legal."[24] For example, if fairness is meant to mean a greater number of competitive districts, making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. In the Court's words, "'[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.'"[25]

The idea of fairness requiring as many safe seats for each party as possible—an approach discussed in *Bandemer* and *Gaffney*—also was rejected because it "comes at the expense of competitive districts and of individuals in districts allocated to the opposing party."[26] The often-discussed approach of adhering to traditional districting criteria also is unworkable as a standard according to the Court because traditional criteria such as compactness and contiguity "cannot promise political neutrality."[27] For instance, the "natural political geography" of a state can lead to lopsided partisan advantages among

districts, given the fact that "urban electoral districts are often dominated by one political party."[28] A decision under this standard of fairness would "unavoidably have significant political effect, whether intended or not."[29]

Beyond Defining Fairness, Measuring Fairness Is Not Within the Competencies of the Court

The determinative question in the partisanship context has been: at what point does permissible partisanship become unfair, or more precisely, unconstitutional? Or, as the Court cast it, "How much is too much?"[30]

The Court demonstrated the difficulty of measuring partisanship, as well as determining a threshold, in terms of the standards of fairness that had been offered. In the traditional criteria context, the question would be "how much deviation from those traditional criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria?"[31] In the context of competitive districts as the standard, the measure would contemplate the question of how close the split needs to be for the district to be considered competitive.[32] Thus, even assuming the Court could define fairness in the political context, it has found "no discernible and manageable standards for deciding whether there has been a violation." [33]

The Lower Court's Equal Protection Analysis Did not Define a Reliable Standard or Measure for Partisanship Claims

Absent any workable definition or measure of fairness, the Court assessed the *Rucho* district court's intent and effects test that it used to determine that North Carolina's 2016 congressional map was a partisan gerrymander. The district court had required plaintiffs to prove that map drawers had the predominant intent to "subordinate adherents of one political party and entrench a rival party in power."[34] Plaintiffs also were made to prove discriminatory effect by showing "[vote dilution] of a disfavored party in a particular district—by virtue of cracking or packing— [that] is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party."[35]

Upon review, the Court held that this intent and effects test under the 14th amendment's Equal Protection Clause was insufficient. First, the Court pointed out that "predominant partisan intent" is permissible. Unlike predominant intent in racial gerrymandering cases, securing partisan advantage is not inherently suspect, nor is it constitutionally impermissible.[36] In addition, requiring that a plaintiff show that the partisan vote dilution is "likely to persist" into future elections—to the extent that an elected representative from the favored party in the district will be apathetic to the concerns of constituents of the disfavored party—was a precarious test:

> *"[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence."* [W]*e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." And the test adopted by the* Common Cause *court[37] requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread."[38]* (internal citations omitted)

First Amendment Theory Does not Offer a Workable Standard to Distinguish Impermissible from Permissible Partisanship in Redistricting

Both district courts concluded that the districting plans at issue violated the plaintiffs' First Amendment right to association. Evidence offered included difficulty raising money, attracting candidates and mobilizing voters, and a general lack of enthusiasm, indifference to voting and sense of disenfranchisement.[39] A basic three-part test was used by both district courts: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden.[40]

The Supreme Court, however, rejected the notion that mere political viewpoint discrimination against supporters of the opposing party is sufficient harm to support a claim under the First Amendment. In the Court's view, "under that theory, *any* level of partisanship in districting would constitute an infringement of their First Amendment rights." Further, the Court pointed out the difficulty—if not the impossibility—of measuring the "chilling effect or adverse impact" on any First Amendment activity:[41]

> *"How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? . . . These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation."[42]*

In concluding that partisan gerrymandering is a political question outside the reach of the federal judiciary, the Court made the point that its decision on justiciability did not imply that excessive partisan line-drawing is an acceptable practice:

> *"Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," Arizona State Legislature, 576 U. S., at ___ (slip op., at 1), does not mean that the solution lies with the federal*

> *judiciary. . . Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."*[43]

Even though the *Rucho* Court established that the U.S. Constitution does not provide a suitable remedy for federal courts to consider, it acknowledged that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."[44] See Exhibit 6.1 for a timeline of Partisan Redistricting Decisions.

EXHIBIT 6.1 Timeline of Partisan Redistricting Decisions

1946	Supreme Court generally finds "apportionment" cases non-justiciable. *Colegrove v. Green*
1962	Supreme Court decides Equal Protection claims regarding apportionment maps are justiciable. Noting that, if "discrimination is sufficiently shown, the right to relief under the Equal Protection Clause is not diminished by the fact that the discrimination relates to political rights." *Baker v. Carr*
1986	Supreme Court declares partisan gerrymandering claims to be justiciable in theory. In practice, courts were unsuccessful in determining a workable legal standard to adjudicate these claims. *Davis v. Bandemer*
2004	A plurality of justices on the Supreme Court determine that partisan gerrymandering claims are nonjusticiable because no reliable standard exists to determine whether a map is unconstitutionally gerrymandered for partisan advantage. *Vieth v. Jubilier*
2016	A Wisconsin federal district court invalidates the states' legislative districts based on both the First and 14th amendments. *Gill v. Whitford*
2018-2019	Federal courts invalidate redistricting maps in Maryland, Michigan, North Carolina and Ohio, based on the First and 14th amendments. The Pennsylvania Supreme Court invalidates the Pennsylvania congressional map on state constitutional grounds. The U.S. Supreme Court denies certiorari in *Common Cause v. Rucho,* holding that this category of claims are not justiciable in federal courts.

Source: NCSL, 2019

The Potential for Partisanship Challenges on State Constitutional Grounds

With *Rucho* foreclosing claims based on partisanship in redistricting in federal courts, future plaintiffs and reformers likely may turn to state courts. The *Rucho* Court noted "[n]umerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage."[45]

Since 2010, state courts in Pennsylvania[46] and Florida[47] overturned maps as partisan gerrymanders on state constitutional grounds. In Florida, the state Supreme Court found both the congressional and state Senate map to be partisan gerrymanders in violation of that state's constitutional amendments adopted

in 2010 prohibiting the "intent to favor or disfavor a political party or an incumbent."[48] In Pennsylvania, however, the state Supreme Court's ruling rested upon a state constitutional provision known as a "free and equal elections clause" that does not specifically address electoral maps. See sidebar.

Free and Equal Election Clauses

Thirty states have some version of a "free and equal" election clause in their constitutions. Arizona,[49] Arkansas,[50] Delaware,[51] Illinois,[52] Indiana,[53] Kentucky,[54] Oklahoma,[55] Oregon,[56] Pennsylvania,[57] South Dakota,[58] Tennessee,[59] Washington[60] and Wyoming[61] use the exact phrase, "free and equal." Other states have different wording with similar meanings. See NCSL's webpage, "Free and Fair Election Clauses in State Constitutions," www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx.

In 2018, the Pennsylvania Supreme Court invalidated the state's 18 congressional districts drawn by a Republican-controlled General Assembly in 2011. The court's opinion emphasized at the outset that, while the federal Constitution may not supply a remedy to the partisan gerrymandering conundrum, the Pennsylvania Constitution's free and fair elections clause did.

> *". . . our founding document is the ancestor, not the offspring, of the federal Constitution. We conclude that, in this matter, it provides a constitutional standard, and remedy, even if the federal charter does not. Specifically, we hold that the 2011 Plan violates Article I, Section 5—the Free and Equal Elections Clause—of the Pennsylvania Constitution."*[62]

The court held that the 2011 map not only subordinated traditional redistricting principles to gain an unfair partisan advantage, but also undermined voters' ability to exercise their right to vote freely and fairly.

It observed that any map that could not be shown to comply with traditional redistricting requirements as a statistical matter is sufficient to establish that it violates the free and equal elections clause of Pennsylvania's Constitution. Much of the evidence regarding nonconformity with traditional principles involved the lack of compactness and excessive splits of local jurisdiction boundaries. The court commented on the overall objective of the state constitution's free and fair elections clause by noting that its purpose was to "prevent dilution of an individual's vote by mandating that the power of his or her vote . . . be equalized to the greatest degree possible with other Pennsylvania citizens."

The U.S. Supreme Court declined certiorari in the case.[63] A special master directed by the state Supreme Court completed a remedial map in February 2018.

In 2019, a lower court in North Carolina held that the state legislative maps violated the equal protection, free elections, freedom of speech and freedom of assembly clauses of North Carolina's Constitution. *Common Cause v. Lewis* is the first state court decision on partisan redistricting since the U.S. Supreme Court's ruling in *Rucho*. At the time of publication, it is unknown whether the decision will be appealed.

These state court decisions have the potential to persuade courts in other states—many of which have a similar clause in their constitutions—to ascribe similar rights to aggrieved voters in future partisan gerrymandering cases.

CONCLUSION

The Supreme Court has closed the door on federal court review of partisan gerrymandering claims on the grounds that they are nonjusticiable political questions. According to the Court, "Federal judges have no license to reallocate political power between the two major political parties, with . . . no legal standards to limit and direct their decisions."[64]

The Court did not express the view, however, that excessive partisan line-drawing was acceptable or that it was compatible with democratic principles. Instead, the Court pointed to recent actions by states to address this issue and the possibility of congressional action.

CASES RELATING TO PARTISAN GERRYMANDERING (IN CHRONOLOGICAL ORDER)

Colegrove v. Green[65]

This suit was filed in federal court to restrain Illinois elections officers from arranging for a congressional election under an electoral map that had not been redistricted since 1901. The suit alleged that, by reason of later changes in population, the congressional districts created by the 1901 Illinois law lacked compactness of territory and approximate equality of population in violation of the U.S. Constitution and in conflict with the Reapportionment Act of 1911, as amended. The Court held that the Reapportionment Act had been superseded by the 1929 act, which did not include compactness and population equality as requirements, and that these types of cases are nonjusticiable political questions. "Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[66]

Baker v. Carr[67]

The Tennessee General Assembly had failed to reapportion seats in either legislative chamber since 1901. By 1960, population shifts in Tennessee made a vote in a small rural county worth 19 votes versus one vote in a large urban county. For decades, the U.S. Supreme Court declined repeated invitations to enter the "political thicket" of redistricting (*Colegrove v. Green*.)[68] This Court, for the first time, held

that a federal district court had jurisdiction over reapportionment claims and that claims alleging a map violated the Equal Protection Clause of the 14th Amendment are justiciable by courts. The Court distinguished its previous holding in *Colegrove* by indicating that decision had been based on the Guaranty Clause of the U.S. Constitution.

Fortson v. Dorsey[69]

In 1965, registered voters in Georgia challenged Georgia's 1962 Senatorial Reapportionment Act, which apportioned the state's 54 senatorial seats mostly along existing county lines. Thirty-three of the senatorial districts were comprised of portions of one to eight counties each, and voters in these districts elected senators by a district-wide vote. The remaining 21 senatorial districts were wholly contained within each of the seven most populous counties; however, voters in these districts elected senators at large by a county-wide vote instead of within individual districts. The Court held that the Equal Protection Clause does not require single-member districts, and that a redistricting plan that includes at-large voting in multi-district counties did not, on its face, deny residents in those counties a vote approximately equal in weight to that of voters in a single-member district. The court cautioned that the Equal Protection Clause would prohibit voting schemes similar to the one at issue if they "operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population."[70]

Karcher v. Daggett[71]

This case was an equal population challenge to the New Jersey Legislature's 1982 congressional plan that had a total deviation of 3,674 people, or 0.6984%.[72] The Supreme Court held that parties challenging a congressional plan bear the burden of proving that population differences among districts were not a good-faith effort to draw districts of equal population. If the plaintiffs carry their burden, the state then must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate state objective. While the case also included an allegation of political gerrymandering of the districts, the Court did not directly rule this claim. In his concurrence, however, Justice Stevens pointed to evidence in the record that the decision-making process leading to adoption of the challenged plan was highly partisan. His concurrence went on to lay out how political gerrymandering could violate the Equal Protection Clause as "[another] species of vote dilution."[73]

Gaffney v. Cummings[74]

Connecticut voters challenged the 1971 redrawing of Senate and House districts by the Apportionment Board on the basis of excessive population deviations among districts as a result of a bipartisan gerrymander of Connecticut legislative districts. The maximum deviation between districts was 7.83% for the House and 1.8% for the Senate. Under the plan, the Apportionment Board "took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats."[75] The Court ruled that the plan's deviations alone did not constitute a violation under the Equal Protection

Clause, nor did the board's use of a "political fairness principle" to roughly approximate the statewide political strength of the two major parties.

Davis v. Bandemer[76]

Democrats challenged Indiana's 1981 state legislative reapportionment plan, claiming it was a political gerrymander prohibited by the Equal Protection Clause of the 14th Amendment. While the Supreme Court found "political gerrymandering to be justiciable,"[77] by courts in general, it reversed the trial court's ruling that the Indiana map was a political gerrymander because evidence at trial was insufficient to establish an Equal Protection Clause violation. The Court found that the key evidentiary basis for the trial court's decision—lack of proportional representation—was insufficient to prove unconstitutional discrimination. Plaintiffs had relied on the results of a single election to support their claim, which the Court stated was unsatisfactory. The Court explained that unconstitutional political gerrymandering occurs only when the electoral system operates as a whole to consistently degrade or disadvantage effective participation by a voter or group of voters based on political affiliation.

Vieth v. Jubelirer[78]

The plaintiffs, registered Democratic voters, challenged Pennsylvania's congressional redistricting plan as a political gerrymander in violation of Article I of the U.S. Constitution and the Equal Protection Clause. The majority of justices in this case held that this particular challenge failed to make out a violation. Four of the five justices in the majority went further, stating that they believed no reliable standard existed for adjudicating partisan gerrymandering claims and, as a result, this category of claims are nonjusticiable political questions that are not addressable by federal courts. However, the fifth justice in the majority—Kennedy—did not go that far. In his view, a workable standard for assessing partisan gerrymandering claims could be developed, possibly under the First Amendment.

Larios v. Cox[79]

In 2004, the Supreme Court summarily affirmed a Georgia district court ruling in *Larios v. Cox* that Georgia's state legislative district plan violated the one-person, one-vote principle based on the Equal Protection clause of the 14th Amendment.[80] While the new lines were drawn to create districts with population deviations of less than 10%, the districts were found to be "systematically and intentionally created" to under-populate certain districts and over-populate others for the partisan advantage of Democratic candidates. The Court found that favoring certain geographic areas and protecting Democratic incumbents were not rational, evenly applied state policies.

League of United Latin Am. Citizens v. Perry[81]

In this challenge to Texas' 2003 congressional map, plaintiffs included a partisan gerrymandering claim in addition to various other legal claims regarding the legislatures' mid-decade redistricting subsequent to the election of a newly Republican-controlled legislature. The Supreme Court upheld the lower district ruling that found no partisan gerrymander. The Court declined to accept the plaintiff's

theory that mid-decade redistricting creates a presumption that the resulting maps are the outcome of a purely partisan motive, and reiterated the need to prove discriminatory effect regardless of the circumstances surrounding the map-drawing process. This includes showing an "actual" burden on the representational rights of plaintiffs, a burden that can be measured by a reliable standard.

Common Cause v. Rucho[82]

Plaintiffs alleged that North Carolina's 2016 congressional plan constituted a partisan gerrymander. The legislative defendants did not dispute that the North Carolina General Assembly intended for the 2016 plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates, nor that the plan had its intended effect. Rather, they argued that a partisan gerrymander was not prohibited by the U.S. Constitution. On remand, the three-judge district court held that at least one of the plaintiffs residing in each of the state's 13 congressional districts had standing to assert a partisan vote dilution challenge under the Equal Protection Clause, and that 12 of the 13 districts in the 2016 plan violated the Equal Protection Clause, the First Amendment and Article I of the U.S. Constitution. The court enjoined the use of the 2016 plan in any election after the 2018 election. In a 5-4 opinion that included the consolidated case of *Benisek v. Lamone*, the Supreme Court vacated the decision and remanded the case, with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral"[83] to measure fairness are not available.

Benisek v. Lamone[84]

Six years after the Maryland General Assembly redrew the Sixth Congressional District, plaintiffs sued to enjoin Maryland's election officials from holding congressional elections under the 2011 map. They alleged lawmakers intentionally used information about voters' histories and party affiliations to replace large numbers of Republican voters with Democratic voters in the Sixth District, thus flipping the district from a reliable Republican seat into a safe Democratic one. On remand, the district court found that the state specifically targeted voters who were registered as Republicans and who historically had voted for Republican candidates. That court held that Maryland's 2011 redistricting law "violates the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history."[85] It enjoined the use of the 2011 congressional plan in future elections and directed the state to submit to the court a remedial plan. It then stayed its decision pending an expedited appeal to the U.S. Supreme Court. In a 5-4 opinion consolidated with *Common Cause v. Rucho*, the Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral"[86]to measure fairness are not available.

League of Women Voters of Florida v. Detzner[87]

The plaintiffs alleged in state court that the congressional redistricting plan was drawn in violation of the Fair Districts Amendment, which prohibited political consideration in redistricting. The trial court found that the 2012 "redistricting process" and the "resulting map" apportioning Florida's 27 congressional districts were "taint[ed]" by unconstitutional intent to favor the Republican Party and incumbent lawmakers. The Florida Supreme Court upheld the finding that the 2012 congressional plan was drawn with the intent to favor a party or incumbent. Subsequently, the Florida Senate stipulated that the 2012 Senate plan similarly violated the law and would not be enforced or used for the 2016 elections.

League of Women Voters of Pa. v. Pennsylvania[88]

The League of Women Voters of Pennsylvania and a group of Democratic Pennsylvania voters challenged the state's 2011 congressional map in state court as an unconstitutional partisan gerrymander under the state constitution. The Pennsylvania Supreme Court found that "the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania"[89] and enjoined its use in future elections. In its opinion, the court reviewed the historical development of Pennsylvania's constitutional limits on the drawing of legislative districts, such as requirements that they be compact, contiguous and maintain the boundaries of political subdivisions, and adopted these standards "as appropriate in determining whether a congressional redistricting plan violates the Free and Equal Elections Clause…"[90] The court held that, when drawing congressional districts, if these neutral criteria are subordinated to gerrymandering for unfair partisan political advantage, whether intentional or not, the plan violates the Free and Equal Elections Clause of the state constitution. The court adopted a remedial plan in 2018 after the Pennsylvania General Assembly failed to submit a congressional redistricting plan to the governor by the court's deadline.

CHAPTER NOTES

1. *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

2. *Ibid*. at 556.

3. *Baker v. Carr*, 369 U.S. 186 (1962); although this decision appears to reverse course on justiciability for reapportionment issues, the actual opinion distinguishes *Colegrove* by clarifying that that case was decided on Guaranty Clause grounds, which presented political questions. Fourteenth Amendment claims provided they are "not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself" are justiciable. *Ibid.* at 227.

4. *Ibid*.

5. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

6. *Davis v. Bandemer*, 478 U.S. 109 (1986).

7. *Ibid.* at 114-15.

8. *Ibid.* at 110.

9. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

10. *Ibid*. at 281.

11. *Ibid*.

12. "The reality is that districting inevitably has and is intended to have substantial political consequences." *Davis v. Bandemer*, 478 U.S. 109, 129 (1986).

13. *Vieth* at 311-12.

14. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

15. *League of Women Voters of Mich. v. Benson*, No. 2:17-CV-14148, 2019 U.S. Dist. LEXIS 6914 (E.D. Mich. Jan. 15, 2019); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019); *Mich. Senate v. League of Women Voters*, 139 S. Ct. 2635 (2019).

16. *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019); *Chabot v. Ohio A. Philip Randolph Inst.*, 204 L. Ed. 2d 280 (2019).

17. *Common Cause v. Rucho*, 240 F. Supp. 3d 376 (M.D.N.C. 2017); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018).

18. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016); vacated and remanded, *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

19. *Rucho v. Common Cause*, No. 18–422, 588.U.S. ___ (2019). (In June 2019, the United States Supreme Court consolidated *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726, into *Rucho v. Common Cause*.)

20. *Rucho v. Common Cause*, No. 18–422, slip op. at 11 (June 27, 2019).

21. *Ibid.* at 10-11.

22. *Ibid.* at 17.

23. *Ibid.* at 16-17.

24. *Ibid.* at 19.

25. *Ibid.* at 18 (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986)).

26. *Ibid*.

27. *Ibid*.

28. *Ibid*.

29. *Ibid.* at 19.

30. *Ibid*.

31. *Ibid*.

32. *Ibid*. at 20.

33. *Ibid.*

34. *Ibid.* at 22.

35. *Ibid*.

36. *Ibid.* at 23.

37. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 867 (M.D.N.C. 2018).

38. *Rucho v. Common Cause*, No. 18–422, slip op. at 23.

39. *Ibid.* at 25.

40. See *Common Cause*, 318 F. Supp. 3d, at 929; Benisek, 348 F. Supp. 3d, at 522.

41. *Rucho v. Common Cause*, No. 18–422, slip op. at 26.

42. *Ibid*. (Internal citation omitted).

43. *Ibid.* at 30.

44. *Ibid*. at 31.

45. *Rucho v. Common Cause*, No. 18–422, syllabus at 5.

46. *League of Women Voters of Pa. v. Commonwealth* (also *Turzai v. Brandt*), 644 Pa. 287 (2018), *cert. denied*, *Turzai v. Brandt*, 139 S. Ct. 445 (2018).

47. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

48. *Ibid*. at 387.

49. Ariz. Const. art. II, § 21.

50. Ark. Const. art. 3, § 2.

51. Del. Const. art. I, § 3.

52. Ill. Const. art. III, § 3.

53. Ind. Const. art. 2, § 1.

54. Ky. Const. § 6.

55. Okla. Const. art. III, § 5.

56. Or. Const. art. II, § 1.

57. Pa. Const. art. I, § 5.

58. S.D. Const. art. VII, § 1.

59. Tenn. Const. art. I, § 5.

60. Wash. Const. art. I, § 19.

61. Wyo. Const. art. I, § 27.

62. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018).

63. *League of Women Voters of Pa. v. Commonwealth* (also *Turzai v. Brandt*), *cert. denied*, 139 S. Ct. 445 (2018).

64. *Rucho v. Common Cause*, No. 18–422, slip op. at 30.

65. *Colegrove v. Green*, 328 U.S. 549(1946).

66. *Ibid*. at 556.

67. *Baker v. Carr*, 369 U.S. 186 (1962).

68. *Colegrove v. Green*, 328 U.S. 549 (1946).

69. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

70. *Ibid*. at 439.

71. *Karcher v. Daggett*, 462 U.S. 725 (1983).

72. *Ibid*. at 728.

73. *Ibid*. at 744.

74. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

75. *Ibid*. at 738.

76. *Davis v. Bandemer*, 478 U.S. 109 (1986).

77. *Ibid*. at 113.

78. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

79. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

80. *Cox v. Larios*, 542 U.S. 947 (2004).

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

82. *Rucho v. Common Cause*, 204 L. Ed. 2d 931 (2019).

83. *Ibid.* at 949.

84. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

85. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (D. Md. 2018).

86. *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 949 (2019).

87. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

88. *League of Women Voters of Pa. v. Commonwealth* (also *Turzai v. Brandt*), 644 Pa. 287 (2018), *cert. denied*, *Turzai v. Brandt*, 139 S. Ct. 445 (2018).

89. *League of Women Voters of Pa. v. Commonwealth*, 644 Pa. 287, 289 (2018).

90. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816 (Pa. 2018).

7 | Legislative Privilege in Redistricting Cases

INTRODUCTION

During the past decade, litigation involving state legislative redistricting plans has increased significantly. In these lawsuits, the courts have increasingly granted litigants during the discovery phase greater access to the files of state legislators. Historically, there were few discovery disputes about whether plaintiffs were entitled to legislators' files and other records. With the increase in the amount of redistricting litigation, however, courts have a greater willingness to allow plaintiffs to dig a little deeper.

The fundamental issue is the degree to which the judicial branch can disregard state legislators' constitutional privilege to be free from compelled discovery in regard to their legislative work. Historically, that privilege has been known as the "legislative privilege," which extends from the Speech and Debate Clause of the U.S. Constitution and generally shields legislative deliberations from compelled judicial testimony and other evidence-gathering processes.

States have, with varying degrees of success, tried to invoke legislative privilege to limit such evidence from being obtained in discovery. Courts have found that state legislators, unlike members of Congress, do not have an absolute right to legislative privilege.

Because this is an emerging and increasingly significant topic, this is the first edition of the NCSL redistricting law book to include a chapter dedicated to legislative privilege. Specifically, this chapter discusses the following concepts:

- The legal origins of the Speech and Debate Clause
- The scope of the Speech and Debate Clause
- Legislative privilege in federal redistricting litigation
- Legislative privilege in state redistricting litigation

It is important to note that the scope of legislative privilege for state legislators involved in federal court redistricting litigation has been reviewed only by lower federal courts and not by the U.S. Supreme Court. Thus, it is not settled law. Until there is greater certainty on this issue, this chapter should serve only as guidance for legislators and staff involved in the post-2020 and future redistricting cycles, and not as prescriptive.

THE LEGAL ORIGINS OF THE SPEECH AND DEBATE CLAUSE

Relative to their legislative work, only members of Congress—not state legislators—have been granted separate constitutional privileges of a) immunity from suit and b) free speech and debate. These foundational privileges find their roots in the Speech and Debate Clause of the U.S. Constitution, which states:

> *The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.*[1]

The Speech and Debate Clause was "a product of the English experience."[2] The first U.S. Constitutional Convention adopted the clause in response to convention members' fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament.[3] Its purpose was to prevent "intimidation by the executive and accountability before a possibly hostile judiciary."[4] Recognizing the importance of this purpose, the Constitutional Convention approved the Speech and Debate Clause "without discussion and without opposition."[5] At such time when there was fear of legislative excess in the United States, "[i]t is significant that legislative freedom was so carefully protected by constitutional framers...."[6]

Ultimately, the Speech and Debate Clause "is a limitation on the Federal Executive"[7] that seeks to protect "the integrity of the legislative process by insuring the independence of individual legislators."[8] In doing so, it provides legislators "wide freedom of speech, debate, and deliberation."[9]

Although Maryland, Massachusetts and New Hampshire adopted similar provisions in their respective state constitutions before the Speech and Debate Clause was incorporated into the U.S. Constitution,[10] almost all the remaining states adopted similar language shortly thereafter.[11]

THE SCOPE OF THE SPEECH AND DEBATE CLAUSE

Legislative Immunity from Liability

The first privilege granted by the Speech and Debate Clause is that legislators are free from arrest or civil process for what they do or say in legislative proceedings.[12] Although it speaks only to legislators, courts have interpreted the Speech and Debate Clause to also include staff/aides "insofar as the conduct of the [staff] would be a protected legislative act if performed by the Member himself."[13] Further, while only congressional immunity from suit is set forth in the Speech and Debate Clause, in the interest of comity, federal courts have extended the clause's absolute legislative immunity from liability to state legislators as well.[14]

Ultimately, the concept of legislative immunity is rooted in two fundamental principles: 1) the separation of powers, and 2) the protection of the legislative process.[15] The privilege ensures that legislators can represent their constituents without fear that they later will be called to task in the courts for that representation.[16] It does so in civil as well as criminal actions, "and against actions brought by private individuals as well as those initiated by the Executive Branch."[17] Legislative immunity does not, however, bar all judicial review of legislative acts.[18]

Legislative Privilege from Testimony

The Speech and Debate Clause not only expressly grants absolute immunity from liability to members of Congress, but also provides them and their staff with an absolute privilege from testimony with respect to their legislative activities. This would include the production of documents pertaining to their legislative activities,[19] the production of committee reports, the passage of resolutions, and voting.[20] "In short…things generally done in a session of the House by one of its members in relation to the business before it."[21] Such activities are "protected not only from the consequences of litigation's results but also from the burden of defending themselves."[22]

Although federal courts have extended the legislative privilege to state legislators, that privilege is not absolute; unlike members of Congress, state legislators are entitled to only a qualified legislative privilege for legislative acts.[23] The Supreme Court concluded this when it declined to extend the evidentiary legislative privilege to a state legislator—who was indicted on various federal criminal charges—because "where important federal interests are at stake, as in the enforcement of federal criminal statutes, [the principles of] comity yield."[24]

Federal courts have provided little protection to state legislators who assert the legislative privilege in redistricting litigation.

LEGISLATIVE PRIVILEGE IN FEDERAL REDISTRICTING LITIGATION

As discussed above, the Speech and Debate Clause and most state constitutions provide absolute immunity to state legislators for their legislative acts. However, neither source provides an absolute privilege to state legislators from testifying in federal court. With redistricting cases, federal courts take an even narrower position on the privilege because "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege...."[25] When looking at the most recent cases that analyze the legislative privilege in redistricting cases, it is important to first review a particular case to which federal courts have recently turned for guidance.

The *Rodriguez* Balancing Test

In 2003, several voters in New York filed a lawsuit in the Southern District of New York against the governor of New York and legislative leaders, challenging New York's state Senate and congressional redistricting plans enacted by the New York Legislature in 2002.[26] During discovery, plaintiffs moved to compel the legislators to produce all documents used by legislators in developing the 2002 state Senate and congressional redistricting plans.[27] After the legislators objected on the grounds that such documents were protected by the doctrine of legislative privilege, the court granted in part and denied in part the plaintiffs' motion to compel.[28] Specifically, the legislative privilege was applicable only to documents that "intrude on deliberations or discussions which took place after the proposed 2002 redistricting plan reached the Legislature's floor."[29]

Since *Rodriguez* was decided, various courts have adopted that court's approach when reviewing the issue of legislative privilege in redistricting cases. What has evolved from these cases is what has become known as the "*Rodriguez* test." The test has been applied by a number of federal courts in cases challenging redistricting plans to determine if the privilege shields state legislators from producing certain documents. Factors the courts consider are:

- Relevance of the evidence sought to be protected;
- Availability of other evidence;
- "Seriousness" of the litigation and the issues involved;
- Role of government in the litigation; and
- Possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Post–*Rodriguez* Cases

In a case challenging Illinois' 2011 congressional redistricting map, a group of plaintiffs argued that the map violated the Voting Rights Act, the 14th Amendment, the 15th Amendment, and the First Amendment.[30] Plaintiffs served dozens of subpoenas on numerous non-parties, including the Illinois House and Senate, and individual state legislators and staff.[31] The non-parties refused to comply with the subpoenas, arguing legislative immunity, among other privileges. The legal issue for the court

was "whether common law legislative immunity absolutely shields non-party state lawmakers from providing evidence in a civil lawsuit related to their legislative activities."[32] The federal district court first concluded that the legislative immunity doctrine does not protect non-party state lawmakers from producing documents in federal redistricting cases.[33] The court then applied the *Rodriguez* test to determine the extent to which a state lawmaker may invoke legislative privilege to protect himself or herself from producing documents related to their legislative activities.

The court held that, unless a member affirmatively waives the legislative privilege doctrine in writing, state lawmakers are not required to disclose documents containing:[34]

- Motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the congressional map prior to its passage; and
- Identities of those who participated in decisions related to the map.

The court therefore concluded that the legislative privilege shields from disclosure pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation. It does not protect facts or information available to lawmakers at the time of their decision.

However, the court held that state lawmakers were required to disclose documents that:[35]

- Contain objective facts that state lawmakers relied upon in drawing the map;
- Were available to state legislators at the time the map was passed;
- Contain the identities of experts and/or consultants retained by state legislators to assist in drafting the map, and any related contracts; or
- Waive legislative privilege.

A few months later, in 2011, a number of individual plaintiffs challenged the 2011 Wisconsin legislative and congressional redistricting plans on the grounds that they violated the Voting Rights Act and the 14th Amendment.[36] During discovery, plaintiffs served subpoenas on certain non-parties, ordering them to turn over documents used in drawing the redistricting plans.[37] The Wisconsin House and Senate moved to quash the subpoenas, but the district court denied their request on the grounds that legislative privilege did not prevent disclosure.[38]

Although the federal district court did not expressly apply the *Rodriguez* test, the court relied upon *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections* in which Rodriguez had been "cited extensively."[39] In relying upon that case, the court concluded that the plaintiff's showing of need outweighed the non-party Wisconsin Legislature's asserted qualified legislative privilege.[40] "[T]he highly relevant and potentially unique nature" of the evidence outweighed any "future 'chilling effect' on the Legislature."[41]

The following year, a case was filed in a New York federal court challenging the newly enacted New York state Senate and Assembly redistricting plans on the grounds that the maps violated the Voting Rights Act and the 14th Amendment.[42] During discovery, various legislative defendants were served with subpoenas to produce documents about how they determined the size of the New York state Senate following the 2010 census redistricting cycle.[43] The legislative defendants objected on various grounds, including that the information was protected by legislative privilege.[44] After the federal district court initially deferred ruling on the question so that it could complete an in camera (when the court looks at documents confidentially) review of the withheld documents,[45] the court subsequently proceeded to apply the *Rodriguez* test and determined that the following were "non-legislative" documents not subject to protection under the legislative privilege:[46]

- Documents or communications prepared in connection with litigation, including documents reflecting communications with or activities conducted by a redistricting expert;
- Inquiries from, and any responses to, the public or media;
- Public remarks or statements, and public speeches made outside the Legislature;
- Public testimony;
- Negotiations with contractors or service providers;
- Administrative tasks;
- Correspondence with or about national political organizations; and
- Any correspondence serving as a "means of informing those outside the legislative forum."

At the same time, the court did presume that the qualified legislative privilege prevents the disclosure of legitimate legislative acts, especially when the line between what is "legislative" and "non-legislative" is blurred. The type of documents it held were presumed to be subject to protection from the legislative privilege doctrine include:

- Materials prepared for floor speeches, floor debate, committee meetings and reports, the casting of votes, or formal information-gathering; and
- Documents and communications reflecting the drafting of remarks to be made on the floor of the Legislature in support of:
    - proposed legislation,
    - proposed changes to statutory language,
    - decision making over placement of district lines,
    - exchanges between legislators or their aides and experts about possible changes to their districts,
    - consideration of public proposals, and
    - emails forwarding newspaper stories or other information to legislators or their staff during legislative deliberations.

Subsequently, in 2015, a Virginia federal court dealt with a discovery dispute in a case filed by a group of plaintiffs who asserted that 12 Virginia House of Delegates districts were unlawful racial gerrymanders in violation of the 14th Amendment.[47] During discovery, plaintiffs sought all documents of non-party legislators related to the 2011 Virginia redistricting process from the Virginia House.[48] On behalf of a number of legislators who asserted legislative privilege, the Virginia House refused to turn over those specific legislators' requested documents.[49]

The Virginia court first recognized that "[s]everal federal courts have … [found] that the [state legislative] privilege is a qualified one in redistricting cases" because "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege…."[50] Like the other courts above, the Virginia court applied the *Rodriguez* test and found that "the totality of circumstances warrant the selective disclosure of the assertedly privileged documents in the House's possession."[51] Thus, the following categories of documents were required to be disclosed:[52]

- Any documents or communications created after the redistricting legislation's date of enactment;
- Any documents or communications shared with, or received from, any individual or organization outside the employ of the General Assembly, unless a chamber specifically retained an individual or organization in accordance with Virginia law; and
- Any internal house documents or communications generated before the redistricting legislation's date of enactment that:
    - reflect strictly factual information, regardless of source, and
    - were produced by committee, technical or professional staff for the House (excluding personal staff of legislators) that reflect opinions, recommendations or advice.

The court did recognize, however, that the following could be withheld or redacted:[53]

- Comments, requests or opinions expressed by legislators or their aides in communication with such staff may be redacted; and
- Documents or communications produced by legislators or their immediate aides before the redistricting legislation was enacted, "except to the extent any such document pertains to, or 'reveals an awareness' of: racial considerations employed in the districting process, sorting of voters according to race, or the impact of redistricting upon the ability of minority voters to elect a candidate of choice."

Most recently, in 2018, a three-judge federal panel in Michigan squarely addressed the issue of legislative privilege in the context of a redistricting case. In *League of Women Voters v. Johnson,*[54] plaintiffs challenged

the state of Michigan's legislative and congressional maps on the grounds that they violated the First and 14th amendments of the U.S. Constitution. During discovery, plaintiffs served document subpoenas on various non-party Michigan state legislators and legislative offices in the state for the purpose of seeking documents related to the state of Michigan's redistricting process in 2012.[55] Those non-parties filed motions to quash the subpoenas, arguing that they enjoy absolute legislative privilege.[56]

After going through an exhaustive review of case law from various circuit courts, the panel concluded that state legislators are afforded a "legislative privilege against being required to provide records or testimony concerning legislative activity." Notably, however, the privilege for state legislators in federal court "is not absolute," especially "where important federal interests are at stake," including "cases involving constitutional challenges to state legislation."[57] In determining the extent of this qualified privilege in this particular case, the panel turned to the *Rodriguez* test and held that "Plaintiffs' need for the documents…is sufficient to overcome the legislative privilege,"[58] and the non-parties were required to produce the following categories of documents:[59]

- Documents and communications related to non-legislative tasks.
- Fact-based documents and communications.
- Documents and communications that legislators or their staff:
  - created after the redistricting legislation's date of enactment,
  - shared with third parties consulted during the redistricting process, or
  - produced for the legislators that reflect opinions, recommendations or advice; however, any comments, requests or opinions expressed by legislators or their aides in communication with committee staff may be redacted.
- Redistricting plans on record, or proposed, during the 2012 redistricting process.
- Any relevant documents or information that were shared with third parties, which would otherwise have been protected by the legislative privilege.

The panel did, however, recognize that the following categories of documents are subject to the legislative privilege and are not required to be turned over in discovery:[60]

- Any documents or information that contains, involves or reveals opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff.
- Documents or communications produced by legislators or their aides before the redistricting legislation date of enactment, unless any such document pertains to, or reveals an intent to or awareness of: discrimination against voters on the basis of their known or estimated political party affiliation, or the impact of redistricting upon the ability of voters to elect a candidate of their choice.

- Any privileged information that is unrelated to the introduction, consideration or passage of Michigan's 2012 redistricting legislation.

LEGISLATIVE PRIVILEGE IN STATE REDISTRICTING LITIGATION

Not surprisingly, states address the legislative privilege question in their respective constitutions in different ways. While many state constitutions expressly include the privilege, some state constitutions do not mention it at all. Thus, because of the varying approaches to the privilege in each state constitution, including how state courts interpret their own constitutional provisions, little reliance can be placed on any particular state's privilege outside the specific state. Nevertheless, the following briefly summarize recent cases handling the legislative privilege question in redistricting litigation in state courts.

In 2013, the Florida Supreme Court was asked whether Florida legislators and their staff had an absolute privilege from testifying about the intent in drawing the state's congressional redistricting plan.[61] Florida's Constitution lacks a speech and debate clause; however, the Florida Supreme Court concluded that a legislative privilege exists in Florida based on the separation of powers in the Florida Constitution.[62] Given that, and in conjunction with the state's broad open meetings requirement, the Florida Supreme Court recognized that "legislators and legislative staff members may assert a claim of legislative privilege ... only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process."[63]

In 2013, the North Carolina Supreme Court was asked whether state legislators were required to disclose documents related to the enactment of the state's legislative and congressional district plans.[64] Plaintiffs sought to compel production based on a state law that made such documents public after the districting plans became law. The state legislators objected, asserting legislative privilege, among others. The North Carolina Supreme Court held that, since the General Assembly had not clearly and unambiguously waived the attorney-client privilege and work-product doctrine, the court would not conclude it had intended to do so; as for the scope of the legislative privilege, the court "defer[red] to the General Assembly's judgment regarding the scope of its legislative confidentiality."[65]

In 2016, the Virginia Supreme Court considered an appeal of a trial court's order that found state legislators, staff and consultants in contempt for not testifying about their role in the drawing of state legislative districts.[66] On appeal of the contempt order, the Virginia Supreme Court concluded that Virginia's Constitution provided a legislative privilege to legislators and staff acting within the sphere of legitimate legislative activity.[67]

CONCLUSION

From the recent cases decided during the past decade, federal courts hearing constitutional challenges to newly drawn maps for congressional and state districts are clearing the way for plaintiffs to obtain documents from state legislators that were produced during a state's redistricting process. Although the legislative privilege doctrine protects 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 or personal email. Consequently, attorneys advising state legislators and their staff must be well-versed on the scope of the legislative privilege in redistricting cases, their state's constitutional privilege provisions (if any) and court interpretations of these, and the consequences of unintended waiver of any applicable protections.

CASES RELATING TO LEGISLATIVE PRIVILEGE (IN CHRONOLOGICAL ORDER)

Rodriguez v. Pataki[68]

In 2003, voters in New York filed a lawsuit against the governor of New York and state legislative leaders, challenging New York's state Senate and congressional redistricting plans enacted in 2002. In developing the plan, the legislators were assisted by an advisory Task Force on Demographic Research and Reapportionment (LATFOR). During discovery, plaintiffs moved to compel the legislators to produce all documents employed by the legislators in developing the 2002 state Senate and congressional redistricting plans. The plaintiffs focused on LATFOR's activities, which involved participation of non-legislators. The court stated that, in deciding whether and to what extent the privilege should be honored, a court must balance the extent to which production of the information sought would chill the Legislature's deliberations concerning important matters against any other factors favoring disclosure. The factors a court should consider in arriving at such a determination are: 1) the relevance of the evidence sought to be protected; 2) the availability of other evidence; 3) the "seriousness" of the litigation and the issues involved; 4) the role of the government in the litigation; and 5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. The district court granted the voters' motion to compel only as to the discovery requests that concerned LATFOR.

Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections[69]

The Illinois House of Representatives and Senate held a series of public hearings at locations around the state where members of the public were allowed to comment on the redistricting process. Both the Illinois House of Representatives and Senate passed the Redistricting Act, and the governor signed it into law. A group of plaintiffs alleged that the 2011 map discriminated against Latino and Republican voters. Plaintiffs served subpoenas on numerous non-parties, including the Illinois House and Senate, and individual state legislators and staff. The non-parties refused to comply with the subpoenas,

arguing legislative immunity, among other privileges. The court did not find in the common law an absolute immunity for non-party state lawmakers that protects them from producing documents in federal redistricting cases. Instead, non-parties' privilege claims are best analyzed under the doctrine of legislative privilege. The court then applied the *Rodriguez* test to determine the extent to which state lawmakers may invoke legislative privilege to protect them from producing documents related to their legislative activities. The court held that state lawmakers were not required to disclose documents containing the 1) motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the 2011 map prior to the passage of the Redistricting Act; or 2) identities of persons who participated in decisions regarding the 2011 map. However, it did not protect facts or information available to lawmakers at the time of their decision.

Baldus v. Members of the Wis. Gov't Accountability Bd.[70]

Plaintiffs alleged that the Wisconsin legislative and congressional plans violated the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act in various ways. Specifically, the plaintiffs alleged the plans were unconstitutional because they violated traditional redistricting principles and failed to protect communities of interest; constituted an impermissible partisan gerrymander; and disenfranchised nearly 300,000 voters. During discovery, plaintiffs served subpoenas on certain non-parties, ordering them to turn over documents used in drawing the redistricting plans. The Wisconsin House and Senate moved to quash the subpoenas, but the district court denied their request on the grounds that legislative privilege did not prevent disclosure. The court concluded that the plaintiff's showing of need outweighed the non-party Wisconsin Legislature's asserted qualified legislative privilege.

Favors v. Cuomo[71]

Plaintiffs challenged the New York Senate and Assembly plans for various violations of Section 2 of the Voting Rights Act and the Equal Protection Clause of the 14th Amendment. Both the Senate majority (Republicans) and Senate minority (Democrats) intervened as defendants. The Senate minority defendants sought discovery from the Senate majority defendants of all documents determining the size of the Senate following the 2010 census. The Senate majority, Assembly majority (Democrats), and Assembly minority (Republicans) defendants moved for an order denying discovery of documents and information protected by the legislative privilege. The court found that certain documents and communications were not "legislative" and not entitled to the privilege: 1) those categorized as public statements or concerning the preparation of public statements; 2) those prepared in anticipation of litigation; 3) inquiries from members of the public or media and responses thereto; 4) public remarks, statements crafted for public relations purposes, and public speeches made outside the Legislature by legislators or their representatives; 5) public testimony; 6) efforts made in connection with negotiation for or securing of government contracts, and remuneration of contractors or service providers; 7) those concerning administrative tasks; 8) correspondence with or about national political organizations; 9) submissions to the Department of Justice related to compliance with Section 5 of the VRA; and 10) any other means of informing those outside the legislative forum.

Bethune-Hill v. Va. State Bd. of Elections[72]

Voters in Virginia filed suit in federal district court alleging that the Virginia General Assembly violated the Equal Protection Clause when it drew state House districts in 2011. During discovery, plaintiffs sought all documents of non-party legislators related to the 2011 Virginia redistricting process from the Virginia House. On behalf of a number of legislators who asserted legislative privilege, the Virginia House refused to turn over those specific legislators' requested documents. Balancing the competing, substantial interests at stake, the court found that the totality of circumstances warranted the selective disclosure of the assertedly privileged documents in the House's possession. In this context, where plaintiffs allege racial gerrymandering and seek an injunctive remedy from the General Assembly itself, and the intent of the General Assembly is the dispositive issue in the case, the balance of interests called for the legislative privilege to yield. The court held first that the House must produce all documents or communications that were created after the redistricting legislation's date of enactment. Second, the House must produce all documents or communications shared with, or received from, any individual or organization outside the employ of the General Assembly. Third, all "internal" documents or communications to the House that were generated before the legislation's date of enactment and that reflected strictly factual information were to be produced.

League of Women Voters v. Johnson[73]

The League of Women Voters of Michigan, numerous league members and several Democratic voters challenged the 2011 congressional, Senate and House redistricting plans as violating their 14th Amendment right to equal protection of the laws and their First Amendment rights to freedom of speech and association by deliberately discriminating against Democratic voters. The Michigan Senate, Republican members of Congress, and members of the Michigan Senate and House intervened to defend the plans. During discovery, plaintiffs served document subpoenas on various non-party Michigan state legislators and legislative offices in the state, for the purpose of seeking documents related to the state of Michigan's redistricting process in 2012. Those non-parties filed motions to quash the subpoenas, arguing that they enjoy absolute legislative privilege. The panel found that the privilege for state legislators in federal court "is not absolute," especially "where important federal interests are at stake," including "cases involving constitutional challenges to state legislation." In determining the extent of this qualified privilege in this particular case, the panel turned to the five-factor *Rodriguez* test and held that "Plaintiffs' need for the documents…is sufficient to overturn the legislative privilege;" and the non-parties were required to produce: 1) documents and communications related to non-legislative tasks; 2) fact-based documents and communications; 3) documents and communications that legislators or their staff created after the redistricting legislation's date of enactment, shared with third parties consulted during the redistricting process, produced for the legislators that reflect opinions, recommendations or advice (excluding any comments, requests or opinions expressed by legislators or their aides in communication with committee staff which may be redacted); 4) redistricting plans on record, or proposed, during the 2012 redistricting process; and 5) any relevant documents or information that were shared with third parties, which otherwise would have been protected by the legislative privilege.

CHAPTER NOTES

1. U.S. Const., Art. I, § 6, cl. 1.

2. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975).

3. *United States v. Johnson*, 383 U.S. 169, 181-183 (1966).

4. *Ibid*. at 181.

5. *Ibid*. *at* 177.

6. *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951).

7. *United States v. Gillock*, 445 U.S. 360, 374 (1980).

8. *United States v. Brewster*, 408 U.S. 501, 507 (1972).

9. *Gravel v. United States*, 408 U.S. 606, 616 (1972).

10. *Tenney*, 341 U.S. at 373.

11. *Ibid*. at 375.

12. *Ibid*. at 372.

13. *Gravel*, 408 U.S at 618.

14. *Tenney*, 341 U.S. at 372; see also *Gillock*, 445 U.S. at 372 n. 10.

15. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975).

16. *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

17. *Eastland*, 421 U.S. at 502-503 (citations omitted).

18. *Powell*, 395 U.S. at 504 (finding that judicial review of the constitutionality of an underlying legislative decision was not barred even though House employees were acting pursuant to express orders of the House); citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (finding a sergeant at arms liable for false imprisonment by simply executing a House-passed resolution that arrested and imprisoned an individual).

19. See *Gravel*, 408 U.S. at 620-21; see also *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660, cert, denied, 552 U.S. 1295 (2008).

20. *Gravel,* 408 U.S. at 617.

21. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

22. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

23. *Gillock*, 445 U.S. 360 (holding that the evidentiary privilege for legislative acts of Fed. R. Evid. 501 did not apply to the federal prosecution of a state legislator).

24. *Ibid.* at 373.

25. *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. May 26, 2015).

26. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (2003).

27. *Ibid.* at 92.

28. *Ibid.*

29. *Ibid*. at 104.

30. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 U.S. Dist. LEXIS 117656, at *5 (N.D. Ill. Oct. 12, 2011).

31. *Ibid*. at *5-6.

32. *Ibid.* at *22.

33. *Ibid*. at *24.

34. *Ibid*. at *37.

35. *Ibid*. at *37-38.

36. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW-RMD, 2011 U.S. Dist. LEXIS 142338 (E.D. Wis. Dec. 8, 2011).

37. *Ibid*. at *4-5.

38. *Ibid*. at *5.

39. *Ibid*. at *10.

40. *Ibid*. at *8.

41. *Ibid*.

42. *Favors v. Cuomo*, 285 F.R.D. 187, 195 (E.D.N.Y. Aug. 10, 2012).

43. *Ibid*. at 195-196.

44. *Ibid*. at 197.

45. *Ibid*. at 202.

46. *Favors v. Cuomo*, No. 11-CV-5632, 2013 U.S. Dist. LEXIS 189355, at *26-30 (E.D.N.Y. Feb. 8, 2013).

47. *Bethune-Hill*, 114 F. Supp. 3d 323.

48. *Ibid*. at 329-330.

49. *Ibid*. at 330.

50. *Ibid*. at 336-37.

51. *Ibid*. at 342-343.

52. *Ibid*. at 343.

53. *Ibid*. at 343-345.

54. *League of Women Voters v. Johnson*, No. 17-14148, 2018 U.S. Dist. LEXIS 86398 (E.D. Mich. May 23, 2018).

55. *Ibid*. at *4.

56. *Ibid*.

57. *Ibid*. at *7-8.

58. *Ibid.* at *13-14.

59. *Ibid*. at *14-15.

60. *Ibid*.

61. *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So.3d 135 (Fla. 2013).

62. *Ibid*. at 138.

63. *Ibid*. at 154.

64. *Dickson v. Rucho*, 366 N.C. 332 (2013).

65. *Ibid*. at 345.

66. *Edwards v. Vesilind*, 292 Va. 510 (2016).

67. *Ibid*. at 528-29.

68. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003).

69. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 U.S. Dist. LEXIS 117656 (N.D. Ill. Oct. 12, 2011).

70. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW-RMD, 2011 U.S. Dist. LEXIS 142338 (E.D. Wis. Dec. 8, 2011).

71. *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012).

72. *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015).

73. *League of Women Voters v. Johnson*, No. 17-14148, 2018 U.S. Dist. LEXIS 86398 (E.D. Mich. May 23, 2018).

8 | Federalism and Redistricting

INTRODUCTION

In earlier editions of this publication, federalism was discussed extensively, almost entirely by analyzing the 1993 U.S. Supreme Court decision in *Growe v. Emison*.[1] In *Growe*, the Court made clear that state courts had a role to play in redistricting litigation. Following this decision, state court litigation proliferated as many redistricting plaintiffs chose to avail themselves of a state forum to litigate their claims, rather than choosing federal courts. The use of state forums for redistricting litigation continues. For example, plaintiffs in *League of Women Voters of Pennsylvania, et al. v. Commonwealth of Pa.* successfully challenged the state's 2011 congressional map as a partisan gerrymander under the Pennsylvania state constitution.[2]

Since the 2010 edition, federalism considerations have been prominent in two significant cases decided by the U.S. Supreme Court:

- *Shelby County v. Holder*[3]
- *Arizona State Legislature v. Arizona Independent Redistricting Commission*[4]

SHELBY COUNTY V. HOLDER: FEDERALISM AND THE VOTING RIGHTS ACT

Of the U.S. Supreme Court's recent federalism cases, perhaps none has received as much comment and analysis as the 2013 *Shelby County v. Holder* case, where the Court invalidated the Section 4 coverage formula found in the Voting Rights Act of 1965 (VRA), rendering the preclearance provisions of Section 5 of the VRA essentially inoperative. These two sections had made it mandatory for specified states and other "covered jurisdictions" to submit all changes in electoral practices to the U.S. Department of Justice or to a special U.S. District Court for the District of Columbia for preclearance before the changes could become effective.

Alabama's Shelby County sought declaratory and injunctive relief against the enforcement of sections 4 and 5 of the VRA. The VRA required that Shelby County (and all Alabama jurisdictions) submit all local changes in electoral practices for preclearance prior to going into effect. After Shelby County lost in the District Court and the Court of Appeals for the District of Columbia, the Supreme Court reversed, finding the Section 4 coverage formula unconstitutional because it had been based on data from the 1960s that at the time showed evidence of widespread voting discrimination in certain states and jurisdictions.

When the Court initially upheld the coverage formula in the 1966 case *South Carolina v. Katzenbach*,[5] it acknowledged that the preclearance requirement was "stringent" and "potent," but it nonetheless upheld the provision, concluding that such an "uncommon exercise of congressional power" could be justified by "exceptional conditions."[6]

As decades passed and the formula for requiring preclearance was not changed or updated, the Court concluded that this could no longer justify the "Federalism costs" that are inherent in a statutory scheme that treats some states differently than others. The 10th Amendment grants states "residual sovereignty" or, put differently, powers not specifically granted to the federal government are reserved to the states or citizens.[7] Because some states were under preclearance and others were not, Section 4 did not provide "equal sovereignty among the states."[8]

The Court noted it had previously voiced concern about the continuing justification for Section 4 in *Northwest Austin Municipal Util. Dist. No. One v. Holder:* [9]

> *"In Northwest Austin, we stated that 'the Act imposes current burdens and must be justified by current needs.' And we concluded that 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.' These basic principles guide our review of the question before us."*[10]

Specifically, the Court was troubled because the law resulted in disparate treatment of states 50 years after original adoption of the VRA. The 2006 reauthorization of the VRA, including sections 4 and 5, was enacted without consideration of the considerable changes in African-American political participation in the covered jurisdictions.[11] In consideration of the changes in the opportunities for African-American political participation in the covered jurisdictions, the Court stated:

> *"Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that … clearly distinguished the covered jurisdictions from the rest of the Nation* [*in 1965*].

> *But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."*[12]

Shelby County v. Holder also is discussed in detail in Chapter 3, Racial and Language Minorities.

ARIZONA STATE LEGISLATURE V. ARIZONA INDEPENDENT REDISTRICTING COMMISSION: FEDERALISM, THE ELECTIONS CLAUSE AND WHO MAY REDISTRICT

The Elections Clause of the U.S. Constitution (Article I, Section 4) was the focus of one of the decade's most important redistricting cases involving federalism. While this constitutional provision is seldom applied by the courts outside of the one-person, one-vote cases addressing congressional redistricting, that was the case in *Arizona State Legislature v. Arizona Independent Redistricting Commission et al*.[13] In this case, the Arizona Legislature challenged the constitutional authority of the state's redistricting commission to develop and implement a congressional redistricting plan for the state, based on the Elections Clause.

In 2000, Arizona voters approved a citizens' initiative for an amendment to Arizona's Constitution that removed redistricting authority from the Arizona Legislature and vested that authority in a newly created Arizona Independent Redistricting Commission (AIRC). After the 2000 and 2010 censuses, the AIRC adopted redistricting maps for congressional and state legislative districts. The Arizona Legislature argued that the constitutional amendment from 2000 completely divested the Legislature of any authority to participate in redistricting and by doing so contravened the Elections Clause. In so arguing, the Arizona Legislature relied heavily on the text and history of the Elections Clause, which states as follows:

> "*The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing* [*sic*] *Senators.*"[14]

A three-judge federal district court panel held that the Arizona Legislature had standing to sue, but dismissed its complaint on the merits.[15] Upon direct review of that decision, the U.S. Supreme Court affirmed the district court's standing decision and the dismissal of the Arizona Legislature's complaint.

In supporting the AIRC's authority to redistrict, the Supreme Court interpreted basic federalism principles as allowing states considerable latitude to establish a process for redistricting without a legislature's involvement. Specifically, it acknowledged that redistricting is a legislative process that

must follow the state's prescribed methods for lawmaking, but these processes can include the use of the citizens' initiative process in the states that have such provisions, despite this method being unknown to the framers of the U.S. Constitution.[16]

In response to the Arizona Legislature's argument that the Elections Clause specifically grants "legislatures" the authority to conduct redistricting, the Court explained that the Elections Clause provides Congress with a means of overriding state election rules with respect to congressional redistricting, but does not restrict the way states adopt laws. While the clause uses the word "legislature," the term must be understood in the context of a federal system in which states establish their own political processes, free from intrusions of the federal government.[17]

Of specific significance was the following from the opinion:

> " '*Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.' Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority.*"[18]

The Court concluded that, although the framers may not have had the remotest thought of a direct initiative, the invention of the initiative was:

> "*in full harmony with the Constitution's conception of the people as the font of governmental power … it would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen … by the People of the several States'… .*"[19]

This case is noteworthy for federalism purposes because it demonstrates the wide latitude states have in how they structure and define their sovereignty in the context of the Elections Clause. In its embrace of a broad definition of the term "Legislature," the Court has allowed states to separately determine, whether it is through a citizens' initiative or the legislative process, if its legislature or some other entity should be responsible for redistricting in their respective state.

CONCLUSION

The federalism principles embedded in the U.S. Constitution are integral to the legal context of redistricting. As a result, the Supreme Court extends to states considerable latitude when drawing congressional, state and local electoral boundaries. This derives directly from Article 1, Section 4, which leaves the times, places and manner of (federal) elections to the states. In the last decade, the

Court employed federalism principles in decisive holdings that reaffirm the delicate interplay between the power of a state versus the federal government to control the redistricting process.

First, the Court reiterated that federalism requires current justifications for current harms to justify the burden on a state that a remedial measure such as preclearance presents. Second, the Court confirmed that federalism principles apply to states not only in the context of a state legislature's lawmaking authority, but also when a legislature assigns its lawmaking power through petition—in this case to establish a redistricting commission, despite the fact that petitions were not contemplated at the time of the constitutional convention.

CHAPTER NOTES

1. *Growe v. Emison*, 507 U.S. 25 (1993).
2. *League of Women Voters of Pa. v. Commonwealth*, 179 A.3d 1080 (Pa. 2018).
3. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).
4. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).
5. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
6. *Ibid*. at 308, 334, 337.
7. *Shelby Cty.*, 570 U.S. at 543 (quoting *Bond v. United States*, 564 U.S. 211 (2011)).
8. *Ibid*. at 544 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).
9. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).
10. *Shelby Cty.*, 570 U.S. at 542 (quoting *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203).
11. *Ibid*. at 547-50.
12. *Ibid*. at 554 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315, 331 (1966)).
13. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).
14. U.S. Const., Art. I, § 4, cl. 1.
15. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2659.
16. *Ibid*. at 2674.
17. *Ibid*. at 2657.
18. *Ibid*. at 2673 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).
19. *Ibid*. at 2674-75 (citations omitted).

9 | Redistricting for Local Jurisdictions, Courts and Other State Entities

INTRODUCTION

This book focuses on state legislative and congressional redistricting. While an in-depth discussion of local and judicial redistricting is outside the scope of the book, this chapter provides a summary of the redistricting process for other electoral bodies, including local jurisdictions (counties, cities and school districts), state courts, and other electoral districts that are geographically determined. The process for redrawing these boundaries varies greatly from jurisdiction to jurisdiction. Consequently, this chapter is not intended to be comprehensive, and NCSL suggests that, for redistricting questions relating to any entities other than Congress and state legislatures, readers seek advice in their own state.

In general, the same concepts that pertain to state and congressional redistricting pertain to redistricting for other entities as well. For instance, redistricting is likely to be required to reflect one person, one vote (although as mentioned in the judicial redistricting section below, this is not always the case); to not be discriminatory based on race in intent or effect; and to follow state-established criteria.
This chapter covers:

- Redistricting for local jurisdictions
- Redistricting for courts
- Redistricting for other state entities

REDISTRICTING FOR LOCAL JURISDICTIONS

The Equal Protection guarantee of one person, one vote applies to the tens of thousands of counties, cities, school boards and other local jurisdictions that elect members from districts. These districts must be redistricted in ways that are similar to congressional and legislative redistricting.

In *Avery v. Midland County*, the U.S. Supreme Court found:

> *"If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when members of a city council, school board, or county governing board are elected from districts of substantially unequal population...."*[1]

The Court went on to say, "We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power though legislatures and its exercise by elected officials in the cities, towns and counties."[2]

The opinion also recognized that local jurisdictions should have flexibility in their governance procedures, asserting that neither the Court nor the U.S. Constitution should throw up "roadblocks in the path of innovation, experiment, and development among units of local government."[3]

Even with that flexibility, local jurisdictions that have gone well past 10 years since redistricting their electoral districts are potentially in violation of federal and/or state law—particularly regarding one person, one vote, although there is greater latitude for local jurisdictions in regard to equal population than in state or federal electoral bodies. In 1971, in *Abate v. Mundt,* the Court said:

> *"[T]he facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lends support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes..."*[4]

With that said, local governments such as counties and cities generally are subject to the same redistricting criteria—such as compliance with the Voting Rights Act—as the states. See Chapter 4, Redistricting Principles and Criteria, for more information.

Racial Requirements Applied to Local Redistricting

Voting Rights Act (VRA) provisions aimed at protecting racial and language minority groups from vote dilution apply not only to states, but also to local jurisdictions. Thus, many VRA cases have involved local jurisdictions. These cases often involve the election of city council members from at-large districts as opposed to single-member districts. In many instances, minorities struggle to elect representatives in at-large election schemes but can successfully elect a preferred candidate from a single district. See Chapter 3, Racial and Language Minorities, for more information.

In a recent example, in the 2017 Texas case *Patino v. City of Pasadena*,[5] a federal judge ruled that Pasadena's move from single-member districts to a combination of single-member and at-large districts for municipal elections was unconstitutional under Section 2 of the VRA because it had the intent and effect of reducing electoral power for Latino voters.

Some courts have given local governments more freedom in how populations living in group quarters—such as prisons, dormitories and military installations—are counted for purposes of redistricting.[6]

REDISTRICTING FOR COURTS

Several states have an elected judiciary. When these states change their electoral districts or other practices addressing the election of judges, such changes must be made in conformity with state and federal legal requirements related to the redistricting and election of the judiciary. However, the requirements are not the same—in fact, as explained below, one person, one vote is not applicable.

The Inapplicability of the One-Person, One-Vote Requirement

Because judges do not represent people, the equal population requirement does not apply when establishing judicial districts. In *Wells v. Edwards*,[7] the Supreme Court, without opinion, affirmed the ruling of a three-judge district court in Louisiana that the 14th Amendment's one-person, one-vote requirement does not apply to the redistricting of judicial districts. The lower court reasoned:

> *"The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents. But as stated in Buchanan v. Rhodes, supra: "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary."*[8]

This position has been consistently applied by lower federal courts and state supreme courts when called upon to rule on plaintiff's one-person, one-vote claims.[9]

The Applicability of the Voting Rights Act of 1965

Courts have consistently held that provisions of the VRA do apply to judicial redistricting. Since *Chisom v. Roemer*[10] was decided in 1991, courts have applied Section 2 requirements to state and local redistricting plans for elected judges.[11]

One-Person, One-Vote Arguments Based on State Constitutional Provisions

More recently, in *Blankenship v. Bartlett*[12] the North Carolina Supreme Court held that the Equal Protection Clause of the North Carolina Constitution applies to challenges to state judicial districts. In this case, the court was faced with a judicial plan that contained electoral districts with as few as

32,199 residents per judge and as many as 158,812 residents per judge. While the court noted that this is not a violation of the federal one-person, one-vote rule per *Chisom*, the North Carolina Constitution's Equal Protection Clause requires that disparities in voter strength be subject to intermediate scrutiny. Under intermediate scrutiny:

> *"...Judicial districts will be sustained if the legislature's formulations advance important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary to further those interests."*[13]

In regard to what important governmental interests might be, the court set out a non-exhaustive list that included VRA compliance, geography, population density, convenience, number of persons in a district eligible to serve as judges, and types of legal proceedings in a given district.[14]

For more on the selection of judges, please consult the American Judicature Society.

REDISTRICTING FOR OTHER STATE ENTITIES

States can have other elected offices besides those of U.S. representatives, legislators and state judges that may be elected from geographically defined districts. Examples include the Utah State Board of Elections and the California State Board of Equalization.

Sometimes redistricting for these entities falls to the legislature or to a commission. How this is handled and what standards are applied are determined by the state in question.

CONCLUSION

While most of the focus on redistricting centers around state legislative and congressional seats, local elected bodies represent a far greater portion of the redistricting litigation since the 14th Amendment requires all representative bodies that elect members based on districts (except in the case of judicial districts) to redistrict. This includes counties, cities, towns, other municipalities, school boards, state courts, state and local boards of education, and utility districts.

The equal population requirement may be less stringent for local redistricting than it is for legislative redistricting. However, the Voting Rights Act applies locally as it does at the state level.

States that elect their judges based on districts must adhere to the same redistricting standards as for other elected officials with one major exception: Courts do not have to comply with the federal equal population requirement.

CASES RELATING TO REDISTRICTING FOR LOCAL JURISDICTIONS, COURTS AND OTHER STATE ENTITIES (IN CHRONOLOGICAL ORDER)

Avery v. Midland County[15]

The Midland County, Texas, commissioners' court exercises broad governmental functions in the counties, including the setting of tax rates, equalization of assessments, issuance of bonds, and allocation of funds, and they have wide discretion over expenditures. A resident challenged that the selection of the commissioners' court from four single-member districts of substantially unequal population violated the Equal Protection Clause of the 14th Amendment. It held that the resident had a right to a vote for the commissioners' court of substantially equal weight to the vote of every other resident. In applying the Equal Protection Clause, there was little difference between the exercise of state power through legislatures and its exercise by elected officials in cities, towns and counties. The Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

Abate v. Mundt[16]

The Rockland County, New York, board of supervisors consisted of the supervisors of the county's five towns. Due to population growth and a court-ordered redistricting, a proposed plan provided for a county legislature of 18 members to be distributed among five districts, corresponding with the towns, and each district being assigned legislators in the proportion of its population to that of the smallest town. The plan produced a total deviation from equality of 11.9%. The Court held that a desire to preserve the integrity of political subdivisions may justify a plan that departs from numerical equality. With regard to the long tradition of overlapping functions and dual personnel in the Rockland County government and the fact that the plan did not contain any built-in bias tending to favor particular political interests or geographic areas, the plan's deviations in population did not violate the Equal Protection Clause.

Wells v. Edwards[17]

The Louisiana Constitution provides for the election of the seven justices of the state Supreme Court from districts that are established without regard to population. The voters in five districts, composed of varying numbers of parishes, elect one justice each, and the sixth district elects two justices. There was considerable deviation between the populations among the districts. The court reasoned that the primary purpose of one-person, one-vote is to make sure that each official member of an elected body speaks for approximately the same number of constituents. Apportionment cases have always dealt with elected officials who performed legislative or executive type duties, and in no case has the one-person, one-vote principle been extended to the judiciary. The court held that the one-person, one-vote rule does not apply to the judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district is not sufficient to state a claim upon which relief can be granted.

Thornburg v. Gingles[18]

In 1982, a legislative redistricting plan for the North Carolina General Assembly was enacted that created seven new districts. It was argued that the state had diluted black voting strength in violation of Section 2 of the Voting Rights Act of 1965 by enacting a redistricting plan with one single-member and six multi-member districts. The Supreme Court interpreted the new language of Section 2 concerning discriminatory effects. The Court enunciated that Section 2 requires the breakup of multi-member districts into minority single-member districts when three preconditions are met: 1) That the minority group is sufficiently large and compact that it can be drawn as a majority of a single-member district; 2) That the minority group is politically cohesive; and 3) That the majority usually votes as a bloc so as to defeat the minority's choices for representative. When the three preconditions are met, the Court's task then is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters.

Chisom v. Roemer[19]

The Louisiana Supreme Court consists of seven members, two of whom are elected at large from one multi-member district, with the remainder elected from single-member districts. The Orleans Parish, which was the largest of the four parishes in the multi-member district, contains about half of the district's registered voters, and the majority of its registered voters were black. However, more than 75% of the other three parishes' registered voters were white. The state's justice election procedure was challenged because it weakened the minority's voting power. The issue in this case was whether the 1982 amendment to Section 2 of the Voting Rights Act applied to judicial elections. The Court argued that Congress did not intend for the 1982 amendment to exclude judicial elections because, if they did, Congress would have explicitly indicated the exclusion. Therefore, the Court held that vote dilution claims for state judicial elections were included within the ambit of the Voting Rights Act, as amended. The Court held that the voters could prevail by demonstrating that the challenged system or practice resulted in minorities being denied equal access to the political process.

Blankenship v. Bartlett[20]

Voters in Wake County, N.C., were divided into four districts for purposes of electing superior court judges. The North Carolina General Assembly gave residents in District 10C one-fifth, or 20%, of the voting power of residents in District 10A. Residents of Districts 10B and 10D had one-fourth, or 25%, of the voting power of residents in District 10A. Therefore, the residents of District 10A had a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D. The issue was whether the Equal Protection Clause of the North Carolina Constitution applies to the General Assembly's creation of an additional judgeship in Superior Court District 10A. The North Carolina Supreme Court held that the state's constitution requires that judicial redistricting is subject to intermediate scrutiny respecting the allocation of judges to the state's judicial districts. Therefore, the state bears

the burden of demonstrating significant interests that justified the General Assembly's subdivisions within District 10 and to show that the disparity in voter strength was not substantially greater than necessary to accommodate those interests.

Patino v. City of Pasadena[21]

The city changed its method for electing city council members from eight single-member districts to six single-member and two at-large districts. This plan for electing its council was challenged because it allegedly diluted the votes of Latino citizens in violation of Section 2 of the Voting Rights Act. The court applied the *Gingles* three-part test and discussed the totality of the circumstances, based on an evaluation of the past and present reality and on a functional view of the political process. The court ruled that Pasadena's move from single-member districts to a mix of single-member and at-large districts for municipal elections was unconstitutional under Section 2 of the VRA because it had the intent and effect of reducing electoral power for Latino voters.

CHAPTER NOTES

1. *Avery v. Midland Cty.*, 390 U.S. 474, 480 (1968).

2. *Ibid*. at 481.

3. *Ibid*. at 485.

4. *Abate v. Mundt*, 403 U.S. 182, 185 (1971).

5. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

6. See *Calvin v. Jefferson Cnty. Bd. of Commrs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016), relating to whether to include state prisoners when redistricting a county; and *Fairley v. Hattiesburg*, 584 F.3d 660 (5th Cir. 2009), relating to excluding residents of college dormitories.

7. *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd* 409 U.S. 1095 (1973).

8. *Ibid.* at 455 (citations omitted).

9. See *Johnson v. State*, 965 So. 2d 866 (La. Ct. App. 2007); *Blankenship v. Bartlett*, 363 N.C. 518 (2009); and *Field v. Michigan*, 255 F. Supp. 2d 708 (E.D. Mich. 2003).

10. *Chisom v. Roemer*, 501 U.S. 380 (1991).

11. See *Harding v. Cty. of Dallas*, 2018 U.S. Dist. LEXIS 35138 (No. 3:15-CV-0131-D, N.D. Tex., Mar. 5, 2018) and *Hall v. Louisiana*, 108 F. Supp. 3d 419 (M.D. La. 2015) as recent examples of Section 2 actions against governmental entities responsible for drawing judicial districts.

12. *Blankenship v. Bartlett*, 363 N.C. 518 (2009).

13. *Ibid*. at 527.

14. *Ibid.*, but see *Johnson v. State*, 965 So. 2d 866 (La. Ct. App. 2007), where a Louisiana court found no state equal protection grounds for scrutinizing population disparities in judicial districts.

15. *Avery v. Midland Cty.*, 390 U.S. 474 (1968).

16. *Abate v. Mundt*, 403 U.S. 182 (1971).

17. *Wells v. Edwards*, 409 U.S. 1095 (1973).

18. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

19. *Chisom v. Roemer*, 501 U.S. 380 (1991).

20. *Blankenship v. Bartlett*, 363 N.C. 518 (2009).

21. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

10 | Enacting a Redistricting Plan Through the Legislative Process

INTRODUCTION

How redistricting plans are enacted varies from state to state. In fact, certain states have distinct differences in how they draw their congressional and state legislative redistricting plans. In most states, however, redistricting is the responsibility of the legislature. This chapter covers those states where legislatures are in charge. For states that have delegated responsibility to a commission, see Chapter 5, Redistricting Commissions.

Historically, a state's general lawmaking process is used to enact that state's redistricting plans. During recent years, however, states have begun to change how they enact redistricting plans. Regardless of how states differ in their procedures and self-imposed rules, all federal, state and local redistricting plans must meet federal constitutional standards and the requirements of the federal Voting Rights Act.[1] For more details about these requirements, see Chapter 4, Redistricting Principles and Criteria.

Besides federal law, a state's constitution and laws impose unique requirements or procedures for redistricting. This chapter addresses:

- Legislative or public hearing requirements
- The role of the governor
- The role, if any, that citizens' initiative processes may play
- Requirements for publication of maps
- The legal format used to describe districts
- Addressing technical errors in enacted maps
- Mid-decade redistricting
- The population data set
- Accounting for prisoners, military service members and college students
- Multi-member districts
- Legal challenges to plans

LEGISLATIVE OR PUBLIC HEARING REQUIREMENTS

Many states require the legislature to hold public hearings, sometimes explicitly requiring that they be held throughout the state. For instance:

- Oregon's Legislative Assembly must hold at least 10 public hearings at locations throughout the state, including those areas that have experienced the largest population shifts, prior to proposing a plan.[2]
- In Illinois, each committee or joint committee must conduct at least four public hearings statewide to receive testimony and inform the public on the applicable existing districts, with one hearing held in each of four distinct geographic regions of the state determined by the respective committee.[3]
- Iowa's legislative commission is required to schedule and conduct at least three public hearings, in different geographic regions of the state, on the plan embodied in the bill delivered by the Legislative Services Agency to the General Assembly.[4]

Whether legislatures or commissions are in charge of redistricting the boundary lines, states are addressing the need for transparency and public participation as part of the process. At the time of this publication, 20 states, through their state constitutions and statutes, require public hearings or meetings during their redistricting process. See NCSL's webpage, Public Input and Redistricting, www.ncsl.org/research/redistricting/public-input-and-redistricting.aspx.

THE ROLE OF THE GOVERNOR

Most states apply the state's general lawmaking process to redistricting bills (a bill is introduced, heard in committee, sent to the floor, etc.), with the bill sent to the governor for a signature or veto. Therefore, governors in most states have a role in the adoption of new redistricting maps.

Because the U.S. Constitution delegates responsibility for elections to state legislatures, a question arose decades ago about whether a governor could play a role in redistricting. The U.S. Supreme Court, in 1932, addressed this point in *Smiley v. Holm*.[5] In that case, the Minnesota Legislature passed a bill redistricting the state into nine congressional districts, and the governor returned it without his approval. Pursuant to a joint resolution, the bill was deposited with the secretary of state without further action by the Legislature. A citizen of Minnesota filed the complaint and argued that the redistricting legislation was null and void because it was vetoed by the governor.[6] The Court upheld the veto of the governor, declaring that the U.S. Constitution requires only that redistricting be done by the method each state chooses. The Court stated that nothing in the U.S. Constitution "precludes a [s]tate from

providing that legislative action in districting the [s]tate for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."[7]

Notably, in *Holm*, the Court recognized that a state's governor is not automatically empowered with veto authority over a congressional plan, unless that authority has been granted to the governor by the state's constitution or law: "Whether the [g]overnor of the [s]tate, through the veto power, shall have a part in the making of state laws is a matter of state polity. Article 1, section 4, of the Federal Constitution, neither requires nor excludes such participation."[8]

Though the U.S. Supreme Court has addressed the issue of veto authority only in the context of congressional redistricting (due to its nexus to federal law), the authority of any state's governor to veto a state legislative redistricting plan is also entirely dependent upon the state's law.[9]

Most states present legislatively enacted redistricting bills to the governor for approval or veto, as they would with any bill. In a few states—such as Florida, Maryland and Mississippi—legislative redistricting plans are adopted by joint resolution and are not subjected to the gubernatorial approval process.[10]

In North Carolina, both legislative and congressional redistricting are conducted by joint resolution.[11]

THE ROLE, IF ANY, THAT CITIZENS' INITIATIVE PROCESSES MAY PLAY

A total of 24 states have a citizens' initiative process, whereby citizens can gather signatures and place policy options on statewide ballots. Twice, courts have addressed the use of citizens' initiatives in regard to redistricting.

In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' referendum that was filed in response to the Ohio General Assembly's enactment of a plan for congressional districts.[12] In supporting a lower court's decision allowing the referendum to go forward, the Court noted that Congress had specifically authorized states to adopt plans for districts "in the manner provided by the laws [of each state]..."[13] Because a referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state.[14]

More recently, in 2015, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the U.S. Supreme Court upheld Arizona's voter-approved ballot initiative process that established an

PREPARING FOR REDISTRICTING

When preparing for the upcoming redistricting cycle, legislators and staff should plan to have on hand:

- The state's constitutional provisions, statutes and guidelines that relate to redistricting.
- A chart or spreadsheet summarizing important data (the ideal population of a district, where is population growth or loss happening, etc.).
- Court precedents under state and federal law for the state, including legislative privilege.
- A history of the state's procedures and action for at least the last two decades.
- A planning timeline starting perhaps with the release of census data (no later than April 30, 2021) and continuing through the first election in which the new districts will be used.
- The status of any legislative or congressional redistricting commissions in the state, and what the legislature's role is in terms of appointments to the commissions or review of their work.
- Information on whether the state reallocates prisoners from their prison address to their last known address and, if so, any guidelines for the prisoner reallocation process, which probably need to be developed in conjunction with state prison officials.
- Guidelines for how to treat college students and military personnel if the state has special rules for these transient populations.
- Contact information for those who can provide legal guidance, authorize or approve portions of maps, talk to the media, etc.

independent redistricting commission, which supplanted the Arizona Legislature's historic authority to adopt congressional districts.[15] Specifically, the Court determined that the ballot initiative process in Arizona was a proper exercise of the state's lawmaking power, and that there is "no constitutional barrier to a State's empowerment of its people by embracing [the initiative process]."[16]

These principles do not apply universally in all circumstances, however. In at least one state, plans adopted by a commission are explicitly excluded from a referendum process by mandate of the state constitution.[17]

See Chapter 5, Redistricting Commissions, for more information.

REQUIREMENTS FOR PUBLICATION OF MAPS

Several states—such as Michigan, Missouri and Oklahoma—require a designated official to produce and publish an official map detailing a set of district boundaries.[18]

Whether explicitly required by state law or not, it is common practice to publish final maps. Draft maps may be published to provide an opportunity for public comment. Online publication considerations include:

- Permanence of the website used for publication
- Ease of finding and navigating the website
- Whether the maps and associated documents are accessible to people with disabilities (for example, someone who uses a screen reader to navigate online content)
- Maintaining links so documents remain live and accessible for a decade or more
- Whether to permanently post proposed plans as well as enacted plans to preserve a more fully developed legislative history

THE LEGAL FORMAT USED TO DESCRIBE DISTRICTS

To be adopted by the legislature, district plans must be described in law. District geography can be specified in at least four ways: metes and bounds; reference to electronic map files; census units, including reference to political subdivisions and other voting districts (counties, cities, towns, etc.); and block equivalency files. Each system has advantages and disadvantages.

Metes and Bounds

The phrase "metes and bounds" is a centuries-old legal term that refers to marking a parcel of land through a narrative description of its physical features. The narrative uses compass directional points; distances; and landmarks, monuments and other visible features on the ground to fully describe the territory. Metes and bounds should enable a person who is on site to drive, walk or follow the boundaries.

Metes and bounds descriptions continue to be used by attorneys, surveyors and other real property specialists when required by law.

A representative sample of a metes and bounds description in an enacted redistricting plan is found in New York's state legislative plan enactment, codified at: New York State Law Title 8, Article 1 (Assembly); Article 2 (Senate).

Writing an accurate metes and bounds description is a highly skilled, technical task. Even though most redistricting software programs offer a "metes and bounds" feature to create a narrative description automatically, a state considering enacting its plans through this method should ensure that the legislative drafter has substantial experience and expertise in this area.

Reference to An Electronic Map File

In recent decades, a few states have moved away from fully codified redistricting plans and instead have enacted by law a reference to an electronic map that is officially filed with an appropriate state authority such as the secretary of state, a geographic information systems office or other responsible entity. This may be referred to as a "shapefile," which is a common data format used in geographic information systems (GIS) software. A shapefile is a combination of several files and data sets. One file (.shp) defines geography, such as legislative districts, congressional districts and census geographic units (block, block groups, tracts, etc.). Another file (.dbf) contains attributes for each geographic unit, such as the total number of people, the voting age population, and the racial composition of the population in each geographic unit (as per the census data).

A representative sample of a redistricting plan enacted by reference to an electronic map file is Utah's state legislative plan, codified at: Utah Code §§ 36-1-201.5 (House); 36-1-101.5 (Senate).

Census Units, Including Political Subdivisions and Other Voting Districts (Counties, Cities, Towns, Etc.)

A redistricting plan that uses census units to describe districts can take a number of forms. It may consist simply of a list of numbered census blocks within each district, or it could include a mix of numbered census units along with more readily understandable territories—often named counties, cities, towns and the like.

A representative sample of census units used in an enacted redistricting plan is found in Kentucky's state legislative plan, codified at: Kentucky Revised Statutes, secs. 5.101-5.138 (House); 5.201-5.300 (Senate).

Using a Block Equivalency File

A block equivalency file is a table that provides a one-to-one correspondence between census blocks and districts. Since a census block is the smallest unit of census geography, a listing of census blocks and the districts where they are assigned is a convenient way to produce an accurate, legal description of a redistricting map. In cases where census blocks are split between districts, this method must be modified.

ADDRESSING TECHNICAL ERRORS IN ENACTED MAPS

A number of states have codified the process for correcting technical errors in detailed statutory descriptions of districts. Most of these statutes deal with the most common error—geography that has been inadvertently omitted from a district description. In these cases, a smaller unit of geography within a district, such as a census block or voting precinct, is located within a congressional or legislative district on a map but is not listed in the statute's description of the district. States most likely require

the excluded geography to be deemed to have been assigned to the district within which it is located. Some states also have further provisions for how to treat unlisted or unassigned geography that is located between two districts. In these cases, states generally provide for the unassigned area to be appended to the nearest contiguous district with the lowest population.[19]

These procedures that allow for technical errors in previously enacted redistricting plans often allow the plans to be administratively corrected. Procedures that address technical errors vary by state. In some states, correction authority is assigned to a specific official—often the secretary of state. In Minnesota, for example, the secretary of state is authorized to make technical corrections and, if necessary, may recommend additional changes to the Legislature for possible enactment. Since 2012, Minnesota's secretary of state has issued at least 19 correction orders to Minnesota's redistricting plans; 18 of these were issued shortly after the plans were ordered, and one was issued as recently as 2017.[20]

In addition to these technical correction orders, the Minnesota Legislature has separately enacted two boundary adjustments that, while not substantive enough to qualify as mid-decade redistricting, were beyond the scope of the secretary of state's administrative correction authority.[21]

In Maine, the secretary of state is authorized to "resolve ambiguities concerning the location of election district lines" consistent with a set of standards included in the state law.[22] This authorization has been in place since 1993.

In Rhode Island, the secretary of state may "undertake measures to ensure compliance with" specific standards for assigning territory provided in law.[23]

In Utah, the local county clerk is authorized to assign territory that has been omitted from a plan to an appropriate district.[24] Utah law also permits "affected parties" to petition the state's lieutenant governor for a clarification order to resolve uncertainty about a boundary line, or to determine in which district a person resides.[25]

In 1982, California law authorized the secretary of state and county clerks to use the official maps to help them interpret the law and conduct elections (Cal. Election Code sec. 30000 (1989)). In 1983, the Legislature and secretary of state used this authority to make corrections to the congressional redistricting plan to save it from constitutional attack.[26]

MID-DECADE REDISTRICTING

Generally, states enact a redistricting plan only once every 10 years. There are times, however—whether due to litigation or simple technical corrections—when a state alters its plan during a particular decade.

While the vast majority of states do not change their redistricting plans until the following decade's new census, a few states expressly prohibit mid-decade changes to district plans (other than technical adjustments or based on court order). For example:

- In Missouri, modification of district boundaries by its commission in the years between a full redistricting cycle is prohibited under its constitution.[27]
- In North Carolina, mid-decade redistricting is prohibited under its constitution.[28]
- In Tennessee, mid-decade adjustments to congressional district boundaries are specifically prohibited by statute.[29]

It is possible, though rare, for states where no prohibition on mid-decade redistricting exists for a state to undertake such redistricting. Texas did so in the 2000s, for instance.

THE POPULATION DATA SET

Occasionally, questions arise about the specific population data set to be used in redistricting. The U.S. Constitution requires congressional apportionment to be based on an "actual Enumeration" of the U.S. population, which means, in practice, with data from the federal decennial census. Most states use population data provided by the census for legislative redistricting as well, although some variation exists in whether this is required or just permitted.

Twenty-two states explicitly require the use of census data for legislative redistricting, with another 17 states implying the same. Six states permit either the use of census or other data sets. For instance, Alabama permits the state to conduct an "enumeration" in the event the federal census is not conducted,[30] and New York has a similar option for a state census.[31] Five states have special rules on how and when the census data is to be used in their redistricting. For more information, see Appendix B. In 2016, the U.S. Supreme Court addressed the issue of what population data is acceptable in a case arising from Texas, *Evenwel v Abbott*.[32] The case related to Texas' use of its total state population (by far the most common practice among states), rather than its population of eligible voters or registered voters, as the basis for drawing state senate districts of equal population. The Court did not direct the use of one particular population metric; instead, it affirmed the right of states to choose to use total population as the basis for upholding the constitutional principle of one-person, one-vote.[33] It did not address whether alternative data sets also would be permissible.

Although the *Evenwel* case did not fundamentally change any requirements for legislative drafters in developing a redistricting plan, it does highlight both the risk of confusion due to the complexity of

available population data sets and the need for consistency and clarity when proposing plans, especially if a legislature may consider multiple plans over the course of a redistricting cycle.

The *Evenwel* case is discussed in more detail in Chapter 1, The Census.

ACCOUNTING FOR PRISONERS, MILITARY SERVICE MEMBERS AND COLLEGE STUDENTS

The federal decennial census counts people where they live. This includes prisoners, military service members and college students, all of whom may be living in a state or jurisdiction other than their permanent home. In the 2010 cycle, New York and Maryland "reallocated" prisoners from the prison address to their last known address for congressional redistricting, legislative redistricting or both. Four additional states (California, Delaware, Nevada and Washington) intend to do so for the 2020 cycle.

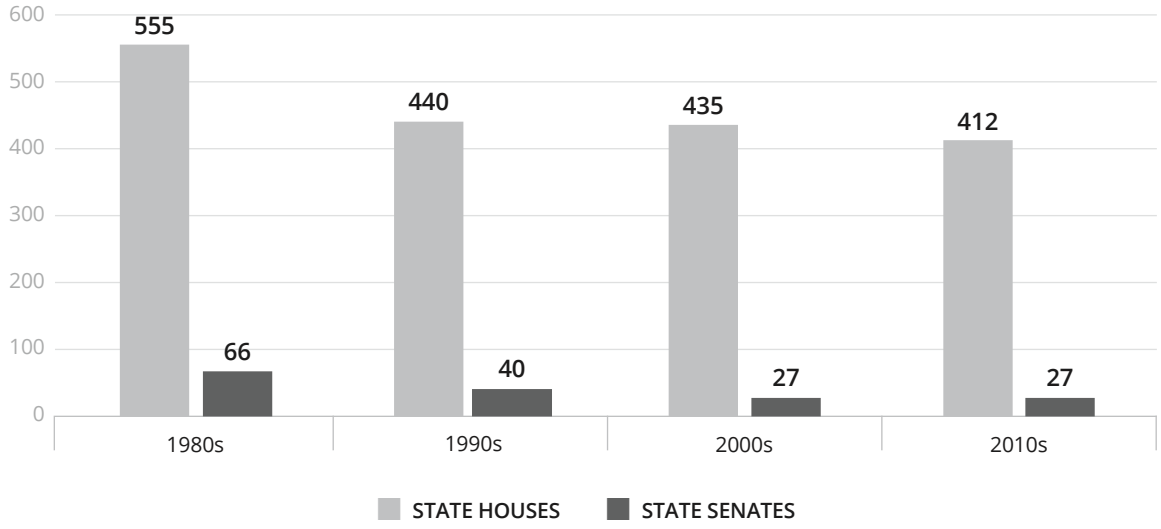
Reallocating specific populations requires guidelines on who will be reallocated (i.e., in the case of prisoners, those in federal and state prisons, or only those in state prisons) and where to reallocate them. Creating these guidelines may present challenges. For example, depending on the state's requirement, reallocating prison populations may involve engaging with local, state and federal corrections authorities. In 2010, Maryland and New York were denied access to federal prison data. Access to the complete set of data from state prisons necessary for redistricting purposes (for example, racial and ethnic data) may or may not be readily available. Rules for allocating individuals with a last known address that is out of state (prisoners, students, and the like) also will require careful thought and preparation.

Hawaii has excluded military service members from their legislative count, a practice upheld in *Burns v Richardson*.[34] Kansas has done the same in the past for military service members and students living away from home. In 2019, Kansas adopted a resolution to stop this practice.[35]

MULTI–MEMBER DISTRICTS

In most legislative chambers, a single representative or senator represents a specific district; these are known as single-member districts. In some cases, a district may be represented by two or more legislators in a given chamber. Chambers can have a mix of single-member and multi-member districts. Sometimes, a legislative district is represented by one senator and by two (or occasionally three, as is the case in Maryland) representatives, who are elected at large. In other cases, a single senate district could be composed of two distinct house districts. These are referred to as "nested" districts. In still other cases, a house district may be large enough to have two, three or more representatives.

EXHIBIT 10.1 Total Number of Multi-member Districts



Source: NCSL, 2019

Congress has prohibited multi-member districts for the purposes of redistricting seats in the U.S. House of Representatives since 1967.[36]

In contrast, the U.S. Supreme Court has held that the use of multi-member legislative districts is not unconstitutional per se. However, the Court has invalidated the use of multi-member legislative districts where their use impedes the ability of minority voters to elect representatives of their choice. Multi-member districts that discriminate against a racial group will most likely be challenged under Section 2 of the Voting Rights Act, which requires only showing that an election practice results in discrimination. The Court has made clear its preference for single-member legislative districts by discouraging the use of multi-member districts in court-drawn plans absent extraordinary circumstances.[37]

The use of multi-member districts for legislative districts has declined over the decades. In 1980, multi-member legislative districts were used in 17 states. In 2019, 10 states still had multi-member districts in at least one of their legislative bodies, as shown in Exhibit 10.1. To see the states that have used multi-member districts in 2000 and 2010, see Exhibit 10.2.

EXHIBIT 10.2 Multi-member Districts in Each State

	STATE HOUSES					
	2000s			2010s		
	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District
Arizona	30	30	2	30	30	2
Idaho	35	35	2	35	35	2
Maryland	65	44	3	67	43	3
New Hampshire	103	92	13	204	99	11
New Jersey	40	40	2	40	40	2
North Dakota	47	47	2	47	47	2
South Dakota	37	33	2	35	3	2
Vermont	108	42	2	150	46	2
Washington	49	49	2	49	49	2
West Virginia	56	23	7	67	20	5

	STATE SENATES					
	2000s			2010s		
	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District
Vermont	13	10	6	13	10	6
West Virginia	17	17	2	17	17	2

Source: NCSL, 2019

LEGAL CHALLENGES TO THE PLANS

An important consideration for a legislature during the redistricting plan development process is determining who will be responsible for defending legal challenges to the plan. The resolution of this issue must be based upon a review of state laws, particularly those that empower the state's attorney general. A legislature's expectation that its attorney general will zealously defend an adopted plan may be affected by the degree of independence the attorney general has in declining representation or the office's power to settle a suit in the "best interests of the public." Likewise, a decision to provide that other parties will bear the responsibility of defending a plan can be affected by the state's allocation of powers and duties to its attorney general. A legislature must address, through careful examination, its constitutional, statutory and case law.[38]

Attorney general's authority to represent or defend a redistricting plan adopted by the legislature

In most states, the attorney general is the state's chief legal officer.[39] Each attorney general's office is unique in scope and sources of authority. In some states, the attorney general is empowered by provisions of the state's constitution as well as by statute. In many, the office is equipped with the same powers the position had at common law.[40]

Generally, state constitutions provide little detail as to the duties of the attorney general, leaving the matter to the legislature or to common law doctrine to define the responsibilities of the office.[41] In states where the office derives its powers from a statute or the common law, legislative enactments either amending statutes or abrogating the common law would appear to be possible means of placing the authority to defend redistricting plans in the hands of other officers.[42] In other states, constitutional language empowering the attorney general may place severe restrictions on the legislature's power to prohibit the attorney general from defending or taking other legal action.[43] In this latter group of states, the attorney general may be required to represent the state in any challenge to a plan.

The attorney general's choice to represent and defend

Forty-three state constitutions are silent on whether an attorney general has a duty to defend; the remaining seven contain language that is ambiguous on this point.[44] State statutes often set out a duty of the attorney general to enter appearances or defend the state, but often are silent as to whether the attorney general may choose *not* to defend, particularly when constitutional issues are raised in the case. Two states—Mississippi and Pennsylvania—specifically set out a duty of the attorney general to defend cases in which the constitutionality of a state law is challenged.[45] To the contrary, statutes in three states would empower their attorneys general to decline to defend their state statutes in constitutional cases.[46] Maryland courts have found that the attorney general may choose not to defend certain laws that are undeniably unconstitutional.[47] In recent years, attorneys general in several states have opted not to defend controversial statutes adopted on such subjects as same-sex marriage and abortion, giving rise to defenses from intervenors or other parties.[48] Thus, in some states, an attorney general who believes that a redistricting plan suffers from a legal infirmity, particularly a constitutional defect, may be able to refuse to defend such plans when they are challenged in court.

The clients' interests and settlements

A decision of an attorney general to decline representation in a redistricting case raises serious concerns about the legislature's ability to defend its adopted plan. As mentioned above, state approaches vary regarding the matter of who will be responsible for defending laws when the attorney general declines to do so. Some states clearly set out statutory guidelines allowing other public officers to make appearances to defend state laws under challenge. These statutes often allow the legislature to take action to defend a challenged statute or allow the governor to do so.[49] Outside intervenors or private counsel hired by affected agencies also may defend a challenged statute in some jurisdictions.[50] In

others, courts have devised tests for determining when state agencies may proceed or defend in cases in which the attorney general has taken a position adverse to the client's interests.[51] When attorneys general have defended challenges to a statute, some courts have made clear that an attorney general may not enter into settlements or make decisions regarding appeals if such actions are adverse to the interests of the clients.[52]

It also is possible that multiple parties or intervenors may appear in a case challenging a statute or a redistricting plan. The case of *Lawyer v. Department of Justice*[53] illustrates the complexities that arise when multiple parties with differing interests appear in a case involving the constitutionality of a redistricting plan.

During the 1990s, Florida Senate District 21 (Tampa Bay) had been challenged in federal court on the grounds that it violated the Equal Protection Clause of the U.S. Constitution. The district had been drawn by the Florida Legislature, but the U.S. Department of Justice 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 Florida 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 was used for the 1992 and 1994 elections. A suit was 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 and found that action by the Legislature was not necessary. The Court 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.[54]

In a 2019 decision, the U.S. Supreme Court held that the Virginia House of Delegates did not have standing to appeal a federal district court decision that created a new redistricting plan for the House after 11 districts were found to be racially gerrymandered.[55] The federal district court redrew the Virginia map after the House and Senate failed to develop their own remedial map during late 2018. The speaker of the House, on behalf of his chamber, appealed the district court decision creating the new map and sought to enjoin use of the court-drawn map in the 2019 elections.

The Court held that "(t)he House lacks standing, either to represent the State's interests or in its own right."[56] Justice Ruth Bader Ginsberg, writing for the majority, wrote that "(O)ne House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process."[57] The opinion noted that the attorney general and governor did not seek to appeal the district

court decision, and the Senate also took no action. While the House was able to intervene in the lower court proceedings, it did not have standing on its own to appeal on behalf of the state.

Civil actions challenging statutes filed by the attorney general

Related to issues associated with the duty to defend is the power of an attorney general to bring a civil action against state agencies to enjoin them from implementing legislation. In several states, case law supports the proposition that an attorney general is under an affirmative duty to bring suits in cases challenging an allegedly unconstitutional law.[58] While states with an expansive view of the common law powers of an attorney general may support this position, several states have taken the position that such suits may not be brought by the attorney general against state agencies or entities absent specific statutory or constitutional authority.[59] In any state where an attorney general has taken the position that the office is legally obligated to take such action, it is possible that a redistricting plan could face a direct challenge from the state's own attorney general.

Legislatures will want to carefully examine the issue of representation before completing a redistricting plan. As this cursory overview reveals, each state's constitutional, statutory and common law is unique and must be carefully explored to help the legislature determine who can defend the adopted plans and whether there is a real possibility of opposition being directed against the plans from the state's attorney general.[60]

CONCLUSION

While the key tenets of redistricting are equal population, not abridging the right to vote based on race, and following state-specified criteria, procedurally based legal concerns can arise as well. Despite their procedural nature, these issues can be contentious. They include whether to count prisoners at their home address, use citizens as the population base, determine how public input is solicited and used, and conduct mid-decade redistricting.

Legal concerns also may arise around when and how states may undertake mid-decade redistricting, how plans are adopted and published, the role of the governor, the role (if any) that citizens' initiative process may play, and procedures for technical corrections and adjustments.

CASES RELATING TO ENACTING A PLAN (IN CHRONOLOGICAL ORDER)

Ohio ex rel. Davis v. Hildebrant[61]

In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' initiative. The citizens filed in response to the Ohio General Assembly's enactment of a plan for 22 additional congressional districts. The voters disapproved the redistricting act by a referendum vote. In supporting a decision that the referendum should go forward, the Court noted that Congress had specifically

authorized states to adopt plans for districts in the manner provided by the laws of each state. The referendum law was part of the legislative power of the state, made so by the state constitution. Since the referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state. For redistricting purposes, Hildebrant thus established, "the Legislature" did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people.[62]

Smiley v. Holm[63]

In 1931, the Minnesota Legislature passed a bill redistricting the state into nine congressional districts, and the governor returned it without his approval. Pursuant to a joint resolution, the bill was deposited with the secretary of state without further action. Since the bill had been vetoed by the governor and was not re-passed by the state Legislature, this case challenged the lawmaking authority and method needed to prescribe congressional districts. The Court held that nothing in the U.S. Constitution "precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."

Arizona State Legislature. v. Arizona Independent Redistricting Commission[64]

In 2000, Arizona voters adopted an amendment to the Arizona Constitution via ballot initiative that removed the Legislature's authority to draw legislative and congressional districts. The amendment vested this power with the Independent Redistricting Commission (IRC). In 2012, the Arizona Legislature challenged the constitutionality of removing what they considered to be their constitutional powers and giving them to another entity. The argument was based on the Elections Clause of the U.S. Constitution, which gives this power to the legislatures to draw congressional districts.

Evenwel v. Abbott[65]

After the 2010 census, the Texas Legislature reapportioned its Senate districts. The 2011 redistricting plan was challenged on the grounds that the districts violated the one-person, one-vote principle. The districts were apportioned based on total population rather than on registered voter population or voter eligible population and, while the new districts were relatively equal in terms of total population, they varied in terms of voter population. It was argued that the Legislature's use of total population violated the Equal Protection Clause by discriminating against voters in districts with low immigrant populations by giving voters in districts with significant immigrant populations a disproportionately weighted vote. The Supreme Court held that its past opinions confirmed that states *may* use total population in order to comply with the one-person, one-vote principle of the Equal Protection Clause. Constitutional history, judicial precedent and consistent state practice all demonstrate that apportioning legislative districts based on total population is permissible under the Equal Protection Clause. The Court did not hold that other methods are impermissible.

CHAPTER NOTES

1. 89 Pub. L. No. 110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101 et seq.).

2. Or. Rev. Stat. Ann. § 188.016.

3. 10 Ill. Comp. Stat. Ann. 125/10-5.

4. Iowa Code § 42.6.

5. *Smiley v. Holm*, 285 U.S. 355 (1932).

6. *Ibid*. at 361.

7. *Ibid*. at 372-73; see also *Carroll v. Becker*, 285 U.S. 380 (1932) (related to veto power of the Missouri governor in congressional redistricting), and *Koenig v. Flynn*, 285 U.S. 375 (1932) (related to veto power of the New York governor in congressional redistricting).

8. *Smiley*, 285 U.S. at 368.

9. See, for example, *Duxbury v. Donovan*, a 1965 Minnesota Supreme Court case holding that state legislative redistricting plans are part of the lawmaking function under Minnesota's constitution and, thus, subject to the governor's approval or veto. *Duxbury v. Donovan*, 138 N.W.2d 692 (1965).

10. Fla. Const. art. III, § 16; Miss. Const. Ann. art. 13, § 254; and Md. Const. art. III, § 5.

11. N.C. Const. art. II, § 22.

12. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

13. *Ibid.* at 568.

14. *Ibid*.; U.S. Const. Art. I, § 4. Interestingly, the Court cites the legislative history of Congress' addition, 1911, of the phrase "in the manner provided by the laws thereof" in the federal law authorizing states to establish procedures for redistricting, concluding that the phrase was inserted explicitly to ensure that redistricting plans could be subject to a state's initiative or referendum procedure. *Davis*, 241 U.S. at 568-69.

15. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

16. *Ibid*. at 2668.

17. See Mo. Const. art. III, §§ 2, 7.

18. See, among others, Mich. Comp. Laws § 3.53 (requiring the creation of a map); Mo. Rev. Stat., § 128.459 (requiring a map to be filed with the Revisor of Statutes); Okla. Stat. tit. 14, §§ 6.5 (congressional plan), 80.35.3 (State Senate), 136 (State House) (all requiring maps be published).

19. Minn. Stat. Ann. § 2.91, subd. 2 ("The legislature intends that a redistricting plan encompass all the territory of this state, that no territory be omitted or duplicated, that all districts consist of convenient contiguous territory substantially equal in population, and that political subdivisions not be divided more than necessary to meet constitutional requirements. Therefore, in implementing a redistricting plan for the legislature or for Congress, the secretary of state, after notifying the Legislative Coordinating Commission and the revisor of statutes, shall order the following corrections: (**a**) If a territory in this state is not named in the redistricting plan but lies within the boundaries of a district, it is a part of the district within which it lies. (**b**) If a territory in this state is not named in the redistricting plan but lies between the boundaries of two or more districts, it is a part of the contiguous district having the smallest population. (**c**) If a territory in this state is assigned in the redistricting plan to two or more districts, it is part of the district having the smallest population. (**d**) If a territory in this state is assigned to a district that consists of other territory containing a majority of the population of the district but with which it is not contiguous, the territory is a part of the contiguous district having the smallest population. (**e**) If the description of a district boundary line that divides a political subdivision is ambiguous because a highway, street, railroad track, power transmission line, river, creek, or other physical feature or census block boundary that forms part of the district boundary is omitted or is not properly named or has been changed, or because a compass direction for the boundary line is wrong, the secretary of state shall add or correct the name or compass direction and resolve the ambiguity in favor of creating districts of convenient, contiguous territory of substantially equal population that do not divide political subdivisions more than is necessary to meet constitutional requirements."); see also Nev. Rev. Stat. Ann. § 304.090; Ohio Rev. Code Ann. § 3521.01; 25 Pa. Cons. Stat. Ann. § 3596.303; and Tenn. Code Ann. § 2-16-103.

20. Minn. Stat. Ann. § 2.91, subds. 2-4. The 2017 order is available online, at https://officialdocuments.sos.state.mn.us/Document/Details/115134.

21. For an example of this style of drafting, see Minn. Stat. Ann. §§ 2.395 (modifying House boundaries within the 39th Senate District); 2.495 (modifying House boundaries within the 49th Senate District).

22. Me. Rev. Stat. tit. 21-A, § 1207.

23. R.I. Gen. Laws §§ 22-1-2 (Senate districts); 22-2-2 (House districts).

24. Utah Code Ann. §§ 20A-13-102 (Congressional districts); 36-1-104 (State Senate); 36-1-203 (State House).

25. Utah Code Ann. §§ 36-1-105 (state Senate boundaries); 36-1-204 (state House boundaries).

26. See *Badham v. United States Dist. Court for N. Dist*., 721 F.2d 1170, 1178-79 (9th Cir. 1983).

27. *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601 (Mo. 2012).

28. N.C. Const. art. II, §§ 3, 5.

29. Tenn. Code Ann. § 2-16-102.

30. Ala. Const. art. IX, § 201.

31. N.Y. Const. art. III, § 4.

32. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

33. *Ibid*. at 1132-33.

34. *Burns v. Richardson*, 384 U.S. 73 (1966).

35. Kansas S.C.R. 1605 (adopted Mar. 27, 2019) and H.C.R. 5005 (pending, will be carried over to the 2020 legislative session).

36. Seemingly conflicting mandates regarding multi-member districts for Congress were addressed by the U.S. Supreme Court when it reviewed a 2002 U.S. District Court-drawn congressional plan for Mississippi. Reviewing the conflicting language in light of the history of the 1967 amendment, the Court ruled that 2 U.S.C.S. § 2c applies to congressional plans whether drawn by the state redistricting authority or a court. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

37. See *Fortson v. Dorsey*, 379 U.S. 433 (1965) (the Supreme Court rejected the notion that the equal protection standard necessarily requires the formation of single-member districts.); *Burns v. Richardson*, 384 U.S. 73 (1966) (the Court stated that multi-member districts will constitute an invidious discrimination *only* if it can be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."); *White v. Regester*, 412 U.S. 755 (1973)("multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State."); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1979) (the Supreme Court required that, to sustain an action under the Equal Protection Clause and Section 2 of the VRA, a showing of purposeful discrimination would be necessary.); *Rogers v. Lodge*, 458 U.S. 613 (1982) (the Supreme Court upheld, for the first time since *Register*, a lower court finding of a violation of the Equal Protection Clause in the use of multi-member districting.); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (the Supreme Court reaffirmed that multi-member legislative districts and at-large election schemes do not, per se, violate the rights of minority voters.); *Connor v. Johnson*, 402 U.S. 690 (1971) (the Court held that, as a general rule, single-member districts are preferable to large multi-member districts when district courts are required to fashion redistricting plans.); *Chapman v. Meier*, 420 U.S. 1 (1975) ("When the plan is court ordered, there often is no state policy of multimember districting which might deserve respect or deference. Indeed, if the court is imposing multimember districts upon a State which always has employed single-member districts, there is special reason to follow the Connor rule favoring the latter type of districting."); and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir., 1973) (the U.S. Court of Appeals held that the preference for single-member districts in court-drawn plans "is not an unyielding one," and a court-drawn plan can use multi-member districts.)

38. For a comprehensive examination of the issues discussed in this section, see Neal Devins and Saikrishna Bangalore Prakash, "Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend," *Yale Law Journal* 124 (2015): 2100-87.

39. See William P. Marshall, "Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive," *Yale Law Journal* 115, no. 19 (2006): 2446, 2452.

40. Devins, "Fifty States," at 2124-25.

41. *Ibid*. at 2128.

42. Examples of cases setting out the legislature's power to modify statutory and common law duties of the attorney general include *Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016); *Dunivan v. State*, 466 S.W.3d 514 (Mo. 2015); *State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel*, 764 S.E.2d 769 (W. Va. 2014); *State ex rel.Morrison v. Sebelius*, 179 P.3d 366 (Kan. 2008); *Botelho ex rel. Members of Alaskan Sports Bingo Joint Venture v. Griffin*, 25 P.3d 689 (Alaska 2001); *State v. City of Oak Creek*, 605 N.W.2d 526 (Wis. 2000); *State ex rel. Cartwright v. Georgia-Pacific Corp.*, 663 P.2d 718 (Okla. 1982).

43. See *Lyons v. Ryan*, 780 N.E.2d 1098(Ill. 2002) and *Hoffman v. Madigan,* 80 N.E.3d 105 (Ill. App. Ct. 2017), wherein Illinois courts ruled that the General Assembly may not diminish the common law prerogatives of the Illinois attorney general; see also *Barati v. State,* 198 So. 3d 69 (Fla. Dist. Ct. App. 2016) and *Murphy v. Yates*, 348 A.2d 837 (Md. 1975).

44. Devins, "Fifty States," 2128–29.

45. See Miss. Code Ann. § 7-5-1; 71 Pa. Cons. Stat. Ann. § 732-204(a)(3).

46. See Tenn. Code Ann. § 8-6-109(b)(9)-(10); Neb. Rev. Stat. Ann. § 84-215, cited in Devins,"Fifty States," at 2130.

47. *State v. Braverman*, 137 A.3d 377 (Md. Ct. Spec. App. 2016), wherein a Maryland court made clear that, while the attorney general is responsible for defending challenges to the constitutionality of a statute, the attorney general does not have to defend a law that is undeniably unconstitutional. *Ibid.* at 391.

48. Katherine Shaw, "Constitutional Nondefense in the States," *Columbia Law Review* 114, no. 13 (2014): 213, 219.

49. Devins, "Fifty States," at 2131.

50. Shaw, "Constitutional Nondefense," at 246–57.

51. *Frazier v. State*, 504 So. 2d 675 (Miss. 1987).

52. See *Tice v. Department of Transp.*, 312 S.E.2d 241 (N.C. Ct. App. 1984); *County of Cook v. Patka*, 405 N.E.2d 1376 (Ill. App. Ct. 1980); *Santa Rita Mining Co. v. Department of Property Valuation,* 530 P.2d 360 (Ariz. 1975). But see *Terrazas v. Ramirez,* 829 S.W.2d 712 (Tex. 1991), wherein respecting a settlement of litigation, the attorney general's broad authority to protect the state's interests superseded the Legislature's specific constitutional authority to redistrict.

53. *Lawyer v. Department of Justice*, 521 U.S. 567 (1997).

54. *Ibid.* at 577-78.

55. *Va. House of Delegates v. Bethune-Hill*, No. 18-281, 587 U.S. ___ (2019).

56. *Ibid*.

57. *Ibid*.

58. Devins, "Fifty States," at 2133; and specifically regarding a redistricting plan, see *State ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003).

59. See *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981), ruling that the California attorney general has no authority to bring suit against state agencies and setting out the several authorities that have ruled similarly, as well the authorities that have ruled otherwise.

60. Other articles pertinent to these issues include Gregory F. Zoeller, "Duty to Defend and the Rule of Law," *Indiana Law Journal* 90 (2015): 513; and Marshall, "*Break Up the Presidency?*"

61. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

62. See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

63. *Smiley v. Holm*, 285 U.S. 355 (1932).

64. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

65. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

APPENDIX A

Census Residence Concepts

The U.S. Census Bureau uses residence criteria to determine where people are counted during the 2020 Census. In general, the criteria follow these three principles:

- Count people at their usual residence, which is the place where they live and sleep most of the time.
- Count people in certain types of group facilities on Census Day at the group facility.
- Count people who do not have a usual residence, or who cannot determine a usual residence, where they are on Census Day.

The table below describes how the residence criteria apply to specific living situations for which people commonly request clarification. For additional details, see U.S. Census webpage, 2020 Census Residence Criteria and Residence Situations, www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html.

LIVING SITUATION	DETAILS	WHERE COUNTED
People away from their usual residence on Census Day	People away from their usual residence on Census Day, such as on a vacation or a business trip, visiting, traveling outside the United States, or working elsewhere without a usual residence there (for example, as a truck driver or traveling salesperson).	Counted at the residence where they live and sleep most of the time.
Visitors on Census Day	Visitors on Census Day.	Counted at the residence where they live and sleep most of the time. If they do not have a usual residence to return to, they are counted where they are staying on Census Day.

LIVING SITUATION	DETAILS	WHERE COUNTED
Foreign citizens in the United States	Citizens of foreign countries living in the United States.	Counted at the U.S. residence where they live and sleep most of the time.
	Citizens of foreign countries living in the United States who are members of the diplomatic community.	Counted at the embassy, consulate, United Nations' facility or other residences where diplomats live.
	Citizens of foreign countries visiting the United States, such as on a vacation or business trip.	Not counted in the census.
People living outside the United States	People deployed outside the United States[1] on Census Day while stationed or assigned in the United States who are military or civilian employees of the U.S. government.	Counted at the U.S. residence where they live and sleep most of the time, using administrative data provided by federal agencies.[2]
	People stationed or assigned outside the United States on Census Day who are military or civilian employees of the U.S. government, as well as their dependents living with them outside the United States.	Counted as part of the U.S. federally affiliated overseas population, using administrative data provided by federal agencies.
	People living outside the United States on Census Day who are not military or civilian employees of the U.S. government and are not dependents living with military or civilian employees of the U.S. government.	Not counted in the census.
People who live or stay in more than one place	People living away most of the time while working, such as people who live at a residence close to where they work and return regularly to another residence.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
	People who live or stay at two or more residences (during the week, month or year), such as people who travel seasonally between residences (for example, snowbirds).	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
	Children in shared custody or other arrangements who live at more than one residence.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
People moving into or out of a residence around Census Day	People who move into a new residence on or before Census Day.	Counted at the new residence where they are living on Census Day.
	People who move out of a residence on Census Day and do not move into a new residence until after Census Day.	Counted at the old residence where they were living on Census Day.
	People who move out of a residence before Census Day and do not move into a new residence until after Census Day.	Counted at the residence where they are staying on Census Day.

LIVING SITUATION	DETAILS	WHERE COUNTED
People who are born or who die on Census Day	Babies born on or before Census Day.	Counted at the residence where they will live and sleep most of the time, even if they are still in a hospital on Census Day.
	Babies born after Census Day.	Not counted in the census.
	People who die before Census Day.	Not counted in the census.
	People who die on or after Census Day.	Counted at the residence where they were living and sleeping most of the time as of Census Day.
Relatives and nonrelatives	Babies and children of all ages, including biological, step, and adopted children, as well as grandchildren. Foster children. Spouses and close relatives, such as parents or siblings. Extended relatives, such as grandparents, nieces/nephews, aunts/uncles, cousins or in-laws. Unmarried partners. Housemates or roommates. Roomers or boarders. Live-in employees, such as caregivers or domestic workers. Other nonrelatives, such as friends.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
People in health care facilities	People in general hospitals or Veterans Affairs hospitals (except psychiatric units) on Census Day, including newborn babies still in the hospital on Census Day.	Counted at the residence where they live and sleep most of the time. Newborn babies are counted at the residence where they will live and sleep most of the time. If patients or staff members do not have a usual home elsewhere, they are counted at the hospital.
	People in psychiatric hospitals and psychiatric units in other hospitals (where the primary function is for long-term non-acute care) on Census Day.	Patients are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in assisted living facilities[3] where care is provided for those who need help with the activities of daily living but do not need the skilled medical care that is provided in a nursing home on Census Day.	Residents and staff members are counted at the residence where they live and sleep most of the time.
	People in nursing facilities/skilled-nursing facilities (which provide long-term non-acute care) on Census Day.	Patients are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People staying at in-patient hospice facilities on Census Day.	Counted at the residence where they live and sleep most of the time. If patients or staff members do not have a usual home elsewhere, they are counted at the facility.

LIVING SITUATION	DETAILS	WHERE COUNTED
People in housing for older adults	People in housing intended for older adults, such as active adult communities, independent living, senior apartments or retirement communities on Census Day.	Residents and staff members are counted at the residence where they live and sleep most of the time.
U.S. military personnel	U.S. military personnel assigned to military barracks/dormitories in the United States on Census Day.	Counted at the military barracks/ dormitories.
	U.S. military personnel (and dependents living with them) living in the United States (living either on base or off base) who are not assigned to barracks/dormitories on Census Day.	Counted at the residence where they live and sleep most of the time.
	U.S. military personnel assigned to U.S. military vessels with a U.S. homeport on Census Day.	Counted at the onshore U.S. residence where they live and sleep most of the time. If they have no onshore U.S. residence, they are counted at their vessel's homeport.
	People who are active duty patients assigned to a military treatment facility in the United States on Census Day.	Patients are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in military disciplinary barracks and jails in the United States on Census Day.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	U.S. military personnel who are deployed outside the United States (while stationed in the United States) and are living on or off a military installation outside the United States on Census Day.	Counted at the U.S. residence where they live and sleep most of the time, using administrative data provided by the Department of Defense.
	U.S. military personnel who are stationed outside the United States and are living on or off a military installation outside the United States on Census Day, as well as their dependents living with them outside the United States.	Counted as part of the U.S. federally affiliated overseas population, using administrative data provided by the Department of Defense.
	U.S. military personnel assigned to U.S. military vessels with a homeport outside the United States on Census Day.	Counted as part of the U.S. federally affiliated overseas population, using administrative data provided by the Department of Defense.

LIVING SITUATION	DETAILS	WHERE COUNTED
Merchant Marine personnel on U.S.–flagged maritime/ merchant vessels	Crews of U.S.–flagged maritime/merchant vessels docked in a U.S. port, sailing from one U.S. port to another U.S. port, sailing from a U.S. port to a foreign port, or sailing from a foreign port to a U.S. port on Census Day.	Counted at the onshore U.S. residence where they live and sleep most of the time. If they have no onshore U.S. residence, they are counted at their vessel. If the vessel is docked in a U.S. port, sailing from a U.S. port to a foreign port, or sailing from a foreign port to a U.S. port, crewmembers with no onshore U.S. residence are counted at the U.S. port. If the vessel is sailing from one U.S. port to another U.S. port, crew-members with no onshore U.S. residence are counted at the port of departure.
	Crews of U.S.–flagged maritime/merchant vessels engaged in U.S. inland waterway transportation on Census Day.	Counted at the onshore U.S. residence where they live and sleep most of the time.
	Crews of U.S.–flagged maritime/merchant vessels docked in a foreign port or sailing from one foreign port to another foreign port on Census Day.	Not counted in the census.
People in correctional facilities for adults	People in federal and state prisons on Census Day.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in local jails and other municipal confinement facilities on Census Day.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in federal detention centers on Census Day, such as metropolitan correctional centers, metropolitan detention centers, Bureau of Indian Affairs (BIA) detention centers, Immigration and Customs Enforcement (ICE) service processing centers, and ICE contract detention facilities.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in correctional residential facilities on Census Day, such as halfway houses, restitution centers, and prerelease, work release, and study centers.	Residents are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.

LIVING SITUATION	DETAILS	WHERE COUNTED
People in group homes and residential treatment centers for adults	People in non-correctional adult group homes on Census Day.	Residents are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in non-correctional adult residential treatment centers on Census Day.	Counted at the residence where they live and sleep most of the time. If residents or staff members do not have a usual home elsewhere, they are counted at the facility.
People in juvenile facilities	People in juvenile correctional facilities or non-correctional group homes on Census Day.	Juvenile residents are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in non-correctional juvenile residential treatment centers on Census Day.	Counted at the residence where they live and sleep most of the time. If juvenile residents or staff members do not have a usual home elsewhere, they are counted at the facility.
People in transitory locations	People at transitory locations such as recreational vehicle (RV) parks, campgrounds, hotels and motels, hostels, marinas, racetracks, circuses or carnivals.	Anyone, including staff members, staying at the transitory location is counted at the residence where they live and sleep most of the time. If they do not have a usual home elsewhere, or they cannot determine a place where they live most of the time, they are counted at the transitory location.
People in workers' residential facilities	People in workers' group living quarters and Job Corps centers on Census Day.	Counted at the residence where they live and sleep most of the time. If residents or staff members do not have a usual home elsewhere, they are counted at the facility.
People in religious-related residential facilities	People in religious group quarters, such as convents and monasteries, on Census Day.	Counted at the facility.

LIVING SITUATION	DETAILS	WHERE COUNTED
People in shelters and people experiencing homelessness	People in domestic violence shelters on Census Day.	People staying at the shelter (who are not staff) are counted at the shelter. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the shelter.
	People who are in temporary group living quarters established for victims of natural disasters on Census Day.	Anyone, including staff members, staying at the facility is counted at the residence where they live and sleep most of the time. If they do not have a usual home elsewhere, they are counted at the facility.
	People who are in emergency and transitional shelters with sleeping facilities for people experiencing homelessness on Census Day.	People staying at the shelter (who are not staff) are counted at the shelter. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the shelter.
	People who are at soup kitchens and regularly scheduled mobile food vans that provide food to people experiencing homelessness on Census Day.	Counted at the residence where they live and sleep most of the time. If they do not have a usual home elsewhere, they are counted at the soup kitchen or mobile food van location where they are on Census Day.
	People who, are at targeted non-sheltered outdoor locations where people experiencing homelessness stay without paying on Census Day.	Counted at the outdoor location where they are on Census Day.
	People who are temporarily displaced or experiencing homelessness and are staying in a residence for a short or indefinite period of time on Census Day.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.

1. "Outside the United States" and "foreign port" are defined for this purpose by the U.S. Census Bureau as being anywhere outside the geographic area of the 50 United States and the District of Columbia. Therefore, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, the Pacific Island Areas (American Samoa, Guam and the Commonwealth of the Northern Mariana Islands) and all foreign countries are considered to be "outside the United States." Conversely, "stateside," "U.S. homeport," and "U.S. port" are defined as being anywhere in the 50 United States and the District of Columbia

2. Military and civilian employees of the U.S. government who are deployed or stationed/assigned outside the United States (and their dependents living with them outside the United States) are counted using administrative data provided by the Department of Defense and the other federal agencies that employ them. If they are deployed outside the United States (while stationed/assigned in the United States), the administrative data are used to count them at their usual residence in the United States. Otherwise, if they are stationed/assigned outside the United States, the administrative data are used to count them (and their dependents living with them outside the United States) in their home state for apportionment purposes only

3. Nursing facilities/skilled-nursing facilities, in-patient hospice facilities, assisted living facilities and housing intended for older adults may coexist within the same entity or organization in some cases. For example, an assisted living facility may have a skilled nursing floor or wing that meets the nursing facility criteria, which means that specific floor or wing is counted according to the guidelines for nursing facilities/skilled nursing facilities, while the rest of the living quarters in that facility are counted according to the guidelines for assisted living facilities.

Source: NCSL, based on U.S. Census Bureau webpage, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html

APPENDIX B

Redistricting and the Use of Census Data

The U.S. Constitution, Article I, Section 2, requires congressional apportionment to be based on an "actual Enumeration" of the U.S. population. However, the Constitution is silent on what data is to be used for redistricting.

This table notes whether each state's constitution or statutes explicitly requires the use of federal census data for congressional and legislative redistricting.

For constitutional and statutory citations and excerpts, see NCSL's webpage, Redistricting and the Use of Census Data, www.ncsl.org/research/redistricting/redistricting-and-use-of-census-data.aspx.

State	Use of Census Data
ALABAMA	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Alabama Const. Art. IX, Sec. 201: "Should any decennial census of the United States not be taken, or if when taken, the same, as to this state, be not full and satisfactory, the legislature shall have the power at its first session after the time shall have elapsed for the taking of said census, to provide for an enumeration of all the inhabitants of this state, upon which it shall be the duty of the legislature to make the apportionment of representatives and senators."
ALASKA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
ARIZONA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
ARKANSAS	**Legislative (House of Representatives):** Explicitly requires the use of federal census data for redistricting **Congressional and Legislative (Senate):** An implied or practiced use of federal census data for redistricting

State	Use of Census Data
CALIFORNIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
COLORADO	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
CONNECTICUT	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
DELAWARE	**Legislative:** Explicitly requires the use of federal census data for redistricting
FLORIDA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
GEORGIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
HAWAII	**Congressional:** Explicitly requires the use of federal census data for redistricting **Legislative:** An implied or practiced use of federal census data for redistricting
IDAHO	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
ILLINOIS	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
INDIANA	**Legislative:** Explicitly requires the use of federal census data for redistricting **Congressional:** An implied or practiced use of federal census data for redistricting
IOWA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
KANSAS	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
KENTUCKY	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
LOUISIANA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
MAINE	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Me. Const. Art. IV, Pt. 1, § 2: "The number of Representatives shall be divided into the number of inhabitants of the State exclusive of foreigners not naturalized according to the latest Federal Decennial Census or a State Census previously ordered by the Legislature to coincide with the Federal Decennial Census, to determine a mean population figure for each Representative District."
MARYLAND	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
MASSACHUSETTS	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
MICHIGAN	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting

State	Use of Census Data
MINNESOTA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
MISSISSIPPI	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
MISSOURI	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
MONTANA	**Legislative:** An implied or practiced use of federal census data for redistricting
NEBRASKA	**Legislative:** Explicitly requires the use of federal census data for redistricting
NEVADA	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Nev. Const. Art. 15, § 13: "The enumeration of the inhabitants of this State shall be taken under the direction of the Legislature if deemed necessary ... and these enumerations, together with the census that may be taken under the direction of the Congress of the United States in A.D. Eighteen hundred and Seventy, and every subsequent ten years shall serve as the basis of representation in both houses of the Legislature."
NEW HAMPSHIRE	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible N.H. Const. Pt. SECOND, Art. 9: "the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state."
NEW JERSEY	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
NEW MEXICO	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
NEW YORK	**Congressional and Legislative:** New York laws provide for census data to be used unless the federal census data is unavailable or delayed. In that case, New York can conduct its own census or use an alternative data source. NY CLS Const Art III, § 4: "the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor." **Legislative:** Does not require the use of federal census data; other options may be possible NY CLS Const Art III, § 4: "The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session."

State	Use of Census Data
NORTH CAROLINA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
NORTH DAKOTA	**Legislative:** An implied or practiced use of federal census data for redistricting
OHIO	**Congressional and Legislative:** Ohio laws provide for the census data to be used unless the federal census data is unavailable or delayed. In those circumstances, the Ohio General Assembly chooses how to proceed. Oh. Const. Art. XI, § 3 [Effective 1/1/2021]: "The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and by the number "thirty-three" and the quotients shall be the ratio of representation in the house of representatives and in the senate, respectively, for ten years next succeeding such redistricting."
OKLAHOMA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
OREGON	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Ore. Const. Art. IV, § 6: "Apportionment of Senators and Representative (1) At the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population."
PENNSYLVANIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
RHODE ISLAND	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
SOUTH CAROLINA	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible S.C. Const. Ann. Art. III, § 3: "The General Assembly may at any time, in its discretion, adopt the immediately preceding United States Census as a true and correct enumeration of the inhabitants of the several Counties, and make the apportionment of Representatives among the several Counties."
SOUTH DAKOTA	**Legislative:** Explicitly requires the use of federal census data for redistricting
TENNESSEE	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
TEXAS	**Legislative (House of Representatives):** Explicitly requires the use of federal census data for redistricting **Congressional and Legislative (Senate):** An implied or practiced use of federal census data for redistricting
UTAH	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
VERMONT	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting

State	Use of Census Data
VIRGINIA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
WASHINGTON	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
WEST VIRGINIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
WISCONSIN	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
WYOMING	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting

Source: NCSL, 2019

APPENDIX C

Population Equality of Districts from 2010-Cycle Plans (aka Deviation)

This table provides 50-state information about congressional and legislative district maps, showing the ideal population for each seat or district, based on 2010 decennial census data, and the overall deviation range (from the smallest district to the largest) for each state's plans.

Unless otherwise noted, this information is from the plans adopted in 2011 or 2012. In a few cases, information is provided from remedial plans adopted later in the decade.

While most states relied upon the Public Law 94-171 block-level datasets as provided by the U.S. Census Bureau when creating their districts, Hawaii, Kansas, Maryland and New York modified these datasets to reassign or exclude individuals in certain population subgroups, such as servicemembers, students or prisoners. In these states the numbers listed below reflect this modification.

Block assignment files generated by the U.S. Census Bureau based on information supplied by the states assign each block to only one district. The overall range tabulated from whole blocks may differ from numbers in this table for some states.

Population Equality of 2010–Cycle

	CONGRESSIONAL PLAN			STATE HOUSE PLAN		STATE SENATE PLAN	
State	Ideal District Size	Percent Overall Range	Overall Range (# of people)	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range
ALABAMA	682,819	0.0%	1	45,521	1.98%	136,564	1.99%
ALASKA[*1]				17,756	4.25	35,512	2.97
ARIZONA[**]	710,224	0.0	0	213,067	8.78	213,067	8.78
ARKANSAS	728,980	.06	428	29,159	8.36	83,312	8.2
CALIFORNIA	702,905	0.0	1	465,674	1.98	931,349	1.99
COLORADO	718,457	0.0	1	77,372	4.98	143,691	4.99
CONNECTICUT[2]	714,819	0.0	1	23,670	5.99	99,280	9.79
DELAWARE[*]				21,901	9.93	42,759	10.73
FLORIDA[3]	696,345	0.0	1	156,678	3.98	470,033	1.92
GEORGIA[4]	691,975	0.0	2	53,820	1.98	172,994	1.84
HAWAII[5]	680,151	0.1	691	24,540	21.57	50,061	44.22
IDAHO[**]	783,791	0.1	682	44,788	9.7	44,788	9.7
ILLINOIS	712,813	0.0	1	108,734	0.0	217,468	0.0
INDIANA	720,422	0.0	1	64,838	1.74	129,676	2.88
IOWA	761,589	0.0	76	30,464	1.93	60,927	1.65
KANSAS	713,280	0.0	15	22,716	2.87	70,986	2.03
KENTUCKY[6]	723,228	0.0%	334	43,394	11.62	114,194	11.02
LOUISIANA	755,562	0.0	249	43,174	9.89	116,240	9.86
MAINE	664,181	0.0	1	8,797	9.9	37,953	9.51
MARYLAND[***7]	721,529	0.0	1	122,813	8.87	122,813	8.87
MASSACHUSETTS	727,514	0.0	1	40,923	9.74	163,691	9.77
MICHIGAN	705,974	0.0	1	89,851	9.96	260,096	9.79
MINNESOTA[**]	662,991	0.0	1	39,582	1.6	79,163	1.42
MISSISSIPPI	741,824	0.2	134	24,322	9.95	57,063	9.77
MISSOURI	748,616	0.0	1	36,742	7.8	176,145	8.5
MONTANA[*8]				9,894	5.44	19,788	5.26
NEBRASKA	608,780	0.0	1	N/A	N/A	37,272	7.39
NEVADA	675,138	0.0	1	64,299	1.33	128,598	0.8
NEW HAMPSHIRE[***]	658,235	0.0	4	3,291	9.9	54,853	8.83

Population Equality of 2010–Cycle

	CONGRESSIONAL PLAN			STATE HOUSE PLAN		STATE SENATE PLAN	
State	Ideal District Size	Percent Overall Range	Overall Range (# of people)	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range
NEW JERSEY**	732,658	0.0	1	219,797	5.20%	219,797	5.20%
NEW MEXICO	686,393	0.0	0	29,417	6.68	49,028	8.70
NEW YORK	717,707	0.0	1	129,089	7.94	307,356	8.8
NORTH CAROLINA[9]	733,499	0.0	1	79,462	9.97	190,710	9.49
NORTH DAKOTA*				14,310	8.86	14,310	8.86
OHIO[10]	721,032	0.0	1	116,530	16.44	349,591	9.2
OKLAHOMA	750,270	0.0	1	37,142	1.81	78,153	2.03
OREGON	766,215	0.0	2	63,851	3.1	127,702	2.99
PENNSYLVANIA[11]	705,688	0.0	1	62,573	7.88	254,048	7.96
RHODE ISLAND	526,284	0.0	1	14,034	4.99	27,699	5.01
SOUTH CAROLINA	660,766	0.0	1	37,301	4.99	100,551	9.55
SOUTH DAKOTA* [12]				23,262**	9.64	23,262	9.47
TENNESSEE	705,123	0.0	86	64,102	9.74	192,306	9.17
TEXAS	698,488	0.0	32	167,637	9.85	811,147	8.04
UTAH[13]	690,971	0.0	1	36,852	0.0	95,306	.01
VERMONT*,*** [14]				4,172	18.8	20,858	18.01
VIRGINIA	727,366	0.0	1	80,010	2.0	200,026	4.0
WASHINGTON**	672,454	0.0	19	137,236	.07	137,236	.07
WEST VIRGINIA***	617,665	.79	4,871	18,530	9.99	109,000	10.00
WISCONSIN	710,873	0.0	1	57,444	.76	172,333	.62
WYOMING*	536,626	0.0	0	9,394	9.84	18,788	9.37

Source: NCSL, 2019

* State has only one congressional seat.

**These states use multi-members districts, with two House seats elected in each Senate district.

***These states use multi-member districts with varying numbers of senators (Vermont) or representatives (Maryland, New Hampshire, Vermont and West Virginia) in each district.

1. Alaska: Data from the unified plan adopted for elections in 2014.

2. Connecticut: An error in the census count affects the overall range for the House: it would be 6.86% using the uncorrected data.

3. Florida: Data for the Senate from the plan adopted for elections in 2016.

4. Georgia: Data from the plans adopted for elections in 2016 (House) and 2014 (Senate).

Continues on page 188

Continues from page 187

5. Hawaii modifies the census counts for legislative plans; the modified numbers are used to apportion seats to the four basic island units (BIUs). Each unit has a separate target population for each chamber. The deviation numbers in the table reflect the range of all districts for that chamber.

6. Kentucky: Data from legislative plans adopted for elections in 2014.

7. Maryland has three House of Delegates districts nested within each Senate district; these three may be either a three-member district or any combination of single-member or two-member districts. The ideal district size for the two-member district is 81,875, with an overall deviation of 9.39%. The ideal district size for the single-member district is 40,938 with an overall deviation of 8.92%.

8. Montana: Data from the legislative plans adopted for elections in 2014.

9. North Carolina: Data from legislative plans finalized for elections in 2018.

10. Ohio used a customized dataset for the legislative plans with numerous split blocks; this does not affect the ranges.

11. Pennsylvania: Data from plans adopted for elections in 2014.

12. South Dakota: Thirty-three of the state's 35 districts elect one senator and two House members, but the state also maintains two Senate districts split into four single-member House districts. These four districts have an ideal population of 11,631, with an overall deviation of 4.68%.

13. Utah: These numbers reflect the legislative plans as enacted in 2011 using the census counts. Subsequent review by the state found several instances where local political boundaries were incorrect in the geography files. Deviations based upon updated block assignment files from the Census Bureau are 1.55% for the House and .39% for the Senate.

14. Vermont split a census block, which affects the overall range for the House; it would be 19.07% using whole blocks.

APPENDIX D

Redistricting Principles and Criteria (in addition to population equality)

This table provides a summary of the districting principles, or criteria, used by each state as it redrew legislative and congressional districts following the 2010 Census. It also includes new principles adopted by Colorado, Michigan, Missouri, New York, Ohio and Utah for the 2020 cycle. (Note that New York's and Utah's principles are to be used by their newly established advisory commissions and may or may not be required to be used if the legislature does not accept the maps offered by these commissions.)

Citations are shown in Appendix E, and full text is shown on NCSL's webpage, Districting Principles for 2010 and Beyond, www.ncsl.org/research/redistricting/districting-principles-for-2010-and-beyond.aspx.

C = Required in congressional plans **L** = Required in legislative plans

	Contiguous	Compact	Preserve Political Subdivisions	Preserve Communities of Interest	
TOTAL STATES Totals include either congressional plans or legislative plans, or both.	**50**	**40**	**44**	**26**	
ALABAMA	C, L	C, L	L	C, L	
ALASKA	L	L	L	L	
ARKANSAS	L	L	L	L	
ARIZONA	C, L	C, L	C, L	C, L	
CALIFORNIA	C, L	C, L	C, L	C, L	
COLORADO	C, L	C, L	C, L	C, L	
CONNECTICUT	L		L		
DELAWARE	L				
FLORIDA	C, L	C, L	C, L		
GEORGIA	C, L	C, L	C, L	C, L	
HAWAII	C, L	C, L		C, L	
IDAHO	C, L	C, L	C, L	C, L	
ILLINOIS	L	L			
INDIANA	L				
IOWA	C, L	C, L	C, L		
KANSAS	C, L	C, L	C, L	C, L	
KENTUCKY	C, L		C	C	
LOUISIANA	C, L		C, L		
MAINE	C, L	C, L	C, L		
MARYLAND	L	L	L		
MASSACHUSETTS	L		L		
MICHIGAN	C, L	C,	C, L	C, L	
MINNESOTA	C, L	C,	C, L	C, L	
MISSISSIPPI	C, L	C, L	C, L	C	
MISSOURI	C, L	C, L	L		
MONTANA	L	L	L		
NEBRASKA	C, L	C, L	C, L		

	Preserve Cores of Prior Districts	Avoid Pairing Incumbents	Not Favor Incumbent	Not Favor Party	Competitive	House Nested in Senate or Congress
	11	**12**	**16**	**16**	**5**	**19**
		C, L				
						L
	L	L				
			C, L		C, L	L
			C, L	C, L		L
			C, L	C, L	C, L	
			L	L		
			C, L	C, L		
		C, L				
			C, L	C, L		L
			C, L	C, L		L
						L
			C, L	C, L		C, L
	C	L				
	C					
	C, L					
						L
	L		C, L	C, L		
		C, L	C, L			L
		C				
				L	L	
			L	L		L
	C, L		C, L	C, L		

C = Required in congressional plans **L** = Required in legislative plans

	Contiguous	Compact	Preserve Political Subdivisions	Preserve Communities of Interest	
NEVADA	C, L	C, L	C, L	C, L	
NEW HAMPSHIRE	L		L		
NEW JERSEY	L	L	L		
NEW MEXICO	C, L	C, L	C, L	C, L	
NEW YORK	C, L	C, L	C, L	C, L	
NORTH CAROLINA	C, L	C, L	C, L		
NORTH DAKOTA	L	L			
OHIO	C, L	C, L	C, L		
OKLAHOMA	C, L	C, L	C, L	C, L	
OREGON	C, L		C, L	C, L	
PENNSYLVANIA	C, L	C, L	C, L		
RHODE ISLAND	C, L	C, L	C, L		
SOUTH CAROLINA	C, L	C, L	C, L	C, L	
SOUTH DAKOTA	L	L	L	L	
TENNESSEE	L		L		
TEXAS	L		L		
UTAH	C, L	C, L	C, L	C, L	
VERMONT	L	L	L	L	
VIRGINIA	C, L	C, L		C, L	
WASHINGTON	C, L	C, L	C, L	C, L	
WEST VIRGINIA	C, L	C, L	C, L		
WISCONSIN	L	L	L		
WYOMING	C, L	C, L	C, L	L	

Note: A few states use additional districting principles, such as "understandability to the voter" (Kansas and Nebraska) and "convenient" (Minnesota, New York and Washington).

Missouri's Constitution, as amended Nov. 6, 2018, requires for legislative plans that the difference between the total "wasted votes" cast for candidates of each of the two major parties, divided by the total votes cast for candidates of the two parties, be as close to zero as practicable.

The Ohio Constitution, effective in 2021, requires that, for legislative districts, "The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio."

Utah's Election Code, as adopted by initiative on Nov. 6, 2018, requires the use of "partisan symmetry" to assess whether legislative and congressional plans favor or disfavor an incumbent, candidate or party.

Source: NCSL, 2019

	Preserve Cores of Prior Districts	Avoid Pairing Incumbents	Not Favor Incumbent	Not Favor Party	Competitive	House Nested in Senate or Congress
		C, L				L
						L
	C, L	C, L				
	C, L		C, L	C, L	C, L	
		C, L				
						L
	L		C	C, L		L
	C, L	C, L				
			C, L	C, L		L
	C, L	L				
						L
			C, L	C, L		
		L				
				C, L	C, L	L
						L
						L

APPENDIX E

Citations for Redistricting Principles and Criteria

This appendix provides citations for each state's principles and criteria for redistricting. For the full text, see NCSL's Redistricting Principles webpage, www.ncsl.org/research/redistricting/districting-principles-for-2010-and-beyond.aspx. Another approach to criteria and redistricting principles can be found at NCSL's Redistricting Criteria webpage, www.ncsl.org/research/redistricting/redistricting-criteria.aspx.

ALABAMA	Ala Const. Art. IX, §198 Ala Const. Art. IX, §199 Ala Const. Art. IX, §200
ALASKA	Alaska Const. Art. VI, §6
ARIZONA	A.R.S. Const. Art. IV, Pt. 2, §1
ARKANSAS	Ark. Const. Art. 8, §3 *Arkansas Board of Apportionment,* Redistricting Criteria Approved By the Courts (last visited Mar. 19, 2018)
CALIFORNIA	Cal Const. Art. XXI §2
COLORADO	Colo. Const. Art. V, §44 Colo. Const. Art. V, §44.3 Colo. Const. Art. V, §46 Colo. Const. Art. V, §48.1
CONNECTICUT	Conn. Const. Art. III., §3, *as amended by Article II, §1, and Article XV, §1, of the Amendments to the Constitution of the State of Connecticut* Conn. Const. Art. III., Sec. 4*, as amended by Article II, §2, and Article XV, §2, of the Amendments to the Constitution of the State of Connecticut* *Conn. Const. Art. III., §5, as amended by Article XVI, §1, of the Amendments to the Constitution of the State of Connecticut*

DELAWARE	Del. Code Ann. tit. 29, §804
FLORIDA	Fla. Const. Art. III, §16 Fla. Const. Art. III, §20 Fla. Const. Art. III, §21
GEORGIA	Ga. Const. Art. III, §II, Para. II *2011-2012 Guidelines, adopted by the Senate Committee on Reapportionment and Redistricting* *2011-2012 Guidelines, adopted by the House Legislative and Congressional Reapportionment Committee*
HAWAII	Hawaii Const. Art. IV, §6 Hawaii Rev. Stat. Ann. §25-2
IDAHO	Idaho Const. Art. III, §2 Idaho Const. Art. III, §4 Idaho Const. Art. III, §5 Idaho Code §72-1506
ILLINOIS	Ill. Const. Art. IV, §2 Ill. Const. Art. IV, §3
INDIANA	Ind. Const. Art. 4, § 5
IOWA	Iowa Const. Art. III §34 Iowa Const. Art. III §37 Iowa Code §42.4
KANSAS	Kan. Const. Art. 10, §1 *Guidelines and Criteria for 2012 Congressional and Legislative Redistricting, adopted by House Select Committee on Redistricting and Senate Committee on Reapportionment, Jan. 9, 2012*
KENTUCKY	Ky. Const. §33
LOUISIANA	La. Const. Art. III, §6 *Committee Rules for Redistricting, Louisiana House of Representatives, Committee on House and Governmental Affairs, adopted Jan. 19, 2011* *Committee Rules for Redistricting, Louisiana Senate, Committee on Senate and Governmental Affairs, adopted Feb. 16, 2011*
MAINE	Me. Const. Art. IV, Pt. 1, §2 Me. Rev. Stat. tit. 21-A, §1206 Me. Rev. Stat. tit. 21-A, §1206-A
MARYLAND	Md. Const. art. III, §3 Md. Const. art. III, §4
MASSACHUSETTS	ALM Constitution Amend. Art. CI (§§1 and 2)*, as amended by Article CIX*

MICHIGAN	MCLS Const. Art. IV, §6*, as amended Nov. 6, 2018* Mich. Comp. Laws Serv. §.63 Mich. Comp. Laws Serv. §4.261 Mich. Comp. Laws Serv. §4.261a
MINNESOTA	Minn. Const. Art. IV, §2 Minn. Const. Art. IV, §3 Minn. Stat. Ann. §2.91 (Subd. 2) *Order Stating Redistricting Principles and Requirements for Plan Submissions, Hippert v. Ritchie, No. A11-152 (Minn. Spec. Redis. Panel Nov. 4, 2011)*
MISSISSIPPI	Miss. Code Ann. §-3-101 *Criteria for Legislative and Congressional Redistricting, adopted by the Standing Joint Legislative Committee on Reapportionment and Standing Joint Congressional Redistricting Committee, April 5, 2012* *Analysis of Factors Considered, Smith v. Hosemann, No. 3:01-cv-855 (S.D. Miss., Dec. 19, 2011)*
MISSOURI	Mo. Const. Art. III, §3 Mo. Const. Art. III, §7 Mo. Const. Art. III, §45
MONTANA	Mont. Const., Art. V §14 Mont. Code Ann. §5-1-115 *Congressional and Legislative Redistricting Criteria, adopted by Districting and Apportionment Commission, May 28, 2010*
NEBRASKA	Neb. Const. Art. III, §5 *Legislative Resolution No. 102, adopted by the Nebraska Legislature, April 8, 2011*
NEVADA	Nev. Const. Art. 4, §5 *Order Re: Redistricting, Guy v. Miller, No. 11-OC-42-1B (1st Jud. Dist., Carson City Sept. 21, 2011)*
NEW HAMPSHIRE	*Constitution, Part Second, House of Representatives* N.H. Const. Pt. SECOND, Art. 9 N.H. Const. Pt. SECOND, Art. 11 N.H. Const. Pt. SECOND, Art. 11-a *Constitution, Part Second, Senate* N.H. Const. Pt. SECOND, Art. 26 N.H. Const. Pt. SECOND, Art. 26-a
NEW JERSEY	N.J. Const., Art. IV, §II
NEW MEXICO	N.M. Stat. Ann. §2-7C-3 N.M. Stat. Ann. §2-8D-2 *Guidelines for the Development of State and Congressional Redistricting Plans, adopted by the Legislative Council Jan. 17, 2011*

NEW YORK	N.Y. CLS Const. Art III, §4 (c) N.Y. CLS Const. Art III, §5
NORTH CAROLINA	N.Y. CLS Const. Art II, §3 N.Y. CLS Const. Art II, §5 *Redistricting Criteria for State House and Senate Districts, Stephenson v. Bartlett, No. 94PA02, 355 N.C. 354, 562 S.E.2d 377 (*April *30, 2002)* *2017 House and Senate Plans Criteria, adopted by North Carolina House and Senate Redistricting Committees, Aug. 10, 2017* *2016 Contingent Congressional Plan Committee Adopted Criteria, adopted by Joint Select Committee on Congressional Redistricting, Feb. 16, 2016*
NORTH DAKOTA	N.D. Const. Art. IV, §2 N.D. Cent. Code §54-03-01.5
OHIO	Ohio Const. Art. XI, §§3 - 11 Ohio Const. Art. XIX, §§1 - 2
OKLAHOMA	Okla. Const. Art. V, §9A *2011 Guidelines for Redistricting, adopted by the House of Representatives Redistricting Committee, Feb. 14, 2011*
OREGON	Ore. Const. Art. IV, §6 Ore. Const. Art. IV, §7 Ore. Rev. Stat. Ann. §188.010
PENNSYLVANIA	Pa. Const. Art. II, §16 *Order, League of Women Voters of Pa. v. Pa., No. 159 MM 2017 (Pa. Jan. 22, 2018)*
RHODE ISLAND	R.I. Const. Art. VII, §1 R.I. Const. Art. VIII, §1 *Laws 2011, chapter 106*, §2
SOUTH CAROLINA	*2011 Redistricting Guidelines, adopted by Senate Judiciary Committee, April 13, 2011* *2011 Guidelines and Criteria for Congressional and Legislative Redistricting, adopted by House of Representatives Judiciary Committee, Election Laws Subcommittee*
SOUTH DAKOTA	S.D. Const. Article III, §5 S.D. Codified Laws §2-2-41
TENNESSEE	Tenn. Code Ann. §3-1-102 Tenn. Code Ann. §3-1-103
TEXAS	Tex. Const. Art. III, §25 Tex. Const. Art. III, §26
UTAH	Utah Const. Art. IX, §1 Utah Code, Title 20A §20A-19-103, Election Code, as amended Nov. 6, 2018 *2011 Redistricting Principles, adopted by the Legislative Redistricting Committee, May 4, 2011*

VERMONT	V.S.A. Const. §13 V.S.A. Const. §18 Vt. Stat. Ann. tit. 17, §1903 Vt. Stat. Ann. tit. 17, §1906b Vt. Stat. Ann. tit. 17, §1906c
VIRGINIA	Va. Const. Art. II, §6 Va. Code Ann. §24.2-305 *Committee Resolution No. 1, adopted by the House Committee on Privileges and Elections, March 25, 2011* *Committee Resolution No. 1, adopted by the Senate Committees on Privileges and Elections, March 25, 2011* *Committee Resolution No. 2, adopted by the Senate Committees on Privileges and Elections, March 25, 2011* *Third Congressional District Criteria, adopted by the Joint Reapportionment Committee, August 17, 2015*
WASHINGTON	Wash. Const. Art. II, §6 Wash. Const. Art. II, §43 Wash. Rev. Code Ann. §44.05.090
WEST VIRGINIA	W. Va. Const. Art. I, §4 W. Va. Const. Art. VI, §4
WISCONSIN	Wis. Const. Art. IV, §3 Wis. Const. Art. IV, §4 Wis. Const. Art. IV, §5
WYOMING	Wyo. Const. Art. 3, §3 Wyo. Const. Art. 3, §49 *Redistricting Principles, adopted by Joint Corporations, Elections and Political Subdivisions Interim Committee, April 12, 2011*

Source: NCSL, 2019

APPENDIX F

State Redistricting Authorities

The legislature typically is the primary redistricting authority, but a number of states have shifted responsibility from the legislature to a redistricting commission. Many states also have commissions that serve in an advisory capacity or as a backup in cases where the legislature does not meet its redistricting deadline.

	Congressional Districts	Legislative Districts
ALABAMA	Legislature has primary responsibility	Legislature has primary responsibility
ALASKA	Legislature has primary responsibility; state has only one congressional district	Commission has primary responsibility
ARIZONA	Commission has primary responsibility	Commission has primary responsibility
ARKANSAS	General Assembly has primary responsibility	Commission has primary responsibility
CALIFORNIA	Commission has primary responsibility	Commission has primary responsibility
COLORADO	Commission has primary responsibility	Commission has primary responsibility
CONNECTICUT	General Assembly has responsibility; backup commission	General Assembly has responsibility; backup commission
DELAWARE	General Assembly has primary responsibility; state has only one congressional district	General Assembly has primary responsibility
FLORIDA	Legislature has primary responsibility	Legislature has primary responsibility
GEORGIA	General Assembly has primary responsibility	General Assembly has primary responsibility
HAWAII	Commission has primary responsibility	Commission has primary responsibility
IDAHO	Commission has primary responsibility	Commission has primary responsibility

	Congressional Districts	Legislative Districts
ILLINOIS	General Assembly has primary responsibility	General Assembly has responsibility; backup commission
INDIANA	General Assembly has responsibility; backup commission	General Assembly has primary responsibility
IOWA	General Assembly has primary responsibility	General Assembly has primary responsibility
KANSAS	Legislature has primary responsibility	Legislature has primary responsibility
KENTUCKY	General Assembly has primary responsibility	General Assembly has primary responsibility
LOUISIANA	Legislature has primary responsibility	Legislature has primary responsibility
MAINE	Legislature has responsibility; advisory commission	Legislature has responsibility; advisory commission
MARYLAND	General Assembly has primary responsibility	General Assembly has primary responsibility[1]
MASSACHUSETTS	General Court has primary responsibility	General Court has primary responsibility
MICHIGAN	Commission has primary responsibility	Commission has primary responsibility
MINNESOTA	Legislature has primary responsibility	Legislature has primary responsibility
MISSISSIPPI	Legislature has primary responsibility	Legislature has responsibility; backup commission
MISSOURI	General Assembly has primary responsibility	Commissions have primary responsibility[2]
MONTANA	Commission has primary responsibility; to date, state has only one congressional district	Commission has primary responsibility
NEBRASKA	Legislature has primary responsibility	Legislature has primary responsibility
NEVADA	Legislature has primary responsibility	Legislature has primary responsibility
NEW HAMPSHIRE	General Court has primary responsibility	General Court has primary responsibility
NEW JERSEY	Commission has primary responsibility	Commission has primary responsibility
NEW MEXICO	Legislature has primary responsibility	Legislature has primary responsibility
NEW YORK	Legislature has responsibility; advisory commission	Legislature has responsibility; advisory commission
NORTH CAROLINA	General Assembly has primary responsibility	General Assembly has primary responsibility
NORTH DAKOTA	Legislative Assembly has primary responsibility; state has only one congressional district	Legislative Assembly has primary responsibility
OHIO	General Assembly has primary responsibility; backup commission	Commission has primary responsibility

	Congressional Districts	Legislative Districts
OKLAHOMA	Legislature has primary responsibility	Legislature has responsibility; backup commission
OREGON	Legislative Assembly has primary responsibility	Legislative Assembly has primary responsibility
PENNSYLVANIA	General Assembly has primary responsibility	Commission has primary responsibility
RHODE ISLAND	General Assembly has primary responsibility	General Assembly has primary responsibility
SOUTH CAROLINA	General Assembly has primary responsibility	General Assembly has primary responsibility
SOUTH DAKOTA	Legislature has primary responsibility; state has only one congressional district	Legislature has primary responsibility
TENNESSEE	General Assembly has primary responsibility	General Assembly has primary responsibility
TEXAS	Legislature has primary responsibility	Legislature has primary responsibility; backup commission
UTAH	Legislature has responsibility; advisory commission	Legislature has responsibility; advisory commission
VERMONT	General Assembly has primary responsibility; state has only one congressional district	General Assembly has primary responsibility; advisory commission
VIRGINIA	General Assembly has primary responsibility	General Assembly has primary responsibility
WASHINGTON	Commission has primary responsibility	Commission has primary responsibility
WEST VIRGINIA	Legislature has primary responsibility	Legislature has primary responsibility
WISCONSIN	Legislature has primary responsibility	Legislature has primary responsibility
WYOMING	Legislature has primary responsibility; state has only one congressional district	Legislature has primary responsibility

1. Maryland's governor has an advisory commission that provides information to the General Assembly.

2. Missouri will have a state demographer produce maps for the two legislative commissions (one for House districts and one for Senate districts) to consider for the 2020 cycle.

Source: NCSL, 2019

APPENDIX G

Redistricting Commissions

Redistricting commissions may have primary responsibility for drawing district plans, serve as an advisory capacity with the legislature having final authority, or come into play only if the legislature is unable to agree on a plan on time. These three kinds of commissions are represented in the following tables.

- Commissions with Primary Responsibility for Redistricting Plans
- Advisory Commissions
- Backup Commissions

For the purpose of this document, the phrase "deeply engaged in partisan politics," is used to generically describe restrictions on a commissioner's prior political activity, including being appointed or elected to public office, serving as an officer of a political party, serving as a registered paid lobbyist, or being on a candidate or issue campaign committee. Exact requirements and exceptions vary by state.

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
ALASKA **Alaska Const. art. 6, § 8**	**Redistricting Board:** Legislative districts only	Governor appoints two; then president of the Senate appoints one; then speaker of the House appoints one; then chief justice of the state supreme court appoints one. Appointments must be made without regard to political affiliation.	A commissioner must have been a resident of the state for at least one year and at least one commissioner must be a resident of each judicial district. No commissioner may be a public employee or official.	
ARIZONA **Ariz. Const. art. 4, pt. 2, § 1**	**Independent Redistricting Commission:** Legislative and congressional districts	The commission on appellate court appointees creates a pool of 25 nominees, 10 from each of the two largest parties and five not from either of the two largest parties. The highest-ranking officer of the House appoints one from the pool, then the minority leader of the House appoints one, then the highest-ranking officer of the Senate appoints one, then the minority leader of the Senate appoints one. These four appoint as chair a fifth from the pool who is not a member of any party already represented on the commission. If the four deadlock on the selection of the chair, the commission on appellate court appointments appoints.	No more than two commissioners may be of the same political party. Of the first four appointed, no more than two may reside in the same county. A commissioner must be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment. During the three years before appointment, a commissioner must not have been deeply engaged in partisan politics.	
ARKANSAS **Ark. Const. 1874, art. 8**	**Board of Apportionment:** Legislative districts only	The commission consists of the governor, the secretary of state and the attorney general.	n/a	
CALIFORNIA **Cal. Const. Article XXI** **Cal. Gov. Code §§ 8251-8253.6**	**Citizens Redistricting Commission:** Legislative and congressional districts	The commission must include five Democrats, five Republicans, and four members from neither party. Government auditors select 60 registered voters from each of the three political applicant pools. Legislative leaders can reduce the pool; the auditors then pick eight commission members by lot, and those commissioners pick six additional members for 14 total members.	During the five years before appointment, a commissioner must have been continuously registered to vote in California with the same political party or unaffiliated with a political party and not have changed political party affiliation. A commissioner must have voted in two of the last three statewide general elections before applying for appointment. During the 10 years before appointment, a commissioner must not have been deeply engaged in partisan politics.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	A commissioner may not be a candidate for the Legislature in the general election following adoption of the final redistricting plan.	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Sept. 1, 2020 **First plan:** 30 days after census officially reported **Final plan:** 90 days after census officially reported	Created by legislative referral, 1998 L.R. No. 74/H.J.R. No. 44
	During the term of office and for three years after, commissioners may not serve in Arizona public office or register as a paid lobbyist.	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Feb. 28, 2021 **First plan:** None **Final plan:** None	Created by citizens' initiative, 2000 Proposition 106
	n/a	**Members:** Three **Adopt a Plan:** simple majority: Two votes	**Commission formation:** None **First plan:** Feb. 1, 2021, or sometime after census data is received **Final plan:** Plan is official 30 days after it is filed	Created by citizens' initiative, 1956 Proposed Amend. 48
	For five years after appointment, a commissioner is ineligible to hold appointive federal, state, or local public office, to serve as paid staff for, or as a paid consultant to, the Board of Equalization, the Congress, the Legislature, or any individual legislator, or to register as a federal, state or local lobbyist in California. For 10 years after appointment, a commissioner is ineligible to hold elective public office at the federal, state, county or city level in California.	**Members:** 14 **Adopt a Plan:** Nine votes, including votes from at least three Democratic commissioners, three Republican commissioners, and three commissioners from neither party	**Commission formation:** Dec. 31, 2020 **First plan:** None **Final plan:** Sept. 15, 2021	Legislative commission created by citizens' initiative, 2008 Proposition 11 Congressional commission created by citizens' Initiative, 2010 Proposition 20

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
COLORADO (Colorado has two commissions, one for legislative redistricting and one for congressional redistricting. **Colo. Const. art. V, §§ 46-48.3** **Colo. Const. art. V, §§ 44-44.6**	**Independent Legislative Redistricting Commission:** Legislative districts **Independent Congressional Redistricting Commission:** Congressional districts	The same procedure is used for each of Colorado's two commissions. A panel of three retired judges of different parties will randomly select 300 applications from each of the largest political parties and 450 who are not affiliated with any party. The panel then selects 50 from each pool based on merit. From those, the panel chooses by lot two commissioners from each of the largest two parties and two who are unaffiliated. The majority and minority leaders in the House and Senate each select from all qualified applicants a pool of 10 candidates who are associated with the two largest parties. The panel of judges then selects one commissioner from each legislative leader's pool and two commissioners from the pool of unaffiliated applicants created earlier.	The same procedure is used for each of Colorado's two commissions. Commissioners must be registered electors who voted in both of the previous two general elections in Colorado, be either unaffiliated with any political party or have been affiliated with the same political party for no less than five years at the time of the application. A legislative commissioner may not be a congressional commissioner, and vice versa. During the five years before appointment, a commissioner must not have been a candidate for the General Assembly. During the three years before appointment, a commissioner must not have been deeply engaged in partisan politics. Appointments to the commission must represent the geographic diversity of the state and, to the extent possible, its demographic diversity.	
HAWAII **Hawaii Const. art. IV**	**Reapportionment Commission:** Legislative and congressional districts	The president of the Senate selects two, and the speaker of the House selects two. The minority leader in both the House and Senate each select one of their number. Those two each select one. These eight select the ninth member, who is the chair.	n/a	
IDAHO **Idaho Const. art. III, § 2** **Idaho Stat. Tit. 72, Chapter 15**	**Commission for Reapportionment:** Legislative and congressional districts	Leaders of the two largest political parties in each house of the Legislature each designate one member; chairs of the two parties whose candidates for governor received the most votes in the last election each designate one member.	A commissioner must be a registered voter in Idaho and must not have been deeply engaged in partisan politics within the last two years (except for precinct committee person).	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** 12 Both commissions have the same number of members and vote requirement to adopt a plan. **Adopt a Plan:** 2/3 majority: Eight votes, including votes from at least two commissioners who are unaffiliated with any political party	**Legislative commission formation:** May 15, 2021 **First plan:** 113 days after commission convened or necessary census data is available, whichever is later **Final plan:** Legislative. Sept. 15, 2021 **Congressional commission formation**. March 15, 2021 **First plan:** 45 days after commission convened or necessary census data is available, whichever is later **Final plan:** Sept. 1, 2021	**Legislative commission:** created by citizens' initiative, 1974 Ballot Measure 9 and replaced by legislative referral, 2018 Amendment Z **Congressional commission:** created by legislative referral, 2018 Amendment Y
	A commissioner may not run for the Legislature or Congress in the two elections following redistricting.	**Members:** Nine **Adopt a Plan:** Simple majority: Five votes	**Commission Formation:** March 1, 2021 **First plan:** 80 days after commission forms **Final plan:** 150 days after commission forms	Created by legislative referral, 1992 HB 2322
	For five years following service as a commissioner, a commissioner may not serve in either house of the Legislature.	**Members:** Six **Adopt a Plan:** 2/3 majority: Four votes	**Commission formation:** 15 days after secretary of state orders formation of commission **First plan:** None **Final plan:** 90 days after commission is organized, or after census data is received, whichever is later	Created by legislative referral, 1994 S.J.R. No. 105

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
MICHIGAN **Mich. Const. Art. IV, § 6**	**Independent Citizens Redistricting Commission:** Legislative and congressional districts	The secretary of state makes applications to become a commissioner available to the public, including mailing to 10,000 Michigan residents at random. The secretary then randomly selects 60 applicants from each pool affiliated with the two major parties and 80 from the pool of those who are unaffiliated. The Senate majority leader, Senate minority leader, the speaker of the House and the House minority leader each can strike five applicants from any pool or pools. The secretary then randomly draws the names of four applicants from the pools affiliated with the two major parties, and five from the unaffiliated pool.	A commissioner must be registered and eligible to vote in Michigan. During the six years before appointment, a commissioner must not have been deeply engaged in partisan politics or otherwise disqualified for appointed or elected office by the constitution, and must remain so while serving as a commissioner.	
MISSOURI **Mo. Const. art. III, § 3**	**House Apportionment Commission:** Legislative districts (house)	The governor picks one person from each list of two submitted by the two main political parties in each congressional district.	n/a	
Mo. Const. art. III, § 7	**Senatorial Apportionment Commission:** Legislative districts (senate)	The governor picks five people from each of two lists of 10 submitted by the state's two major political parties.	n/a	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	For five years after appointment, a commissioner is ineligible to hold a partisan elective office at the state, county, city, village or township level in Michigan.	**Members:** 13 **Adopt a plan:** Simple majority: Seven votes, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party	**Commission formation:** Oct. 15, 2020 **First plan:** 45 days before Nov. 1, 2021 **Final plan:** Nov. 1, 2021	Created by citizens' initiative, 2018 Ballot Measure 18-2
	For four years after the plan is adopted, a commissioner is disqualified from holding office as a member of the General Assembly.	**Members:** 18 **Adopt a plan:** State demographer submits a plan to the commission. A 70% majority (13 votes) may amend the plan. Otherwise, the plan becomes final.	**Commission formation:** Within 60 days after census data becomes available **First plan:** Five months after commission forms **Final plan:** Six months after commission forms	Created by legislative referral in 1966 Amendment 3 Amended by citizens' initiative in 2018 Amendment 1
	For four years after the plan is adopted, a commissioner is disqualified from holding office as a member of the General Assembly.	**Members:** 10 **Adopt a plan:** State demographer submits a plan to the commission. A 70% majority (seven votes) may amend the plan. Otherwise, the plan becomes final.	**Commission formation:** Within 60 days after census data becomes available **First plan:** Five months after commission forms **Final plan:** Six months after commission forms	Created by legislative referral in 1966 Amendment 3 Amended by citizens' initiative in 2018 Amendment 1

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
MONTANA **Mont. Const. art. V, § 14** **Mont. Code Ann. Tit. 5, Part 1**	**Commission:** Legislative and congressional districts**	Majority and minority leaders of both houses of the Legislature each select one member. Those four select a fifth, who is the chair.	Commissioners cannot be public officials and must be appointed from different districts in the state.	
NEW JERSEY **N.J. Const. art. IV, § 3**	**Apportionment Commission:** Legislative districts	The two parties getting the most votes in the last gubernatorial election each select five members. If the 10-member commission cannot agree, an 11th member will be chosen by the chief justice of the state Supreme Court.	Due consideration must be given to the representation of the various geographical areas of the state.	
N.J. Const. art. II, § II	**New Jersey Redistricting Commission:** Congressional districts	The majority and minority leaders in each legislative chamber and the chairs of the state's two major political parties each choose two commissioners. These 12 commissioners then choose a 13th, who has not held any public or party office in New Jersey within the last five years. If the 12 commissioners are not able to select a 13th member to serve as chair, they will present two names to the state Supreme Court, which will choose the chair.	A commissioner may not be a member or employee of Congress and must be appointed with due consideration to geographic, ethnic and racial diversity.	

**Montana had a single representative to the U.S. House of Representatives in recent decades, so a commission has not yet been used for congressional districts. Depending on federal apportionment after the 2020 census, this may change.

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	For two years after the plan becomes effective, a commissioner may not run for a seat in the Legislature.	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** The legislative session before the census data is available **First plan:** The commission must give its plan for legislative districts to the Legislature at the first regular session after its appointment **Final plan:** The final plan for legislative districts is due 30 days after the Legislature returns recommendations to the plan The final plan for congressional districts is due 90 days after official census figures are available	Created by Constitutional Convention in 1972 Amended by legislative referral in 1984 Measure C-14
	n/a	**Members:** 10 **Adopt a plan:** simple majority: Six votes	**Commission formation:** Dec.1, 2020 **First Plan:** Feb. 1, 2021, or one month after census data becomes available, whichever is later **Final plan:** The initial deadline, or one month after the 11th member is picked	Created by legislative referral, 1966 Public Question #1
	n/a	**Members:** 13 **Adopt a plan:** Simple majority: Seven votes	**Commission formation:** Sept. 8, 2021 **First Plan:** None **Final Plan:** Jan. 18, 2022	Created by legislative referral, 1995 Public Question #1

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
OHIO **Ohio Const. art. XI, § 1**	**Ohio Redistricting Commission:** Legislative districts only	The commission consists of the governor, auditor, secretary of state and four people appointed by the majority and minority leaders of the General Assembly.	An appointed commissioner may not be a current member of Congress.	
PENNSYLVANIA **Pa. Const. art. II, § 17**	**Reapportionment Commission:** Legislative districts only	The majority and minority leaders of the legislative houses each select one member. These four select a fifth to chair. If they fail to do so within 45 days, a majority of the state Supreme Court will select the fifth member.	The chair, selected by the other commissioners, must be a citizen of the Commonwealth and may not be a local, state or federal official holding an office to which compensation is attached.	
WASHINGTON **Wash. Const. art. II, § 43** **RCW chap. 44.05**	**Commission:** Legislative and congressional districts	The majority and minority party leaders in each legislative chamber each select one registered voter to serve as commissioner, and these four commissioners choose a nonvoting fifth commissioner to serve as chair.	A commissioner may not be an elected official or a person elected to a legislative district, county or state political party office. During the two years before appointment, a commissioner may not have been an elected official and may not have been elected as a legislator, county official or state political party officer, but may have been a precinct committee person.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes, including at least two members of the commission who represent each of the two largest political parties	**Commission formation:** None **First Plan:** None **Final Plan:** Sept. 1, 2021	Created by legislative referral, 2015 HJR 12 (2014)/Issue 1
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** None **First plan:** 90 days after the availability of the census data or after commission formation, whichever is later **Final plan:** 30 days after the last public exception is filed against the initial plan	Created by legislative referral, 1968 (last amended in 2001) Adopted as part of 1968 State Constitution
	A commissioner may not hold or campaign for a seat in the state Legislature or Congress for two years after the effective date of the plan.	**Members:** Five **Adopt a plan:** At least three of four voting members	**Commission formation:** Jan. 31, 2021 **First Plan:** None **Final Plan:** Nov. 15, 2021	Created by legislative referral, 1983 SJR 103

Advisory Commissions

State	Name and Type of Districts	Selection	Qualifications	
MAINE **Me. Const. art. IV, pt. 3, § 1-A** **Me. Rev. Stat. tit. 21-A, § 1206**	**Apportionment Commission:** Legislative and congressional districts	The speaker of the House appoints three. The House minority leader appoints three. The president of the Senate appoints two. The Senate minority leader appoints two. Chairs of the two major political parties each choose one. The members from the two parties represented on the commission each appoint a public member, and the two public members choose a third public member.	The 12 commissioners appointed by a legislative leader must be a member of the appointing house. There are no qualifications required for the three public members.	
NEW YORK **N.Y. Const. art. III, § 5-b**	**Independent Redistricting Commission:** Legislative and congressional districts	Each of the four legislative leaders appoints two commissioners; the original eight commissioners select two additional commissioners.	Commissioners must be registered voters in the state. To the extent practicable, the commissioners must reflect the diversity of the residents of the state. During the three years before appointment, the two commissioners selected by other commissioners must not have been enrolled in either of the two largest political parties. During the three years before appointment, a commissioner may not have been deeply engaged in partisan politics and must remain so while serving as a commissioner. Commissioners may not be a spouse of a statewide elected official, member of the state Legislature or member of Congress.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** 15 **Adopt a plan:** Simple majority: Eight votes The Legislature must enact the plan, or another, by 2/3 vote of both houses within 30 days after it receives the commission's plan. If the Legislature fails to meet the deadline, the state Supreme Court must adopt a plan within 60 days.	**Commission formation:** Within three calendar days of convening the Legislature in 2023 **First plan:** The commission must submit its plan to the Legislature within 120 days after the Legislature convenes in 2023. The Legislature must enact the plan, or another plan, by a 2/3 vote of both houses within 30 days after it receives the commission's plan. **Final plan:** Within 60 days after the Legislature fails to meet its deadline, the state Supreme Court must adopt a plan	Created by legislative referral in 1975 H-54
	n/a	**Members:** 10 **Adopt a plan:** Seven votes, including at least one member appointed by each of the legislative leaders, if the speaker of the House and the temporary president of the Senate are of the same party. If they are of different parties, one of those voting in favor must include an appointee of the speaker and one appointee of the temporary president of the Senate. If plans submitted by the commission are rejected by the Legislature twice, the Legislature can amend as necessary.	**Commission formation:** Feb. 1, 2020, or when court orders congressional or legislative districts be amended **First Plan:** None **Final plan:** Jan. 1, 2022	Created by legislative referral, 2014 AB 2086/Proposal 1

Advisory Commissions

State	Name and Type of Districts	Selection	Qualifications	
UTAH **Utah Code § 20A-19-201**	**Utah Independent Redistricting Commission:** Legislative and congressional districts	Commissioners are appointed, one each, by the governor, the president of the Utah Senate, the speaker of the Utah House, the leader of the largest minority political party in the Utah Senate, the leader of the largest minority political party in the Utah House, Utah Senate and House leadership of the political party that is the majority party in the Utah Senate, and Utah Senate and House leadership of the political party that is the largest minority party in the Utah Senate. *NOTE:* If the Legislature rejects a commission-recommended plan, the commission must review the Legislature's plan and publish a report on why the Legislature rejected the commission's plan and whether the Legislature's plan adheres to Utah-specific standards.	During the four years before appointment, commissioners must have been an active voter but must not have been deeply engaged in partisan politics. During the four years before appointment, nonpartisan commissioners may not have been affiliated with a political party, voted in any political party's primary election or been a delegate to a political party convention.	
VERMONT **Vt. Stat. Ann. tit. 34A, § 1904**	**Legislative Apportionment Board:** Legislative districts only	The chief justice appoints the chair; the governor appoints one member from each political party with at least three state legislators for six of the previous 10 years; those parties each select one. The secretary of state is secretary of the board but does not vote.	A commissioner may not be a member or employee of the General Assembly.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	For four years after appointment, a commissioner must not be deeply engaged in partisan politics.	**Members:** Seven **Adopt a plan:** Five votes	**Commission formation:** 30 days after census data is received or the number of districts changes for a reason other than the census **First plan:** 120 days after census data is received or the number of districts changes for a reason other than the census **Final plan:** 30 days after the last public hearing on the plan	Created by citizens' initiative, 2018 Proposition 4
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes	**Commission formation:** July 1, 2020 **First plan:** April 1, 2021 **Final plan:** May 15, 2021. General Assembly must adopt the plan or a substitute at that biennial session	Created by legislation, 1965 No. 97, §4

Backup Commissions

State	Name and Type of Districts	Selection	Qualifications	
CONNECTICUT **Conn. Const. art. III, § 6 as amended by Amend. XXVI (b)-(c)**	**Commission:** Legislative and congressional districts	The president pro tem of the Senate, the Senate minority leader, the speaker of the House, and the House minority leader each select two; these eight must select the ninth within 30 days.	n/a	
ILLINOIS **Ill. Const. art. IV, § 3**	**Legislative Redistricting Commission:** Legislative districts only	The president of the Senate, the Senate minority leader, the speaker of the House, and the House minority leader each select two members, one of whom is a legislator and the other who is not. No more than four may be from the same party. If the commission fails to develop a plan by August 10 in the year ending in one, the state Supreme Court selects two people not of the same political party, one of whom is chosen by lot to be the ninth member.	n/a	
INDIANA **Ind. Code § 3-3-2-2**	**Redistricting Commission:** Congressional districts only	The commission is made up of the speaker of the House, president pro tem of the Senate, the chair of the redistricting committee from each legislative chamber, and a state legislator nominated by the governor.	n/a	
MISSISSIPPI **Miss. Const. art. 13, § 254**	**Commission:** Legislative districts only	The chief justice of the state Supreme Court is chair; the attorney general, secretary of state, speaker of the House, and president pro tem of the Senate are the other members	n/a	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** Eight **Adopt a plan:** Simple majority: Five votes	**Commission formation:** After General Assembly fails to meet deadline **First plan:** None **Final plan:** Nov. 20, 2021	Created in 1976
	n/a	**Members:** Eight **Adopt a plan:** Simple majority: Five votes	**Commission formation:** July 10, 2021 (if General Assembly fails to meet its June 30 deadline) **First plan:** None **Final plan:** Oct. 5, 2021	Created in 1980
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Adjournment of General Assembly session that failed to adopt required plan **First plan:** None **Final plan:** 30 days after adjournment of regular session	Created in 1969
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** After Legislature fails to meet deadline (60 days after end of second regular session following decennial census) **First plan:** None **Final plan:** 180 days after special apportionment session adjourns	Created by legislative referral, 1977, and ratified by voters, 1979

Backup Commissions

State	Name and Type of Districts	Selection	Qualifications	
OHIO **Ohio Const. art. XI, § 1, art. XIX**	**Ohio Redistricting Commission:** Congressional districts only	The commission consists of the governor, auditor, secretary of state, and four people appointed by the majority and minority leaders of the General Assembly.	An appointed commissioner may not be a current member of Congress.	
OKLAHOMA **Okla. Const. § V-11A**	**Bipartisan Commission on Legislative Apportionment:** Legislative districts only	Lieutenant governor is the nonvoting chair; the governor, Senate majority leader, and House majority leader each choose two members, one Republican and one Democrat.	n/a	
TEXAS **Tex. Const. art. 3, § 28**	**Legislative Redistricting Board of Texas:** Legislative districts only	Lieutenant governor is the nonvoting chair; the governor, Senate majority leader, and House majority leader each choose two, one Republican and one Democrat.	n/a	

Source: NCSL, 2019

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes, including at least two who represent each of the two largest political parties	**Commission formation:** None **First plan:** None **Final plan:** Oct. 31, 2021	Created by legislative referral, 2018 Issue 1
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes	**Commission formation:** After Legislature fails to meet deadline (90 days after convening first regular session following decennial census) **First plan:** None **Final plan:** None	Created by legislative referral, 2010 State Question No. 748, Legislative Referendum No. 349
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Within 90 days after Legislature fails to meet deadline (adjournment of the first regular session following decennial census) **First plan:** None **Final Plan:** 60 days after commission formation	Created in 1948

APPENDIX H

Historic Supreme Court Redistricting Cases

CASES RELATING TO POPULATION

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

SIGNIFICANCE: For the first time, the court held that the federal courts had jurisdiction to consider constitutional challenges to state legislative redistricting plans.

SUMMARY: Since the earliest days of the republic, redrawing the boundaries of legislative and congressional districts after each decennial census has been primarily the responsibility of state legislatures. Following World War I, as the nation's population began to shift from rural to urban areas, many legislatures lost their enthusiasm for the decennial task and failed to carry out their constitutional responsibility. For decades, the U.S. Supreme Court declined repeated invitations to enter the "political thicket" of redistricting—*Colegrove v. Green* (1946)—and refused to order the legislatures to carry out their duty.

In this case, the Tennessee General Assembly had failed to reapportion seats in the Senate and House of Representatives since 1901 (*Id.* at 191). By 1960, population shifts in Tennessee made a vote in a small rural county worth 19 votes in a large urban county. The court held that a federal district court had jurisdiction to hear a claim that this inequality of representation violated the Equal Protection Clause of the 14th Amendment.

***Wesberry v. Sanders*, 376 U.S. 1 (1964)**

SIGNIFICANCE: The court held that the constitutionality of congressional districts was a question that could be decided by the courts.

SUMMARY: Voters in Georgia's Congressional District 5, which had three times the population of Congressional District 9, alleged that this imbalance denied them the full benefit of their right to vote.

A three-judge federal district court held that drawing congressional districts was a task assigned by the Constitution to state legislatures, subject to guidance by Congress, and not assigned to the courts. The district court held that the complaint presented a "political question" the court had jurisdiction to decide, but should not (*Id.* at 2-3). The Supreme Court reversed, holding that congressional districts must be drawn so that "as nearly as is practicable one man's vote in a congressional election is worth as much as another's" (*Id.* at 7-8).

Reynolds v. Sims, 377 U.S. 533 (1964)

SIGNIFICANCE: Both houses of a bicameral state legislature must be apportioned substantially according to population. Legislative districts may deviate from strict population equality only as necessary to give representation to political subdivisions and provide for compact districts of contiguous territory. Legislative districts should be redrawn to reflect population shifts at least every 10 years. Once a constitutional violation has been shown, a court should take equitable action to correct it, bearing in mind the practical requirements of running an election.

SUMMARY: Alabama Senate and House seats had not been reapportioned among the counties since 1903. Each county had one or more senators and one or more representatives, regardless of population. According to the 1960 census, the largest Senate district had about 41 times the population of the smallest Senate district, and the largest House district had about 16 times the population of the smallest House district.

Alabama attempted to justify the disparity in the Senate by analogy to the federal system, but the Supreme Court found that comparison to not be pertinent. Justice Earl Warren declared, "Legislators represent people, not trees or acres" (*Id.* at 562).

The court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis" (*Id.* at 568). More flexibility is allowed for legislative districts than for congressional districts. "[M]mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that the maps achieve "substantial equality of population among the various districts" (*Id.* at 579). Deviations from population equality in legislative plans may be justified if they are "based on legitimate considerations incident to the effectuation of a rational state policy," such as maintaining the integrity of political subdivisions and providing for compact districts of contiguous territory (*Id. at 578*).

Redrawing legislative districts at least every 10 years to reflect population shifts is not constitutionally required, but to redraw them less often "would assuredly be constitutionally suspect" (*Id. at 583-84*).

Once a constitutional violation has been shown, a court should take equitable action to correct it, bearing in mind the practical requirements of running an election (*Id. at 585*).

Gaffney v. Cummings, 412 U.S. 735 (1973)

SIGNIFICANCE: The Court upheld a Connecticut legislative redistricting plan in which the total deviation was 1.81% for the Senate and 7.83% for the House. This indicates that legislative plans with a total deviation of 10% or less are presumptively constitutional, although 10% is not a safe harbor.

SUMMARY: Connecticut voters challenged the 1971 redrawing of Senate and House districts by the Apportionment Board. The Senate districts had a total population deviation of 1.81%. The House districts had a total deviation of 7.83% (*Id.* at 737). The complaint alleged that the population deviations were larger than required by the Equal Protection Clause of the 14th Amendment and split too many town boundaries (*Id.* at 738-39). The Supreme Court held that the board was not required to justify population deviations of this magnitude (*Id.* at 740-751). In dissent, Justice William J. Brennan surveyed the various legislative plans whose total deviations the court had approved or rejected and alleged it had established a 10% threshold: "deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever" (*Id.* at 777).

In later cases, the court majority has endorsed and followed the rule 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, -43 (1983); and *Voinovich v. Quilter*, 507 U.S. 146 (1993).) Based on this line of cases, plans with a total deviation of 10% or less are presumptively constitutional. But a total deviation of less than 10% is not a safe harbor; plaintiffs may rebut the presumption by providing other evidence of discrimination within the 10%. See *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947, 2004.

Karcher v. Daggett, 462 U.S. 725 (1983)

SIGNIFICANCE: Congressional districts must be mathematically equal in population, unless necessary to achieve a legitimate state objective.

SUMMARY: The New Jersey Legislature drew a congressional plan that had a total deviation of 3,674 people, or 0.6984% (*Id.* at 728). The Supreme Court held that parties challenging a congressional plan bear the burden of proving that population differences among districts could have been reduced or eliminated by a good-faith effort to draw districts of equal population. If the plaintiffs carry their burden, the state must then bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate state objective. Brennan, now writing for the 5-4 majority, noted that complying with what we now call "traditional redistricting principles," such as compactness, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbents, could meet the state's burden (*Id.* at 740-41).

***Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)**

SIGNIFICANCE: Total population is a permissible metric for calculating compliance with "one person, one vote."

SUMMARY: Since *Reynolds* and *Wesberry*, states have almost universally used total population as the unit for calculating population equality for districting plans. Plaintiffs in *Evenwel* challenged Texas's 2011 redistricting scheme, arguing that its use of total population violated the Equal Protection Clause by discriminating against voters in districts with low immigrant populations by giving voters in districts with significant immigrant populations a disproportionately weighted vote. The Supreme Court held that its past opinions confirmed that states *may* use total population in order to comply with one person, one vote. The Court did not address the issue of whether other methods are impermissible.

CASES RELATING TO LEGISLATURES VS. COMMISSIONS

***Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13-1314, 135 S. Ct. 2652 (2015)**

SIGNIFICANCE: The creation of a redistricting commission for congressional districts via citizens' initiative does not violate the Elections Clause of the U.S. Constitution.

SUMMARY: In 2000, Arizona voters created the Arizona Independent Redistricting Commission via citizens' initiative to redraw state legislative districts and congressional districts. In 2015, the Arizona Legislature challenged the right of the commission to draft congressional lines, arguing that the Elections Clause of the U.S. Constitution only grants two institutions the power to regulate the time, place or manner of electing congressional representatives: the legislatures in each of the states, or Congress. The Supreme Court held that the reference to the "Legislature" in the Elections Clause encompassed citizens' initiative in states like Arizona, where the state constitution explicitly includes the people's right to bypass the Legislature and make laws directly through such initiatives.

CASES RELATING TO RACE

***Thornburg v. Gingles*, 478 U.S. 30 (1986)**

SIGNIFICANCE: This case created the standard for determining whether Section 2 of the Voting Rights Act (VRA) requires that a majority-minority district be drawn.

SUMMARY: Following the 1982 amendments to the Voting Rights Act, it was unclear precisely *when* the VRA would require a majority-minority district be drawn to prevent vote dilution. Here, the Supreme Court held that, for a plaintiff to prevail on a Section 2 claim, he or she must show:

1. The racial or language minority group "is sufficiently numerous and compact to form a majority in a single-member district."
2. The minority group is "politically cohesive," meaning its members tend to vote similarly.
3. The "majority votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate."

A later case, *Bartlett v. Strickland* (556 U.S. 1 (2009)) added the requirement that a minority group be a numerical majority of the voting-age population in order for Section 2 of the Voting Rights Act to apply.

***Shaw v. Reno*, 509 U.S. 630 (1993)**

SIGNIFICANCE: Legislative and congressional districts will be struck down by courts for violating the Equal Protection Clause if they cannot be explained on grounds other than race. While not dispositive, "bizarrely shaped" districts are strongly indicative of racial intent.

SUMMARY: Plaintiffs brought a novel legal claim, arguing that a North Carolina congressional district was so bizarrely shaped that it amounted to a "racial gerrymander," which they claimed violated the Equal Protection Clause. The court rejected the state's defense that the district was justified as a so-called "majority-minority district," holding that the Voting Rights Act required no such district to be drawn where one did not previously exist. Claiming the North Carolina district resembled "the most egregious racial gerrymanders of the past," the Court struck down the district on the basis that it reflected the incorrect belief that members of minority groups in different geographic areas (e.g., *Durham v. Charlotte*) had the same interests and did not have independent local needs that would be better served by having a more locally oriented representative.

***Miller v. Johnson*, 515 U.S. 900 (1995)**

SIGNIFICANCE: A district becomes an unconstitutional racial gerrymander if race was the "predominant" factor in drawing its lines.

SUMMARY: Following *Shaw*, it remained unclear what the standard of review was under the new racial gerrymandering doctrine. In *Miller*, the U.S. Department of Justice in 1991 refused preclearance to Georgia's initial congressional redistricting plan under Section 5 of the Voting Rights Act, claiming the state needed to create an additional majority-minority district. Plaintiffs challenged the newly drawn districts as racial gerrymanders. The Supreme Court held for the plaintiffs and established the rule for racial gerrymandering claims: if a district is drawn predominantly on the basis of race, it violates the Equal Protection Clause.

***Bush v. Vera*, 517 U.S. 952 (1996)**

SIGNIFICANCE: Those who want to argue that partisan politics, not race, was the dominant motive in drawing district lines will want to beware of using race as a proxy for political affiliation. To survive

strict scrutiny under the Equal Protection Clause and avoid being struck down as a racial gerrymander, a district must be reasonably compact.

SUMMARY: 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, and one new Hispanic majority district in the Houston area. In addition, the Legislature reconfigured a district in the Houston area to increase its percentage of African Americans. The Legislature used sophisticated software that allowed it to redistrict with racial data at the census block level. Plaintiffs challenged 24 of the state's 30 congressional districts as racial gerrymanders. The Supreme Court struck down three districts, holding that race was the predominant factor in drawing the lines. In these districts, the Court concluded that districts drawn to satisfy Section 2 of the VRA must not subordinate traditional redistricting principles more than reasonably necessary. The districts in question were, in the Court's words, "bizarrely shaped and far from compact." These characteristics were predominantly attributable to racially motivated gerrymandering.

Shelby County v. Holder, No. 12-96, 570 U.S. 529 (2013)

SIGNIFICANCE: Section 5 of the Voting Rights Act no longer applies to any jurisdictions in the United States. As a result, redistricting plans and any other changes in voting laws, need not be approved before they take effect.

SUMMARY: Section 5 of the Voting Rights Act of 1965 (codified as amended at 52 U.S.C. § 10304, prohibits certain states and political subdivisions from changing any voting law or practice without first obtaining from either the U.S. Attorney General or the U.S. District Court for the District of Columbia a determination that the change neither had the purpose nor would have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. (A "language minority group" is defined as "American Indian, Asian American, Alaskan Native or of Spanish heritage." 52 U.S.C. § 10310(c)(3)). This process is called "preclearance." A redistricting plan had to be precleared before it could take effect. Section 5 applies only to certain jurisdictions in the South and elsewhere that meet the requirements of Section 4(b): the jurisdiction had imposed a literacy test or similar requirement making it difficult to vote and less than 50% of its voting-age population had been registered to vote or had voted in the presidential election of 1964, 1968 or 1972 (depending on when the jurisdiction first became subject to Section 5).

In 2011, Shelby County, Alabama, challenged the constitutionality of both the formula that determined whether Section 5 applied to a jurisdiction—Section 4(b)—and Section 5 itself. It alleged that the coverage formula in Section 4(b) had not changed since the VRA was enacted in 1965, that conditions in Shelby County had changed drastically since then, and that standards based on old data should no longer apply.

The Supreme Court held that Section 4(b) was unconstitutional. It balanced the exceptional conditions surrounding implementation of the Voting Rights Act with the basic principles of the 10th Amendment. The 10th Amendment reserves to the states all powers not specifically granted to the federal government. This includes the power to regulate elections. In addition, the principle of equal sovereignty among the states frowns upon their disparate treatment. It also found that the exceptional conditions that gave rise to the Voting Rights Act no longer existed.

Post-*Shelby*, it is still possible that states or jurisdictions could be "bailed in" under Section 3 of the VRA for preclearance, if a pattern of current discrimination is found.

***Alabama Legislative Black Caucus v. Alabama*, No. 13-895, 135 S. Ct. 1257 (2015)**

SUMMARY: Racial gerrymandering claims proceed district-by-district, not against an entire plan. Further, equal population is not a "factor to be considered" when redistricting, but rather a constitutional mandate. Section 5 of the Voting Rights Act does not require a covered jurisdiction to maintain a specific numerical minority percentage when redistricting.

SIGNIFICANCE: The district court upheld an Alabama legislative redistricting plan that tried to make populations nearly equal in the districts, and attempted to maintain the same black population percentages in these districts as those in the plan from the previous decade. The Supreme Court reversed and remanded the case to the district court for several reasons.
These reasons are:

1. The district court's analysis of the racial gerrymandering claim erroneously referred to the state "as a whole," rather than district-by-district. Case law since *Shaw v. Reno* has made clear that racial gerrymandering claims are judged on a district-by-district basis.

2. The state could not use its equal-population goal as a factor to be weighed against other factors when redistricting. Rather, equal population is a constitutional mandate that undergirds the entire redistricting process and can neither give way to other mandatory factors nor justify deviating from them.

3. Respecting the state's compelling interest to consider race in drawing districts so as to comply with Section 5 of the Voting Rights Act, the district court, while understanding that a plan had to be narrowly tailored to meet the compelling interest test, asked the wrong question when it concluded that it must answer, "How can we maintain present minority percentages in majority-minority districts?" The proper inquiry would have focused on the extent to which present percentages of minority voters had to be maintained to preserve a minority's ability to elect a candidate of its choice. Asking the wrong question yielded the wrong answer.

***Cooper v. Harris*, No. 15-1262, 137 S. Ct. 1455 (2017)**

SIGNIFICANCE: Partisanship cannot be used to justify a racial gerrymander. Further, Section 2 of the Voting Rights Act requires that a racial minority have the opportunity to elect a "candidate of choice," not that a particular percentage of minority voters be present in a district. This case represents a synthesis of earlier cases on the requirements of Section 2 as set out in *Gingles*, and the now well-developed case law on racial gerrymandering that began with *Shaw v. Reno*.

SUMMARY: Voters in two North Carolina congressional districts challenged their districts as unconstitutional racial gerrymanders. The state argued the case on two primary grounds. First, the state argued the increase in the percentage of black voters in the district was required to avoid a potential vote dilution challenge under Section 2 of the Voting Rights Act. Second, the state argued that any gerrymandering that had transpired was strictly partisan. The Court rejected these arguments, holding that: 1) Section 2 of the Voting Rights Act does not require a numerical majority of voters in a particular district; rather, it requires only that a compact and politically cohesive minority have the opportunity to elect its candidate of choice; and 2) Even if the underlying intent of the legislature in drawing maps is for partisan advantage and not with racial intent, the predominant use of race as a proxy for partisanship nonetheless constitutes racial gerrymandering.

CASES RELATED TO PARTISANSHIP

***Gaffney v. Cummings*, 412 U.S. 735 (1973)**

SIGNIFICANCE: An otherwise acceptable reapportionment plan is not constitutionally vulnerable when its purpose is to provide districts that would achieve "political fairness" between the political parties.

SUMMARY: Connecticut voters challenged the 1971 redrawing of Senate and House districts by the Apportionment Board. The board followed a policy of "political fairness," using results from the preceding three statewide elections to create a number of Republican and Democratic legislative seats that would reflect as closely as possible the actual statewide plurality of votes for House and Senate candidates in a given election. The complaint alleged that the plan was a political gerrymander that favored the Republican party. The Supreme Court held that a state's attempt, within tolerable population limits, to fairly allocate political power to the parties in accordance with their voting strength is constitutional.

It should be noted that, in *Larios v. Cox* 300 F. Supp.2d 1320 (N.D. Ga. Feb. 10, 2004), the U.S. Supreme Court affirmed without opinion a three-judge federal court decision holding unconstitutional a legislative plan within tolerable statistical limits (overall range less than 10%) when the General Assembly had departed from traditional redistricting principles and had discriminated against Republican incumbents. In *Larios*, plaintiffs challenged the 2001 congressional and House plans and the 2001 and 2002 Senate plans enacted by the Georgia General Assembly on various grounds.

A three-judge federal district court upheld the congressional plan but struck down the legislative plans as a violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. The order regarding the 2001 Senate plan was stayed pending preclearance of the plan. The overall range of both the 2001 House plan and the 2002 Senate plan was 9.98%, but the court found that the 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. The plans also systematically paired Republican incumbents, while reducing the number of Democratic incumbents who were paired. 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.

Davis v. Bandemer, 478 U.S. 109 (1986)

SIGNIFICANCE: Partisan gerrymandering claims may be brought in federal courts under the Equal Protection Clause. While a standard for measuring partisan gerrymanders was established, over the next 18 years it proved so difficult to satisfy that no partisan gerrymander was struck down under the *Bandemer* discriminatory effects test, which was abandoned in *Vieth v. Jubelirer* discussed below (541 U.S. 267 (2004)).

SUMMARY: Democrats in Indiana challenged the 1981 legislative redistricting plan, claiming the district lines intentionally discriminated against them in violation of the Equal Protection Clause. The Supreme Court held that the claim was not a "political question," and instead posed questions of law. The fact that a bright-line rule such as one-person, one-vote does not exist for partisanship did not mean that such challenges were non-justiciable political questions. The court required that, in order to prove partisan discrimination, a plaintiff political group must prove that those drawing a plan had an intent to discriminate against them, and that the plan had a discriminatory effect on them.

The Court assumed that a discriminatory intent would not be hard to prove. As Justice Byron White said for the majority, "We think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win" (*Id.* at 128).

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] (*Id.* at 128)."

***Vieth v. Jubelirer*, 541 U.S. 267 (2004)**

SIGNIFICANCE: While a plurality of justices in this case held that partisan gerrymandering claims were non-justiciable, Justice Anthony Kennedy left the door open for potential future claims under the First Amendment, rather than the 14th Amendment as had been cited in *Bandemer*.

SUMMARY: Between *Bandemer* and *Vieth*, nearly 20 years elapsed. During that time, no lower court successfully created a manageable legal standard under which to scrutinize partisan gerrymanders. The majority of justices in this case held that this particular challenge also failed to prove a violation of the Constitution. Four of the five justices in the majority went further, stating that they believed no such standard existed and that partisan gerrymandering claims should be excluded from federal courts under the political question doctrine. However, the fifth justice in the majority—Kennedy—would not go that far. In his view, partisan gerrymandering claims might be justiciable, possibly under the First Amendment. Nonetheless, he concluded that, "the failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper. If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief (*Id*. at 317)."

Because Kennedy did not join the other four justices in the majority on this point, aggrieved parties could continue to offer arguments for judicially manageable standards by which alleged political gerrymanders may be reviewed.

***Rucho v. Common Cause* (2019) Case No. 18–422, 139 S.Ct. 2484 (2019)**

SIGNIFICANCE: Partisan gerrymandering represents a political question that is not justiciable by federal courts, because there is no credible way to define and measure fairness in the political context.

SUMMARY: Plaintiffs alleged that North Carolina's 2016 contingent congressional plan constituted a partisan gerrymander. The legislative defendants did not dispute that the North Carolina General Assembly intended for the 2016 plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates, nor that the plan had its intended effect. Rather, they argued that a partisan gerrymander was not against the law.

The federal district court held the challenged congressional plan to be an unconstitutional partisan gerrymander under both the First and 14th amendments. However, in a 5-4 opinion that included the consolidated case of *Benisek v. Lamone*, the Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court stated that constitutional history confirms that drawing congressional electoral boundaries was an issue assigned to state legislatures with ultimate authority reserved for Congress, with nothing to suggest the federal courts have a role to play. Secondly, the Court found a fundamental problem in attempting to determine what is "fair" in

a politically adversarial system of government. The Court stated that the U.S. Constitution does not guarantee proportional representation of political parties and without "proportionality" as a measure of fairness, and it was unable to fashion any rational framework for making objective determinations of political fairness in districting. As a result, the Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral" to measure fairness are not available.

Rucho does not preclude state courts from hearing cases based on partisanship.

Source: NCSL, 2019

APPENDIX I

Major Case Summaries, 2010 to 2019, on Legislative and Congressional Redistricting

Summaries of major redistricting cases relating to legislative and congressional redistricting plans from the 2010 cycle are presented below. NCSL has defined "major" as those cases that strike down an enacted plan or that refine and further develop redistricting law. Cases that simply apply the law as established prior to 2010 are not included. For additional information on major redistricting cases from the 2010s, please see NCSL's Redistricting Case Summaries 2010-Present webpage, www.ncsl.org/research/redistricting/redistricting-case-summaries-2010-present.aspx.

ALABAMA

***Shelby County v. Holder*, 570 U.S. 529 (2013)**

TOPIC(S) ADDRESSED: Racial VRA

RELATES TO: Legislative Redistricting

Shelby County, Alabama, challenged sections 4(b) and 5 of the Voting Rights Act of 1965, claiming that the act was unconstitutional because it required some, but not all, states and counties to obtain preclearance from federal authorities in Washington, D.C.—either the U.S. Attorney General or a three-judge court—before they changed voting procedures. The U.S. Supreme Court found that Section 4(b) of the act was unconstitutional because it was based on a formula that used 40-year-old facts that had no logical relation to the present day, and it held that the formula could not be used as a basis for subjecting jurisdictions to preclearance by federal authorities.

***Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015)**

TOPIC(S) ADDRESSED: Partisanship, Equal Protection and Equal Population

RELATES TO: Legislative Redistricting

The Alabama Legislative Black Caucus and others filed suit claiming that the Alabama Legislature violated the Equal Protection Clause of the 14th Amendment by drawing the 2012 state legislative map

with race as their predominant motivation. When racial considerations predominate, the reason for this predominance must be narrowly tailored to a compelling governmental interest. The Supreme Court remanded the case to the three-judge federal district court to apply this standard. The Supreme Court also indicated that there may be solid evidence that race does predominate, citing testimony that legislators in charge of creating the plan told their technical advisers that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district.

ALASKA

***Alaska, In re 2011 Redistricting Cases*, 294 P.3d 1032 (Alaska 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

This case was a consolidation of multiple challenges to the post-2010 census maps drawn by Alaska's reapportionment board. The main issue faced by the Alaska Supreme Court was how to resolve the tension "between strictly complying with the Alaska Constitution . . . and the contrary requirements of the federal Voting Rights Act." The Alaska Supreme Court held the board must first draw a plan for all 40 House districts without regard to complying with the Voting Rights Act and then, "to the extent it is noncompliant, make revisions that deviate from the Alaska Constitution when deviation is 'the only means available to satisfy Voting Rights Act requirements.'" Op. at 6, 294 P.3d 1032, 1035 (Alaska Dec. 28, 2012) (quoting 274 P.3d at 467). Ultimately, the Alaska Supreme Court approved new maps prior to the 2012 elections.

ARKANSAS

***Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012)**

TOPIC(S) ADDRESSED: Racial VRA, Racial Equal Protection

RELATES TO: Legislative Redistricting

Registered voters of Arkansas challenged the state Senate districts. Plaintiffs argued that the districts in question did not have a large enough black voting-age population (BVAP) to elect a member of their choosing. Although it was a majority-minority district with a BVAP of 53%, block voting by white voters usually defeated their preferred candidate of choice. Plaintiffs argued that a BVAP of 60% was necessary to defeat the white voting bloc in the district. The three-judge federal court denied the plaintiffs' challenge, stating that a BVAP of 53% was sufficient, and that they did not prove that the Arkansas Board of Apportionment drew districts with an intent to discriminate based on race. In addition, the court stated that creation of the redistricting plan was not the result of racial intent, but instead reflected political preferences.

ARIZONA

***Arizona State Legislature. v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Legislative Redistricting and Congressional Redistricting

In 2000, Arizona voters adopted an amendment to the Arizona Constitution via ballot initiative that removed the Legislature's authority to draw legislative and congressional districts. The amendment vested this power with the Independent Redistricting Commission. In 2012, the Arizona Legislature challenged the constitutionality of removing what they consider to be their constitutional powers and giving them to another entity. The argument is based on the Elections Clause of the U.S. Constitution, which gives this power to the legislatures to draw congressional districts. The Supreme Court held that redistricting is a legislative function, and that it is left to the laws of the state to determine the process. The Elections Clause does not restrict this particular power of the state. States retain autonomy to establish their own governmental process. If this includes enacting laws via a citizens' initiative process, as is true in Arizona and two dozen other states, then the state retains this power to establish an independent redistricting process through a ballot initiative.

***Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016)**

TOPIC(S) ADDRESSED: Equal Population, Partisanship and Racial VRA

RELATES TO: Legislative Redistricting

Voters in Arizona challenged the Independent Redistricting Commission's state legislative redistricting plan based on alleged equal population violations stemming from alleged partisan bias. A three-judge federal district court ruled in favor of the commission. The U.S. Supreme Court affirmed the district court's decision. The Court held that deviations are justified by "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). These legitimate factors include: compactness, contiguity, integrity of political subdivisions, competitive balance of political parties, and Section 5 of the Voting Rights Act. In addition, plaintiffs must show that it is "more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors." The district court concluded that the deviations were the result of a good-faith effort to comply with the Voting Rights Act. The plaintiffs did not show that it is more probable than not that the deviation reflects the predominance of illegitimate reapportionment factors. Therefore, plaintiffs failed to show that the revised plan violates the Equal Protection Clause, and the plans remain in place.

COLORADO

***In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108 (Colo. 2011)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

The main issue in this case was whether the Reapportionment Commission responsible for crafting

plans for the General Assembly to consider violated the hierarchy of considerations set forth in the 1982 reapportionment cases. *In re Reapportionment 1982* created a hierarchy of weight that must be given to all the mandatory criteria, prohibiting lower-ranked criteria from infringing on higher-ranked criteria if not absolutely necessary. The commission's plan that the General Assembly ultimately adopted split several counties around Denver into multiple districts, claiming this was necessary to comply with the Voting Rights Act. The challengers to the maps said there was no evidence indicating a need to create majority-minority districts in either of the contested counties. The Colorado Supreme Court held that the commission had not established a need to comply with the Voting Rights Act, and thus it improperly infringed on the commands of Section 47(2). The districts were remanded to the commission to be redrawn correctly.

FLORIDA

***Brown v. Secretary of State*, 668 F.3d 1271 (11th Cir. 2012)**

TOPIC(S) ADDRESSED: State Constitution Challenge

RELATES TO: Congressional Redistricting

Plaintiff members of Congress and the Florida House of Representatives challenged the Fair Districts Amendment relating to congressional districts (art. III, § 20) as violating the Elections Clause of the U.S. Constitution. They argued that, because the Elections Clause authorizes "the Legislature" of each state to prescribe the times, places and manner of holding congressional elections, a state constitutional amendment proposed by citizen initiative was invalid as applied to congressional elections. The 11th U.S. Circuit Court of Appeals upheld the amendment because, rather than dictating electoral outcomes, the amendment seeks to maximize electoral possibilities by leveling the playing field.

***Fla. House of Representatives v. League of Women Voters of Florida* (*Apportionment III*), 118 So. 3d 198 (Fla. 2013)**

TOPIC(S) ADDRESSED: State Constitutional Challenge and Legislative Privilege

RELATES TO: Legislative Redistricting

The Florida Supreme Court rejected the Legislature's argument, stating that it never interpreted art. III, § 16(d) of the Florida Constitution, which provides that the Florida Supreme Court's judgment determining an apportionment to be valid is "binding upon all the citizens of the state," as granting the court exclusive jurisdiction over all claims relating to legislative apportionment. The court held that the lower court did have subject matter jurisdiction to hear the case. That litigation continued until the circuit court adopted the plaintiffs' Senate plan in *League of Women Voters of Florida v. Detzner*, No. 2012 CA 2842 (2nd Cir. Leon County Dec. 30, 2015), discussed below.

In re Senate Joint Resolution of Legislative Apportionment 1176 **(*Apportionment I*), 83 So. 3d 597 (Fla. 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

Senate, House and congressional redistricting plans passed the Legislature on Feb. 9, 2012. The state constitution provides for automatic review by the state supreme court to determine the validity of Senate and House apportionment plans. In *Apportionment I,* the Florida Supreme Court interpreted the Fair Districts Amendments for the first time. The court explained that, while the Fair Districts Amendments do not prohibit a partisan effect, an intent to favor or disfavor a political party or an incumbent can be inferred from objective indicators, such as a district's level of compliance with compactness and other second-tier requirements. The court found that the state Senate plan contained indicators of improper intent and ordered eight Senate districts to be redrawn. The state House plan was approved.

In re Senate Joint Resolution of Legislative Apportionment 2-B **(*Apportionment II*), 89 So.3d 872 (Fla. 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

On March 27, 2012, the Legislature adopted a revised Senate plan in accordance with the court's order. The Florida Supreme Court reviewed the revised plan as prescribed by the state constitution and declared the Senate plan valid.

Fla. House of Representatives v. League of Women Voters of Florida **(*Apportionment III*), 118 So.3d 198 (Fla. 2013)**

TOPIC(S) ADDRESSED: State Constitutional Challenge and Legislative Privilege

RELATES TO: Legislative Redistricting

The revised Senate plan was challenged again in *League of Women Voters of Florida v. Detzner*, Complaint, No. 2012 CA 2842 (2nd Cir. Leon County Sept. 5, 2012). Plaintiffs alleged that the Legislature continued to violate the state constitution by "drawing districts that will keep incumbent Senators in office, assist incumbent house members with election to the Senate, impact internal Senate leadership battles, and make gains for the controlling party." The Legislature moved to dismiss the complaint based on the view that, once the apportionment plan was validated through the supreme court's constitutionally mandated automatic review, no further challenges could be brought. The trial court denied the motion to dismiss, and the Legislature petitioned the state supreme court to review the trial court's ruling. The Florida Supreme Court rejected the Legislature's argument, stating that it never interpreted art. III, § 16(d) of the Florida Constitution, which provides that the supreme court's judgment determining an apportionment to be valid is "binding upon all the citizens of the state," as granting the supreme court exclusive jurisdiction over all claims relating to legislative apportionment. The court held that

the lower court did have subject matter jurisdiction to hear the case. That litigation continued until the circuit court adopted the plaintiffs' Senate plan in *League of Women Voters of Florida v. Detzner*, No. 2012 CA 2842 (2nd Cir. Leon County Dec. 30, 2015), discussed below.

***League of Women Voters of Florida v. Detzner*, No. 2012 CA 2842 (2nd Cir. Leon County Dec. 30, 2015)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

In light of the July 9, 2015, Florida Supreme Court opinion upholding the finding that the 2012 congressional plan was drawn with the intent to favor a party or incumbent, the Florida Senate stipulated that the 2012 Senate plan similarly violated the law and would not be enforced or used for the 2016 elections. The Legislature convened in special session on Oct. 19, 2015, to adopt new Senate districts and adjourned on Nov. 5, 2015, without adopting a plan. The Senate president submitted proposed plans to the trial court, as did the plaintiffs, and the court adopted one of the plaintiffs' plans that it found to be metrically superior. The legislative defendants did not appeal the trial court's final judgment.

***Romo v. Detzner*, No. 2012-CA-412 (2nd Cir. Leon County)**

TOPIC(S) ADDRESSED: State Constitution Challenge

RELATES TO: Congressional Redistricting

The congressional plan enacted under the new constitutional standards was challenged in state court. In *Romo v. Detzner*, plaintiffs challenged numerous congressional districts and the plan as a whole. They alleged that the Legislature intentionally favored the Republican Party and incumbents by drawing districts that preserved the cores of prior districts and avoided pairing incumbents, packed Democratic and African-American voters, created districts that were not compact, and did not utilize existing political and geographic boundaries where feasible. Before the final ruling on either the Senate or the congressional plan, a discovery battle ensued, resulting in three more decisions by the Florida Supreme Court (*Apportionment IV*, *V*, *and VI*).

***League of Women Voters of Fla. v. Fla. House of Representatives* (*Apportionment IV*), 132 So. 3d 135 (Fla. 2013)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

In the congressional case, the legislative defendants asserted "an absolute privilege against testifying as to issues directly relevant to whether the legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory 'intent.'" The Florida Supreme Court recognized a legislative privilege founded on the constitutional principle of separation of powers, even though there is no legislative privilege explicitly stated in the state constitution. However, the privilege is not absolute "where the purposes underlying the privilege are outweighed by the compelling, competing

interest of effectuating the *explicit* constitutional mandate [in the Fair Districts Amendment] that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting." The court approved "the circuit court's order permitting the discovery of information and communications, including the testimony of legislators and the discovery of draft apportionment plans and supporting documents, pertaining to the constitutional validity of the challenged apportionment plan." It concluded that "legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process."

***League of Women Voters v. Data Targeting, Inc.* (*Apportionment V*), 140 So. 3d 510 (Fla. 2014)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

Again, in the congressional case, non-party political consultants asserted that the First Amendment privilege protected documents reflecting their communications. The plaintiffs contended that the documents would "demonstrate 'the surreptitious participation of partisan operatives in the apportionment process,'" by submitting "through 'public front persons' draft redistricting maps for the legislature's consideration." The trial court ruled that the privileged documents in possession of non-parties might be admitted as evidence under seal, but that court proceedings would remain open during any use of the documents at trial. The Florida Supreme Court, however, required the trial court to maintain the confidentiality of the documents by permitting disclosure or use only under seal, and in a courtroom closed to the public.

***Bainter v. League of Women Voters* (*Apportionment VI*), 150 So. 3d 1115 (Fla. 2014)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

On appeal from the trial court's order to produce documents, the Florida Supreme Court held that the political consultants had waived any objection to production of the documents based on a qualified First Amendment privilege by not raising it during more than six months of hearings and filings regarding document production. The court also rejected the consultants' claim of a trade secrets privilege against production. It ordered the sealed documents and sealed portions of the trial transcript unsealed.

***League of Women Voters of Florida v. Detzner* (*Apportionment VII*), 172 So. 3d 363 (Fla. 2015)**

TOPIC(S) ADDRESSED: State Constitution Challenge

RELATES TO: Congressional Redistricting

On July 10, 2014, the *Romo v. Detzner* trial court declared two congressional districts invalid. On Aug. 11, 2014, the Legislature in special session enacted a remedial plan, which the trial court approved. In *Apportionment VII*, the supreme court reviewed the trial court's final judgment and the Legislature's

remedial plan. The supreme court held that the trial court, in approving the remedial plan, failed to give proper legal effect to its determination that the congressional plan was enacted in 2012 with unconstitutional intent to favor a political party or incumbents. The supreme court held that, in light of the trial court's finding of improper intent, the trial court should have required the Legislature to justify any district that the plaintiffs showed to have a problematic configuration. The supreme court required eight districts to be redrawn: five districts where plaintiffs proved there was intent to favor or disfavor a political party or incumbent, and three that were not compact or did not utilize existing political and geographical boundaries.

***League of Women Voters v. Detzner* (*Apportionment VIII*), 179 So. 3d 258 (Fla. 2015)**
TOPIC(S) ADDRESSED: State Constitution Challenge
RELATES TO: Congressional Redistricting
A special session on Aug. 10-21, 2015, adjourned without enactment of a revised congressional plan. Thereafter, the Florida Supreme Court gave final approval to the congressional plan adopted by the trial court, which consisted of districts 1 to 19 (North and Central Florida) as passed by the House and incorporated into the plaintiffs' alternative map and districts 20 to 27 (South Florida) as proposed by plaintiffs.

GEORGIA

***Georgia State Conf. of NAACP v. Georgia*, No. 1:17-cv-1427 (N.D. Ga. Aug. 25, 2017)**
TOPIC(S) ADDRESSED: Racial VRA, Equal Protection and Partisan Gerrymander
RELATES TO: Legislative Redistricting
Plaintiff African-American voters and the NAACP alleged that Georgia's 2015 redistricting of Georgia House of Representatives districts 105 and 111 resulted from racial and partisan gerrymandering. The plaintiffs asked the district court to declare these two districts unconstitutional, order them redrawn, and impose preclearance requirements on Georgia for the next 10 years. A three-judge federal district court entered an order dismissing the plaintiffs' Section 2 and partisan gerrymandering claims. The order did not address the plaintiffs' racial gerrymandering claims. The court consolidated this case with *Thompson v. Kemp*. After the November 2018 election and the close of discovery, the case was dismissed by stipulation of the parties.

IDAHO

***Twin Falls County v. Idaho Comm'n on Redistricting*, 152 Idaho 346, 271 P.3d 1202 (2012)**
TOPIC(S) ADDRESSED: State Constitutional Challenge
RELATES TO: Legislative Redistricting
This case involves a state constitutional challenge to the legislative apportionment plan adopted by the Idaho Commission on Redistricting. Plaintiffs argued the plan adopted by the commission violated art.

III, § 5, of the Idaho Constitution, which states that "a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States." The Idaho Supreme Court interpreted the requirements of art. III, § 5, as being mandatory, thus holding that the only permissible reason to deviate from art. III, § 5, was to comply with the Equal Protection Clause, and only then to the smallest extent necessary. Because the commission had considered plans that split fewer counties and complied with the Equal Protection Clause, the plan the commission ultimately adopted did not split as few counties as was practicable. Thus, the commission's plan violated the Idaho Constitution. The court directed the commission to reconvene and adopt new maps.

KENTUCKY

***Legislative Research Commission v. Fischer*, No. 2012-SC-000091 (Ky. Apr. 26, 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

This case was a state constitutional challenge to the state House and Senate maps adopted by the Kentucky Legislature in 2011. Section 33 of the Kentucky Constitution requires that state legislative districts be drawn "as nearly equal in population as may be without dividing any county, except where a county may include more than one district." The plaintiffs in *Fischer v. Grimes*, Civil Action No. 12-Cl-109, requested a temporary injunction preventing the state from using the new plans until remedial plans could be drawn. The trial court granted plaintiffs' motion and enjoined the state from enforcing the maps. On appeal, the Kentucky Supreme Court held that the Legislative Research Commission had not carried its burden of proving the excessive population deviation was a result of a consistently applied rational state policy. Since plaintiffs had demonstrated that fewer county splits and population deviations of no more than 5% could be achieved in both the House and Senate, the new maps adopted by the General Assembly in 2011 were unconstitutional.

MAINE

***Desena v. Maine*, No. 1:11-cv-117 (D. Me. June 21, 2011)**

TOPIC(S) ADDRESSED: Equal population

RELATES TO: Congressional Redistricting

After the 2010 census data was completed, Maine's two congressional districts saw an increased population differential. Instead of having a gap of 23 residents between the two congressional districts, as was the case after the previous redistricting cycle, these two districts varied by 8,669 residents. Plaintiffs, who were residents of the larger district, sued the state on March 28, 2011, alleging that the plan from 2003, which was in effect for the 2012 election cycle, was unconstitutionally malapportioned and that the 2012 congressional election could not go forward under these current maps. The Maine federal district court ruled in favor of the plaintiffs, holding that the population deviation between the

two districts was significant and was greater than variances previously deemed unconstitutional by the U.S. Supreme Court. On June 21, 2011, the court ordered the Legislature to act quickly and redraw the districts before the 2012 congressional elections. On Sept. 27, 2011, at a special session called for this specific purpose, both houses of the Maine Legislature approved legislation adopting new congressional districts based on the 2010 federal decennial census. The governor signed the bill the next day, no challenges were filed against it, and the court ordered judgment for plaintiffs.

MARYLAND

***Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), 567 U.S. 930 (2012)**

TOPIC(S) ADDRESSED: Counting of Prisoners and Equal Population

RELATES TO: Congressional Redistricting

Maryland drew its congressional redistricting plan in accordance with the requirements of Maryland's "No Representation Without Population Act." This act requires that prisoners be counted at their last known residence before incarceration, not at the prison address. If prisoners were residents of an address outside of Maryland before incarceration, the prisoners must be excluded from data used for redistricting. Plaintiffs challenged the congressional districts, based on alleged racial and partisan gerrymandering, unequal population, violations of the Voting Rights Act, and two claims based on adjustments to account for the population in prison—including a claim based on omission of individuals in prison whose last known addresses are outside the state. The court rejected plaintiffs' claims of partisan and racial gerrymandering and of violations of the Voting Rights Act and found no constitutional deficiency in Maryland's decision to adjust census data to account for the incarcerated population. The decision was summarily affirmed by the U.S. Supreme Court.

***Shapiro v. McManus*, 136 S. Ct. 450 (2015)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Maryland voters challenged the state's congressional redistricting plan, saying it burdened their First Amendment rights of political association by drawing partisan-based lines. A single federal district court judge—not a three-judge panel—dismissed the claim, concluding that no relief could be granted. The 4th Circuit U.S. Court of Appeals affirmed this single judge's dismissal. The Supreme Court held that this standard was inconsistent with its precedents and clarified when U.S. district court judges must refer cases to three-judge panels. The court ruled that federal district courts are required to refer cases to a three-judge panel when plaintiffs challenge the constitutionality of the apportionment of congressional districts.

***Benisek v. Lamone*, No. 18–422, 588.U.S. ___ (2019). (The U.S. Supreme Court consolidated *Rucho v. Common Cause* and *Lamone v. Benisek*)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Six years after the Maryland General Assembly redrew the Sixth Congressional District, plaintiffs sued to enjoin Maryland's election officials from holding congressional elections under the 2011 map. They alleged lawmakers intentionally used information about voters' histories and party affiliations to replace large numbers of Republican voters with Democratic voters in the district, thus flipping the district from a reliable Republican seat into a safe Democratic one. They asserted that extending the alleged gerrymander into the 2018 election would be a manifest and irreparable injury. The three-judge panel hearing the case denied the state's motion to dismiss and held that a map could be an unconstitutional partisan gerrymander if the plaintiffs could satisfy a three-part test laid out by the court. The trial court denied the preliminary injunction and stayed further proceedings pending the outcome of *Gill v. Whitford*. The U.S. Supreme Court held that a district court did not abuse its discretion in denying a preliminary injunction in a gerrymandering case, but deferred its ruling in the face of the legal uncertainty surrounding any potential remedy was within its sound discretion. On remand, the district court found that the state specifically targeted voters who were registered as Republicans and who historically had voted for Republican candidates. That court held that Maryland's 2011 redistricting law "violates the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history." It enjoined the use of the 2011 congressional plan in future elections and directed the state to submit to the court a remedial plan. It then stayed its decision pending an expedited appeal to the U.S. Supreme Court. In a 5-4 opinion consolidated with *Common Cause v. Rucho*, the Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral" to measure fairness are not available.

MICHIGAN

***League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Legislative Redistricting and Congressional Redistricting

The League of Women Voters of Michigan, numerous League members, and several Democratic voters challenged the 2011 congressional, Senate and House redistricting plans as violating their 14th Amendment right to equal protection of the laws and their First Amendment rights to freedom of speech and association by deliberately discriminating against Democratic voters. The Michigan Senate, Republican members of Congress and of the Michigan Senate and House intervened to defend the plans. The district court considered testimony and documents showing the motivations of the members, staff

and consultants who drew the plans and the process they followed. The court also considered expert evidence comparing the challenged plans to those drawn by the expert's computer using programs to create districts that complied with traditional districting principles. Based on this evidence, the court applied the standard used in *Common Cause v. Rucho* to establish a violation of the 14th Amendment's Equal Protection Clause: 1) a predominant intent to subordinate the adherents of one political party and entrench a rival party in power, 2) a discriminatory effect diluting a plaintiff's vote by cracking or packing, and 3) no legitimate state interest to justify the discrimination. It applied a three-part test—similar to that used in *Ohio A. Philip Randolph Inst. v. Householder*—to establish a violation of the First Amendment: 1) a specific intent to burden individuals or entities that support a disfavored candidate or political party, 2) an actual burden imposed on the political speech or associational rights of those individuals or entities, and 3) that the intent to burden actually caused the burden to be imposed. The court found that partisan considerations played a central role in every aspect of the redistricting process. The court found that the challenged districts had intentionally been drawn to disadvantage Democratic candidates and voters. The court gave the Michigan Legislature until Aug. 1, 2019, to draw remedial plans, but also set a schedule for the court to appoint a special master to draw a plan if the Legislature failed or if the court were to find the remedial plan invalid. The Michigan Senate and Michigan House and congressional intervenors applied to the U.S. Supreme Court for a stay of the judgment of the district court pending a direct appeal.

MISSISSIPPI

***Clemons v. U.S. Dep't of Commerce*, No. 3:09-cv-104 (N.D. Miss. July 8, 2010), 131 S. Ct. 821 (2010)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Congressional Redistricting

Registered voters across the country filed suit in a Mississippi federal district court in 2010 alleging that Section 2a of Title 2 of the U.S. Code, which freezes the number of U.S. representatives at 435, is unconstitutional under the principle of "one-person, one-vote." Freezing the number of U.S. representatives naturally leads to under-representation of some districts and over-representation of others. The three-judge federal district court granted the government's motion for summary judgment.

***Mississippi NAACP v. Barbour*, No. 3:11-cv-159 (S.D. Miss. May 16, 2011), 565 U.S. 972 (2011)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Legislative Redistricting

The Mississippi NAACP filed suit alleging that the legislative plans drawn for the 2010 cycle were unconstitutionally malapportioned and violated the Equal Protection Clause of the 14th Amendment. The federal district court ruled that the 2011 elections for the state House and Senate could go on absent a plan adopted by the Mississippi Legislature precleared before the June 1 qualifying deadline for the 2011 elections. The court ruled in favor of the Legislature on the premise that it was not required to

redistrict at this time. The U.S. Supreme Court had previously held that state legislatures are required to redistrict every 10 years. Here, only nine years had passed. In addition, the three-judge panel found that the Legislature did not violate the Mississippi Constitution pertaining to when the reapportionment process must begin. The U.S. Supreme Court affirmed the lower court's ruling.

***Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Congressional Redistricting

When the 2001 Mississippi Legislature failed to enact a congressional redistricting plan based on the 2000 census that reflected a reduction from five representatives to four, a three-judge federal district court adopted a four-district plan and retained jurisdiction "to implement, enforce, and amend [its] order as shall be necessary and just." When the 2011 Mississippi Legislature likewise failed to enact a plan based on the 2010 census that reflected population shifts within the state, the same panel amended its 2001 judgment to impose a new plan that met equal population requirements.

NEW HAMPSHIRE

***City of Manchester v. Gardner*, No. 2012-0338 (N.H. June 19, 2012)**

TOPIC(S) ADDRESSED: Racial, Process and State Constitutional Challenges

RELATES TO: Legislative Redistricting

Plaintiffs argued that by strictly adhering to a 10% overall deviation rule for the state House redistricting plan, the General Court violated the New Hampshire Constitution. The General Court failed to provide approximately 62 towns, wards and places with their own representatives, which the plaintiffs argued was excessive. The New Hampshire Supreme Court ruled in favor of the General Court, stating that plaintiffs did not show that the General Court lacked a rational or legitimate basis for adhering to the 10% rule. The court went on to say that it had not found a case in which a court has required a legislature to adopt a redistricting plan with an overall deviation range of more than 10% in order to enhance its compliance with a state constitutional mandate. The state supreme court remanded the case to the state trial court, which subsequently dismissed the case.

NEW YORK

***Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

Plaintiffs challenged the state Senate and Assembly plans for various violations of Section 2 of the Voting Rights Act and the Equal Protection Clause of the 14th Amendment. Both the Senate majority (Republicans) and Senate minority (Democrats) intervened as defendants. The Senate minority defendants sought discovery from the Senate majority defendants of all documents determining the

size of the Senate following the 2010 census. The Senate majority, Assembly majority (Democrats), and Assembly minority (Republicans) defendants moved for an order denying discovery of documents and information protected by the legislative privilege. A U.S. magistrate judge applied a five-factor analysis and ordered the parties to submit for *in camera* inspection the documents for which they claimed a privilege. The magistrate judge found that certain documents and communications were not "legislative" and thus not entitled to the privilege: 1) those categorized as public statements or concerning the preparation of public statements; 2) those prepared in anticipation of litigation; 3) inquiries from members of the public or media and responses thereto; 4) public remarks, statements crafted for public relations purposes, and public speeches made outside the Legislature by legislators or their representatives; 5) public testimony; 6) efforts made in connection with negotiation for or securing of government contracts, and remuneration of contractors or service providers; 7) those concerning administrative tasks; 8) correspondence with or about national political organizations; 9) submissions to the Department of Justice related to compliance with Section 5 of the VRA; and 10) any other means of informing those outside the legislative forum.

***Leib v. Walsh*, 45 Misc. 3d 874, 992 N.Y.S.2d 637 (Sup. Ct. 2014)**

TOPIC(S) ADDRESSED: Process Challenge

RELATES TO: Legislative Redistricting

In 2013, the New York Legislature approved a concurrent resolution to amend the state Constitution to include the creation of an "independent" redistricting commission to draw legislative and congressional redistricting plans starting in 2020. One of the main issues in question was the use of the qualifier "independent" in the ballot language. Plaintiffs sued the State Board of Election in New York state trial court for approving this ballot initiative with "misleading, ambiguous, illegal, or inconsistent" language. The state trial court agreed with the plaintiff that the term "independent" was indeed misleading because the ultimate outcome was subject to control by others (the Legislature). The Legislature could reject any map drawn by the commission for unstated reasons and draw its own lines, therefore calling into question the true independence of the commission. Also, the court found that the standard of review was "misleading, ambiguous, illegal, or inconsistent," based on previous case law interpreting the challenge of specific ballot language or ballot abstracts. The court then held that, to remedy this matter, the word "independent" must be stricken from the ballot.

NORTH CAROLINA

***Covington v. North Carolina*, 137 S. Ct. 1624 (2017), 138 S. Ct. 2548 (2018)**

TOPIC(S) ADDRESSED: Racial Equal Protection

RELATES TO: Legislative Redistricting and Congressional Redistricting

In 2011, plaintiffs claimed that the General Assembly employed a race-based proportionality policy for state House and Senate plans. They argued that approximately 10 of the state's 50 Senate districts and approximately 24 of the state's 120 House districts should be black-majority districts. The three-judge

federal district court agreed with the plaintiffs and ordered a new map to be drawn for a 2017 special election. On direct appeal, the Supreme Court affirmed on liability, but vacated the order for a special election. The General Assembly drew new plans, but on Oct. 26, 2017, the trial court appointed a Special Master in light of concerns about the General Assembly's remedy. The court expressed concerns that the General Assembly had not sufficiently corrected the racial gerrymandering violation, and that the General Assembly had unnecessarily redrawn districts in Wake and Mecklenberg counties, contrary to state law prohibiting mid-decade redistricting. The Special Master drew new plans adopted by the court on Jan. 21, 2018. On June 28, 2018, the Supreme Court affirmed the trial court's decision to deploy the Special Master's plan with respect to the racially gerrymandered districts, but reversed the trial court's decision to correct the alleged state law violation in Wake and Mecklenberg counties. The court held that the district court's remedy should have been confined to violations of federal law, not the state law prohibition on mid-decade redistricting.

***North Carolina Conference of NAACP Branches v. Lewis*, No. 18CVS 002322 (N.C. Superior Ct, Wake County Nov. 2, 2018)**

TOPIC(S) ADDRESSED: Racial Equal Protection

RELATES TO: Legislative Redistricting

Following the Feb. 6, 2018, refusal of the U.S. Supreme Court to enjoin use of the General Assembly's Aug. 31, 2017, remedial plan for five House districts in Wake and Mecklenburg counties, plaintiffs challenged those districts as a mid-decade redistricting before a three-judge state panel in Wake County Superior Court. On April 13, 2018, the panel found that plaintiffs were reasonably likely to succeed on the merits, but that the election, in which absentee voting had begun four weeks earlier, was too far along to enjoin the use of the challenged districts for 2018. The court denied the plaintiffs' motion for preliminary injunction. On Nov. 2, 2018, the panel held that the alteration of the four districts was not necessary to remedy the racial gerrymander and thus violated the state constitution's ban on mid-decade redistricting. It directed the General Assembly to enact a new Wake County House District map for use in the 2020 general election no later than the earlier of: 1) the adjournment of the 2019 regular session of the General Assembly, or 2) July 1, 2019. On June 25, 2019, the General Assembly enacted the Special Master's plan for House districts in Wake County.

***Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super Ct., Wake County)**

TOPIC(S) ADDRESSED: Racial VRA

RELATES TO: Legislative Redistricting and Congressional Redistricting

An action in state court challenged North Carolina's legislative and congressional maps as violating federal and state law for relying too heavily on race to create its 2011 maps. According to the plaintiffs, the General Assembly used a racial proportionality target to determine the number of majority-minority districts that it drew and required that each such district meet a fixed 50% black voting-age population (BVAP) target. The North Carolina Supreme Court found that drawing districts to comply with the Voting Rights Act did not automatically amount to consideration of race warranting strict scrutiny, and

that the state had a strong evidentiary basis for concluding that the districts it drew were sufficiently tailored to satisfy the Voting Rights Act. Also, the districts met state constitutional requirements. On two separate occasions, the U.S. Supreme Court vacated and remanded in light of *Alabama Legislative Black Caucus v. Alabama* and *Cooper v. Harris*. The North Carolina Supreme Court remanded to the trial court. On Feb. 11, 2018, the Wake County Superior Court entered a judgment in the case, stating that challenged districts in the 2011 congressional and legislative plan were unconstitutional but holding that no further remedy could be offered by the court since the 2011 maps had already been redrawn. The court declared all the plaintiffs' remaining claims moot.

***Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016); aff'd *Cooper v. Harris*, 137 S. Ct. 1455 (2017)**

TOPIC(S) ADDRESSED: Racial Equal Protection

RELATES TO: Congressional Redistricting

Plaintiffs alleged that North Carolina's First and 12th congressional districts, as drawn by the General Assembly in 2011, violated the Equal Protection Clause of the 14th Amendment. They argued that race was the predominant motive in drawing the challenged districts. The federal district court ruled in favor of the plaintiffs on this claim. On Feb. 5, 2016, the trial court struck the two challenged congressional districts as districts drawn predominantly based on race, without adequate justification. That decision was affirmed on appeal by the Supreme Court. On Feb. 19, 2016, the General Assembly passed a remedial plan; plaintiffs challenged that remedial plan as a partisan gerrymander. On June 2, 2016, the three-judge panel denied the plaintiffs' objections, ruling that the court could not "resolve this question based on the record before it." The Supreme Court, on June 28, 2018, summarily affirmed that decision.

***Common Cause v. Rucho*, No. 18–422, 588.U.S. ___ (2019). (The U.S. Supreme Court consolidated *Rucho v. Common Cause* and *Lamone v. Benisek*)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Plaintiffs alleged that North Carolina's 2016 contingent congressional plan constituted a partisan gerrymander. They alleged that the plan violated the Equal Protection Clause of the 14th Amendment, the First Amendment, and Article I, Section 2 (Members chosen by the People) and Section 4 (the Elections Clause) of the U.S. Constitution. The three-judge district court found for the plaintiffs on all their constitutional claims. The legislative defendants did not dispute that the North Carolina General Assembly intended for the 2016 plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates, nor that the plan had its intended effect. Rather, they argued that a partisan gerrymander was not against the law. The court also found that the plan's partisan favoritism excluded it from the class of "reasonable, politically neutral" electoral regulations that pass First Amendment muster and that the 2016 plan represented an impermissible effort to "dictate electoral outcomes" and "disfavor a class of candidates." The district court ordered the North Carolina General Assembly to draw new congressional districts. On remand, the three-judge district

court held that at least one of the plaintiffs residing in each of the state's 13 congressional districts had standing to assert a partisan vote dilution challenge under the Equal Protection Clause and that 12 of the 13 districts in the 2016 plan violated the Equal Protection Clause, the First Amendment and Article I of the U.S. Constitution. The court enjoined the use of the 2016 plan in any election after the 2018 election. In a 5-4 opinion that included the consolidated case of *Benisek v. Lamone*, the U.S. Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral" to measure fairness are not available.

OHIO

***Ohio A. Philip Randolph Inst. v. Householder*, No. 1:18-cv-357 (S.D. Ohio May 3, 2019)**

TOPIC(S) ADDRESSED: Partisanship and Legislative Privilege

RELATES TO: Congressional Redistricting

Seventeen Ohio Democratic voters and five Ohio-based Democratic and nonpartisan organizations challenged the 2011 congressional plan as violating their 14th Amendment right to equal protection of the law, their First Amendment right to freedom of association, and the Elections Clause of Article I, sections 2 and 4, of the U.S. Constitution, by deliberately discriminating against Democratic voters. Members of the Ohio congressional delegation intervened to join the speaker of the Ohio House, the president of the Ohio Senate, and the secretary of state in defending the plan. Based on the evidence, the court applied the standard used in *Rucho v. Common Cause* (North Carolina) and *League of Women Voters of Mich. v. Benson* (Michigan) to establish a violation of the 14th Amendment's Equal Protection Clause: 1) a predominant intent to subordinate the adherents of one political party and entrench a rival party in power, 2) a discriminatory effect diluting a plaintiff's vote by cracking or packing, and 3) no legitimate state interest to justify the discrimination. The court applied a similar three-part test used in *Rucho* and *Benson* to establish vote dilution under the First Amendment: 1) a specific intent to burden individuals or entities that support a disfavored candidate or political party, 2) an actual burden imposed on the political speech or associational rights of those individuals or entities, and 3) that the intent to burden actually caused the burden to be imposed. The court found that partisan considerations played a central role in every aspect of the redistricting process. All 16 districts were struck down. The court gave the Ohio General Assembly until June 14, 2019, to draw a remedial plan, but also set a schedule for the court to appoint a special master to draw a plan if the General Assembly failed or if the court were to find the remedial plan invalid. At the time of publication, further motions are expected.

PENNSYLVANIA

***Holt v. 2011 Legislative Reapportionment Comm'n*, 614 Pa. 364, 38 A.3d 711 (2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenges

RELATES TO: Legislative Redistricting

This is a consolidation of multiple challenges to the final plan adopted by the Pennsylvania Legislative Reapportionment Commission (LRC) following the 2010 census. While there were more than 10 individual challenges, there were two challenges to the entire legislative scheme that the Pennsylvania Supreme Court used when it struck down the plan as unconstitutional. Most of the legal dispute in this case centered around what kinds of evidence challengers could bring to the attention of the state supreme court to back up their arguments. The supreme court held that its precedents did not preclude it from seeing alternative plans from challengers, so long as those plans were being submitted as evidence of the unconstitutionality of the adopted maps, and not as proposed plans that should be enacted in place of the unconstitutional maps adopted by the LRC. The supreme court struck down the LRC's final plan, saying it violated Article II, Section 17(d), of the Pennsylvania Constitution, which requires the LRC to craft a plan with no more splits of townships, wards and counties than are "absolutely necessary." The court remanded the case to the LRC, directing them to adopt maps that had fewer splits as mandated by art. II, § 17(d).

***Holt v. 2011 Legislative Reapportionment Comm'n*, 620 Pa. 373, 67 A.3d 1211 (2013)**

TOPIC(S) ADDRESSED: State Constitutional Challenges

RELATES TO: Legislative Redistricting

On remand, the LRC adopted Senate and House plans with fewer political subdivision splits than in its 2011 final plan, but not as few as in plans submitted by challengers that also had lower population deviations and more compact districts. On appeal, the Pennsylvania Supreme Court held that "the LRC, in crafting the 2012 Final Plan, sufficiently heeded this court's admonition that it 'could have easily achieved a substantially greater fidelity to all of the mandates in Article II, § 16' than it did in its unconstitutional 2011 Final Plan, and as the court stated, "the appellants have not demonstrated that the 2012 Final Plan is contrary to law."

***League of Women Voters of Pa. v. Pennsylvania*, 644 Pa. 287 (2018), cert. denied, 139 S. Ct. 445 (2018)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

The League of Women Voters of Pennsylvania and a group of Democratic Pennsylvania voters challenged the state's 2011 congressional map in state court as an unconstitutional partisan gerrymander under the state constitution. The petitioners sought a declaration that the plan discriminates against Democratic voters in violation of the Pennsylvania Constitution's Free Expression and Association clauses, Equal Protection Guarantees, and Free and Equal Clause. The Pennsylvania Supreme Court found that "the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the

Commonwealth of Pennsylvania" and enjoined its use in future elections, commencing with the state primary election May 15, 2018. The court gave the General Assembly and the governor until Feb. 15, 2018, to submit to the court a remedial plan. If they failed to do so, the court would adopt its own plan by Feb. 19, 2018. The court reviewed the historical development of Pennsylvania's constitutional limits on the drawing of legislative districts, such as requirements that they be compact, contiguous and maintain the boundaries of political subdivisions, and adopted them "as appropriate in determining whether a congressional redistricting plan violates the Free and Equal Elections Clause..." The court held that, when drawing congressional districts, if these neutral criteria are subordinated to gerrymandering for unfair partisan political advantage, whether intentional or not, the plan violates the Free and Equal Elections Clause. The Pennsylvania General Assembly failed to submit a congressional redistricting plan to the governor by the court's deadline of February 9. The court released its adopted remedial plan. On Feb. 27, 2018, the legislative defendants filed an Emergency Application for Stay with Justice Samuel Alito. The stay was denied.

***Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Eight incumbent Pennsylvania congressmen and two members of the Pennsylvania Senate challenged the supreme court's new map in federal district court as a violation of the Elections Clause of the U.S. Constitution, alleging that the court had neither authority to strike down the 2011 plan nor authority to draw a new map in its place. The new congressional map was put in place by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*. A three-judge court dismissed the complaint for lack of standing. The two members of the Pennsylvania Senate were not a sufficient number to enact a law or override a governor's veto, so they were not entitled to defend the rights of the General Assembly. The eight members of Congress had no legally recognized interest in the composition of their congressional districts. Their complaint that the state court had adopted improper criteria and provided too little time for the General Assembly to draw a plan was not why their districts' boundaries had changed, so it was not the cause of their injury.

***Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 16, 2017), 138 S. Ct. 2576 (2018)**

TOPIC(S) ADDRESSED: Partisanship and Legislative Privilege

RELATES TO: Congressional Redistricting

Four Pennsylvania citizens challenged the state's 2011 congressional map in federal court as a partisan gerrymander. The plaintiffs asserted that the 2011 plan unlawfully placed citizens into congressional districts based upon their likely voting preferences. The plaintiffs asked the court to redraw the districts before the 2018 congressional elections. The court dismissed the partisan gerrymandering claim under the Equal Protection Clause of the 14th Amendment for failure to articulate a standard for reviewing the claim. The speaker of the Pennsylvania House moved for a protective order that he not be deposed at all or, if deposed, that he not be questioned about his deliberative process or subjective

intent regarding the 2011 congressional map. The three-judge federal district court denied the motion, saying there was no legislative or deliberative process privilege as to documents and communications with third parties nor for questions about his own intent or motive, nor for communications with the public or outside of the members and staff of the General Assembly. The court dismissed the partisan gerrymandering claim under the First Amendment for failure to articulate a standard for reviewing the claim. The court dismissed the remaining claims on Jan. 10, 2018. The plaintiffs filed a notice of appeal to the Supreme Court. On May 29, 2018, the Supreme Court dismissed the appeal as moot, in light of *League of Women Voters of Pa. v. Pennsylvania*.

SOUTH CAROLINA

***Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012), 568 U.S. 801 (2012)**

TOPIC(S) ADDRESSED: Racial Equal Protection and Racial VRA

RELATES TO: Legislative Redistricting and Congressional Redistricting

Registered voters in South Carolina challenged the General Assembly's state and congressional redistricting plans in federal court. They argued that the maps as drawn in the 2010 cycle denied African-American voters equal protection under the law, violating the 14th Amendment to the U.S. Constitution and Section 2 of the Voting Rights Act. The plaintiffs argued that the new plans unnecessarily packed African-American voters into specific districts. The three-judge federal district court rejected the plaintiffs' challenge, stating that the plaintiffs had failed to prove that the General Assembly acted with a discriminatory purpose. In addition, the plaintiffs failed to prove a discriminatory effect. The plaintiffs appealed to the U.S. Supreme Court. The Court summarily affirmed the lower court's ruling. The plaintiffs moved the trial court for relief from the dismissal due to the holding in *Shelby County v. Holder*. Once again, the plaintiffs were denied by the three-judge federal district court and the U.S. Supreme Court.

TENNESSEE

***Moore v. State,* 436 S.W. 3d 775 (Tenn. Ct. App. 2014)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Legislative Redistricting

Article II, Section 6 of the Tennessee Constitution prohibits splitting counties to form senatorial districts. In 2012, the General Assembly adopted a Senate redistricting plan splitting eight counties with an overall population range of 9.17%. Plaintiffs challenged the constitutionality of the plan based on county splitting and offered a plan that split five counties with an overall population range of 10.05% as a plan more compliant with the Tennessee Constitution. No plan splitting fewer counties with an overall population range under either 9.17% or 10% was offered as an alternative. Affirming summary judgment in favor of the state, the Tennessee Court of Appeals found that the state demonstrated that crossing county lines was necessary to best achieve population equality on balance with the state constitutional interests.

TEXAS

***Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Legislative Redistricting and Congressional Redistricting

Voters in Texas sought an injunction barring the use of the 2011 state legislative maps. They argued that Texas should adopt a map measured by *voter population* numbers, not *total population* numbers. The U.S. Supreme Court rejected the plaintiffs' claim that the Texas plan based upon total population was in violation of the one-person, one-vote principle of the Equal Protection Clause. The Supreme Court held that centuries of practice and precedent establishes the principle of representation that serves all residents, not just those who are eligible to vote. Because non-voters have an important stake in many policy decisions and debates, they therefore are accorded their fair representation. The Court did not determine that a state must use total population numbers, and instead said that a state may use total population numbers.

***Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex.) (formerly Perez v. Perry)**

TOPIC(S) ADDRESSED: Process, Legislative Privilege, Racial Equal Protection and VRA

RELATES TO: Legislative Redistricting and Congressional Redistricting

Voters in Texas challenged the 2011 congressional, state House, and state Senate plans. Plaintiffs alleged that the Legislature intentionally diluted Latino and African-American voting strength based on alleged violations of the Voting Rights Act, racial and partisan gerrymandering, and excessive population deviations based on impermissible purposes and on counting the population of individuals in prison at the facilities where they are incarcerated rather than at their former addresses. The defendants asserted legislative privilege under federal common law and moved for a protective order. The motion was denied as premature. Twenty-three of Texas' members of Congress then asserted legislative privilege under the Speech and Debate Clause of the U.S. Constitution and moved to prevent disclosure of written communications between them, their staff and counsel and Texas legislators, staff and counsel relating to the Texas Legislature's redistricting. The communications had been submitted to the trial court under seal. The trial court denied the motion and unsealed the documents. When it appeared that the state's newly enacted plans would not be precleared under Section 5 of the Voting Rights Act before the 2012 election, the trial court drew interim plans. On appeal, the U.S. Supreme Court said that the trial court must follow the enacted plans, except for districts that violated the Constitution or the Voting Rights Act. In 2013, the Texas Legislature enacted those plans into law, with minor changes to the state House plan. Plaintiffs agreed that the enacted 2013 plan for the Senate remedied their complaint, and the complaint was dismissed. While the trial court continued its consideration of the challenges to the 2011 House and congressional plans on the merits, it ordered the House and congressional plans enacted in 2013 to be used for elections in 2014 and 2016. On appeal, the U.S. Supreme Court held the district court had disregarded the presumption of legislative good faith and improperly reversed the burden of proof when it required the state to show a lack of discriminatory intent in

adopting new districting plans. The Supreme Court reversed all the holdings of the district court with regard to the congressional plan and House plan, except its holding that HD 90 in Tarrant County (Fort Worth) was a racial gerrymander that needed to be redrawn.

VIRGINIA

***Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), 137 S. Ct. 788 (2017), No. 18-1134, (June 17, 2019)**

TOPIC(S) ADDRESSED: Racial Equal Population

RELATING TO: Legislative Redistricting

Voters in Virginia filed suit in federal district court alleging that the Virginia General Assembly violated the Equal Protection Clause when it drew state House districts in 2011. The General Assembly drew new lines for 12 state House districts that ensured that each of these districts would have a black voting-age population (BVAP) of at least 55%. The General Assembly claimed they did so to comply with the Voting Rights Act. On the merits, the district court rejected the challenge to 11 of the 12 districts. The U.S. Supreme Court held that the federal district court applied the wrong standard with regard to establishing racial predominance. The Court reasserted the controlling standard established in *Miller v. Johnson*, 515 U.S. 900, 916 (1995), that challengers may show predominance "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." What is crucial when evaluating predominance is the actual considerations of the General Assembly for drawing the district lines, not an after-the-fact evaluation of what appear to be district lines that deviate from traditional criteria. The Court remanded the case to the district court. After a new trial, the trial court held that the 11 remaining districts were drawn predominantly based on race, without sufficient justification. The court ordered the General Assembly to draw new lines. When the House of Delegates failed to draw a remedial plan, the district court imposed one to be used in the 2019 state election. The House of Delegates appealed the district court's order to redraw the districts. The House of Delegates also appealed the district court's remedial plan, alleging it was a racial gerrymander. The Supreme Court dismissed this appeal for a lack of standing.

***Personhuballah v. Alcorn* (aka *Page v. Va. State Bd. of Elections*, *Cantor v. Personhuballah*, and *Wittman v. Personhuballah*), 239 F. Supp. 3d 929 (E.D. Va. 2017)**

TOPIC(S) ADDRESSED: Partisanship and Legislative Privilege

RELATES TO: Congressional Redistricting

Plaintiffs alleged that their rights under the Equal Protection Clause of the U.S. Constitution were violated by the racial gerrymander of Virginia Congressional District 3 during the 2011-12 redistricting cycle. Plaintiffs subpoenaed documents related to the 2012 Virginia redistricting process—including

draft maps and communications about the maps—from a consultant retained as an independent contractor by the House Republican Campaign Committee. The consultant moved to quash the subpoena or for a protective order, asserting legislative privilege as to some of the documents. The federal district court held that, since the consultant was not an employee of the House, a committee or an individual member, he was not "so critical to the performance of the legislature that he should be treated as a legislative alter ego and extended the benefit of legislative privilege." Even if he were entitled to claim the privilege, the court used a five-factor analysis to determine that "he would be entitled to withhold only those documents concerning the actual deliberations of the Legislature once the redistricting legislation had been formally introduced." The three-judge court struck down Congressional District 3 as a racial gerrymander because the use of race in drawing district lines was not narrowly tailored to serve a compelling governmental interest. The U.S. Supreme Court vacated and remanded the decision for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*. The federal district court again found Congressional District 3 was a racial gerrymander. When the Virginia General Assembly failed to enact a remedial plan, the district court ordered Virginia to implement a plan drawn by a special master for elections in 2016.

***Vesilind v. Va. State Bd. of Elections*, 295 Va. 427, 813 S.E.2d 739** (2018)

TOPIC(S) ADDRESSED: State Constitutional Challenges and Legislative Privilege

RELATES TO: Legislative Redistricting

Challengers filed suit in state court alleging that six Senate and five House districts were not as compact as the Virginia Constitution requires. Legislative members, staff and consultants were subpoenaed to testify about their role in the redistricting process. They claimed legislative privilege. The defendants first requested the court to quash the discovery requests and subpoenas relating to the redistricting process, but then consented to be found in contempt of the trial court's order compelling discovery from some of the members, staff and consultants to facilitate an appeal of the order to the Virginia Supreme Court. On appeal, the Virginia Supreme Court found for the defendants since the actions of the members, staff and consultants fell within the sphere of legitimate legislative activity because they acted as an "alter ego" of the legislator in performing a legislative activity. They were deemed to be functioning in a legislative capacity on behalf of and at the direction of a legislator. Therefore, legislative privilege applied to these communications. After a trial on the merits of the case, the circuit court held in favor of the defendants, ruling against the plaintiffs' claim that the alleged districts violated the Virginia Constitution.

WEST VIRGINIA

***Tennant v. Jefferson County*, 567 U.S. 758** (2012)

TOPIC(S) ADDRESSED: Equal Population and State Constitution Challenge

RELATES TO: Congressional Redistricting

The Jefferson County Commission and residents of Jefferson County alleged that West Virginia's 2011

congressional plan violated the "one-person, one-vote" principle of Article I, Section 2, of the U.S. Constitution. West Virginia created a redistricting plan that had a maximum population deviation of 0.79% (the variance between the smallest and largest districts). The state conceded that it could have made a plan with less deviation, but that other traditional redistricting principles—such as not splitting counties, avoiding contests between incumbents, and preserving the cores of prior districts—were legitimate state objectives. The district court held that "the State's asserted objectives did not justify the population variance." The U.S. Supreme Court held that the Legislature did provide a sufficient record connecting the state's interests and the necessary deviation needed to sustain those interests. The court reversed and remanded the case to the district court. The federal district court then dismissed the case, without prejudice to refiling in the appropriate state court because the case asserted claims under state law.

WISCONSIN

***Baldus v. Brennan*, 849 F. Supp. 2d 840 (E.D. Wis. 2012)**

TOPIC(S) ADDRESSED: Partisanship, Equal Population and Legislative Privilege

RELATES TO: Legislative Redistricting and Congressional Redistricting

Plaintiffs alleged that the Wisconsin legislative and congressional plans violated the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act in various ways. Specifically, the plaintiffs alleged the plans were unconstitutional because they violated traditional redistricting principles and failed to protect communities of interest; constituted an impermissible partisan gerrymander; and disenfranchised nearly 300,000 voters who were shifted from even-numbered Senate districts to odd-numbered Senate districts (meaning they could not vote for a Senator for an extra two years). The plaintiffs further alleged the plan "cracked" the Milwaukee Latino community into two districts, neither of which was a majority-minority district of citizen-voting-age Latinos, in violation of Section 2 of the Voting Rights Act. On March 22, 2012, the court upheld the plans as constitutional, but found that Assembly districts 8 and 9 violated Section 2 of the Voting Rights Act by diluting the voting power of Latino voters in Milwaukee. The court held the plan violated federal law because it failed to create a majority-minority district for the Latino community in Milwaukee. The court enjoined the state from using the existing Assembly districts 8 and 9 and ordered creation of new maps affecting only those districts. The court then gave the Legislature the first opportunity to redraw the districts but noted that the Legislature must act quickly given upcoming elections. On April 11, 2012, the court adopted a remedial plan for Assembly districts 8 and 9 drawn by plaintiffs. The court explained that the Hispanic citizen-voting-age population in the maps proposed by the defendants was too low, whereas the plaintiffs' proposed maps provided an effective majority-minority district for the Latino community in Milwaukee and balanced traditional redistricting criteria. For this reason, the court selected the proposed maps submitted by the plaintiffs and ordered that the maps be substituted for Assembly districts 8 and 9 in the original map.

***Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), 138 S. Ct. 1916 (2018)**

TOPIC(S) ADDRESSED: Partisanship and State Constitutional Challenge

RELATES TO: Legislative Redistricting

Voters in Wisconsin challenged the Wisconsin Legislature's state Assembly plan adopted in 2011. Plaintiffs alleged that the Wisconsin Legislature drew the districts with excessive partisan intent, intending to hurt the opposing party. A three-judge federal district court struck down the map as a partisan gerrymander. The court's opinion considered, without depending on, a new standard: the "efficiency gap." The efficiency gap is a mathematical metric that calculates how many votes each party wastes compared to the other party. A wasted vote for a party is the number of votes above 50% plus one in a district won, and the total votes received by the losing candidate. These totals are compiled for both parties and then compared to each other. If one party has significantly more wasted votes than the other party, then that plan is called into question.

On appeal, the U.S. Supreme Court sent the case back to the district court for further proceedings, consistent with its opinion that a partisan gerrymandering case alleging vote dilution under the Equal Protection Clause of the 14th Amendment must be considered district by district, rather than statewide. Plaintiffs had alleged that Democratic votes had been diluted by packing them into some districts and cracking them among other districts, but plaintiffs had not identified which districts were packed or were cracked and that at least one plaintiff resided in each of the challenged districts. Further, plaintiffs had not sought to prove at trial that they lived in a packed or cracked district or identify the harm to them as individuals. After the 5-4 opinion in *Rucho v. Common Cause* (North Carolina) and *Lamone v. Benisek* (Maryland), the district court dismissed the case.

Glossary

This glossary includes key redistricting terms. Although a few are terms of art or slang and do not have a well-defined meaning in the context of redistricting, they are widely used. Please note this information is intended to be for informational purposes only. The terms have been selected and defined by the NCSL redistricting team.

Alternative population base—A count other than total population from the federal decennial census that is used for redistricting.

Apportionment—The process of assigning seats, or apportioning them, in a legislative body among pre-existing political subdivisions such as states or counties. In the past, some states assigned districts on the basis of county boundaries and therefore continue to call their redistricting process "apportionment."

At-large—When a district elects more than one member, all candidates run against each other on one ballot, and they are elected by the entire district population.

Census—A complete count or enumeration of the population; the federal decennial census is mandated by the U.S. Constitution in Article 1, Section 2.

Census block—The smallest and lowest level of geography defined for decennial census tabulations. States may have input into the boundaries through the first phase of the Redistricting Data Program—the Block Boundary Suggestion Project (BBSP). The Census Bureau provides redistricting data down to the lowest level of census geography, the block level. Blocks can have any population, including no people.

Census block group—Block groups (BGs)—statistical divisions of census tracts—generally contain between 600 and 3,000 people. BGs tend to follow neighborhoods. They are used to present data and control block numbering. A block group consists of clusters of blocks within the same census tract that have the same first digit of their four-digit census block number. Most BGs were delineated by local participants in the Census Bureau's Participant Statistical Areas Program.

Census Bureau—The U.S. Census Bureau, which is part of the Department of Commerce, conducts the decennial Census of Population and Housing as well as numerous ongoing projects for the federal government. The mission for the bureau is to "Count Everyone Once, Only Once and in the Right Place" in the decennial census.

Census geography—The geographic units for which census information is tabulated and reported with several hierarchies; from smallest to largest, these are census blocks, census block groups, census tracts, counties and states.

Census tract—Census tracts are small, relatively permanent geographic entities within counties (or the statistical equivalents of counties) delineated by a committee of local data users. Generally, census tracts have between 2,500 and 8,000 residents and boundaries that follow visible features. When first established, census tracts were to be as homogeneous as possible with respect to population characteristics, economic status and living conditions. Tracts were first defined in 1970, and the Census Bureau maintains them as consistently as possible across the decades.

Commission—A statutory or constitutional body charged with researching, advising or enacting 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 demographic and/or 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 district. Various methods have been developed to measure compactness.

Contiguity—All parts of a district are connected geographically at some point with the rest of the district. Limits on contiguity by point or by water vary by state.

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 population, however defined, per district. Deviation can be expressed as an absolute number or as a percentage.

District—The geographic area that defines the region from which a public official is elected.

Effective minority district—A district that allows minority voters to elect their preferred candidate of choice.

Gerrymander—A term of art to describe a plan or a district intentionally drawn to give one group or party advantage over another.

Geographic Information System (**GIS**)—Computer software used to create or revise plans and analyze geographically oriented data.

Ideal population—The total population or alternative for the state or top-level jurisdiction divided by the number of seats in a legislative body.

Influence district—Term used to describe a district where a racial minority does not constitute a majority but is populous enough to influence electoral outcomes.

Justiciable—A case is "justiciable" if it relates to a matter that a court can decide. If a case is non-justiciable, then it is not something on which a court can rule.

Legislative body—Any entity that performs governmental legislative duties, with membership elected by the people; also known as a representational body.

Majority-minority districts—Term used by courts for seats where a group or a single racial or language minority constitutes a majority of the population. These are also are referred to as "effective districts."

Metes and bounds—A detailed and specialized description of district boundaries using specific geographic features and street directions such as those usually found in describing real property for legal purposes.

Minority opportunity district—A district with at least a 50% minority citizen voting age population.

Multi-member district—A single district that elects two or more members to a legislative body.

Natural boundaries—District boundaries that include natural geographic features such as bodies of water, mountains, etc.

Nested—When multiple districts of a legislature's lower chamber are wholly contained within the geographic boundaries of one of the upper chamber's districts.

One-person, one-vote—A constitutional standard established by the U.S. Supreme Court that means all districts for representational bodies should be approximately equal in population. The degree of equality may vary in congressional plans versus legislative and/or local plans.

Overall range—The difference in population between the largest and smallest districts in a districting plan in either absolute (people) or relative (percentage) terms.

Packing—A term used when one group is consolidated as a super-majority in a smaller number of districts, thus reducing its electoral influence in nearby districts.

Partisan Gerrymandering—See gerrymander.

Plan—A set of boundaries for all districts of a representational body, also known as a map.

PL 94-171—Federal law enacted in 1975 that requires the U.S. Census Bureau to provide the states with data for use in redistricting and also mandates the program where the states define the geography for collecting data.

Plurality—The margin by which the votes for the winning candidate exceeds the votes for the losing candidate with the highest number of votes. If the winners receive more than 50% of the total votes, they win with a majority; otherwise they win with a plurality.

Racial Gerrymandering—See gerrymander.

Reapportionment—See apportionment.

Redistricting—The redrawing or revision of boundaries for representational districts.

Sampling—Technique or method that measures part of a population to estimate the same characteristic for the entire population.

Section 2 of the Voting Rights Act (**VRA**)—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 (**VRA**)—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. The provision has become limited in scope since the 2013 *Shelby County v. Holder* decision, where the U.S. Supreme Court invalidated Section 4(b), which delineates the coverage of the section. This decision effectively suspended Section 5 of the VRA.

Single-member district—District electing only one representative; in the U.S. House of Representatives, states that are granted more than one seat must use single-member districts. States that have only one seat often are referred to as at-large states.

Single-member election—Election in which only one candidate is elected. While this is how all elections are held in single-member districts, it also can occur in mulit-member districts if seats within the district are uniquely designated and not all are elected at the same time.

Standard deviation—A statistical formula measuring variance from the average for the entire set of data.

Tabulation—The totaling and reporting of census data from individual responses for all levels of census geography.

Topologically Integrated Geographic Encoding and Referencing (**TIGER**)—The system and digital database developed at the U.S. Census Bureau to support computer maps used by the census.

Voting age population (**VAP**)—The number of people age 18 years and older.

Voting district (**VTD**)—A census term for a geographic area, such as an election precinct, where election information and data are collected; boundaries are provided to the Census Bureau by the states. Since boundaries must coincide with census blocks, VTD boundaries may not be the same as the election precinct and may include more than one precinct.

Index

B

C

D

E

F

G

H

K

L

M

N

O

R

S

T

U

V

W

Z