



Congressional Redistricting: An Overview

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November 21, 2012

Congressional Research Service

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www.crs.gov

R42831

CRS Report for Congress

Prepared for Members and Committees of Congress

Summary

The decennial apportionment process determines the number of seats in the House of Representatives for which each state qualifies, based on population counts (for more on the apportionment process, see CRS Report R41357, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, by (name redacted)). The redistricting process determines where those seats are geographically located within each state. Apportionment allocates the seats by state, while redistricting draws the maps.

Redistricting is a state process governed by federal law. Much of this law is judicially imposed because, in 1929, Congress let lapse its standards requiring districts to be made up of “contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.” If Congress chooses to legislate again in this area, its authority will come from Article I, Section 4 of the Constitution, granting the authority to Congress to change state laws pertaining to congressional elections.

The goal of redistricting is to draw boundaries around geographic areas such that each district results in “fair” representation. An effort to favor one group of interests over another by using the redistricting process to distort this fairness is often referred to as gerrymandering. Aside from distorting representation, it is believed by some that such gerrymandering diminishes electoral responsiveness by minimizing political competition among the parties.

Many of the “rules” or criteria for drawing congressional boundaries are meant to enhance fairness and minimize the impact of gerrymandering. These rules, standards, or criteria include assuring population equality among districts within the same state; protecting racial and language minorities from vote dilution while at the same time not promoting racial segregation; promoting geographic compactness and contiguity when drawing districts; minimizing the number of split political subdivisions and “communities of interest” within congressional districts; and preserving historical stability in the cores of previous congressional districts.

Most redistricting is currently done by state legislatures. Some believe that allowing redistricting to be the purview of state legislators promotes, at best, status quo districts protecting incumbents and, at worst, blatant partisan gerrymandering that can lead to a decade of one-party dominance. Reform efforts mostly have aimed at transferring the redistricting task from state legislatures to independent redistricting commissions. Efforts at creating these commissions have been successful at the state level; however, proposed federal legislation (for the 112th Congress, see H.R. 453, H.R. 590, H.R. 3846, and S. 694) to create such commissions within all states has not been successful.

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Introduction

Every 10 years, through the apportionment and redistricting processes within each state, Congress and the states attempt to create a U.S. House of Representatives that reflects a fair representation of the people of the United States. It is, generally, a complex, volatile, and highly political process, but one that, with a single exception, has occurred in various forms for over 200 years (since 1790), and, for some, represents, along with free elections, the clearest indication that the United States is a representative democracy.

U.S. congressional districts (currently set at 435) are reallocated among the 50 states based on population counts from the national census taken at the beginning of each decade. Once the reapportionment¹ of seats among the states is complete, congressional district boundaries are subject to change by state governments in all states with more than one district.² The goals of the redistricting process within states are that each congressional district shall be represented by a single Member; nearly equal in population within each state; and moderately unequal in population among states.

The U.S. Constitution (Article 1, Section 2 as amended by the 14th Amendment, Section 2) requires that “representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.” The requirement that districts must be apportioned *among* states means district boundaries cannot cross state lines. The Constitution, also in Article 1, Section 2, sets a minimum size for the House of Representatives (one Representative for each state) and a maximum size for the House (one Representative for every 30,000 persons). Congress is free to choose a House size (with the concurrence of the President) within these boundaries.

The single-member district is now the norm in the United States House of Representatives. States with more than one Representative are divided into districts that are each represented by one Member. There have been exceptions to this practice, especially prior to 1842, when a number of states elected Representatives on a “general ticket” or “at-large” basis by having them listed on a statewide ballot.³ The United States has also implicitly rejected the concept of proportional representation *by party* for Congress by adopting the single-member district standard.⁴

Once districts are allocated among the states based on population (apportionment), the actual redrawing of district lines (redistricting) is carried out by each state. This process is usually

¹ The term *reapportionment* is used by some as a synonym for *redistricting*, especially when referring to redistricting within states. This is not how it is used in this report. The *reapportionment* or *apportionment* process actually refers to assigning seats in the House of Representatives among the states based on population counts from the decennial census, and is carried out at the national government level. The *redistricting* process, or the drawing of boundaries for congressional districts, occurs within states, and is conducted by the states. For a description of how seats are apportioned among the states see CRS Report R41357, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, by (name redacted).

² After the 2010 Census, seven states (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming) were allocated a single Representative, the same states as following the 2000 Census.

³ CRS Report RS22628, *Congressional Redistricting: The Constitutionality of Creating an At-Large District*, by (name redacted), p. 2.

⁴ 81 Stat. 581 (PL 90-196, enacted in 1967) requires Representatives to be elected from districts, “no district to elect more than one Representative, codified at 2 USC 2c.”

completed by the state legislatures, but a number of states provide for nonpartisan or bipartisan commissions to draft the plans.⁵

Although the technology has changed, the process of redistricting in the 21st century is likely to be much the same as it was in the 20th century. Line-drawers use information from the census (and other data, such as voting patterns and voter registration figures) to plot district boundaries on maps.

As legal requirements have changed and technology has improved for analyzing data, many districts are created using smaller and more complicated geographic units or entities. Rather than using whole counties, cities, towns, or other natural geographic features to delineate districts as in the past, line-drawers now use geographic units created by the Census Bureau for statistical purposes. These “census tracts” and the smaller “blocks” are used because, as very small geographical units, they facilitate the precision necessary to make districts absolutely equal in population.

During the 1980s and 1990s the redistricting process moved from calculators and paper maps to computerized databases and mapping software. Whereas pre-1980s technology limited the number of competing plans that could be drawn, computerized redistricting often increased the number of plans that were presented to districting bodies in the states. During this period, however, the immense size of computerized map and census data files tended to limit participation of groups outside state government to those with relatively sophisticated computer technology.

Today, with the advancement of personal computer technology as well as access to relatively inexpensive advanced geographic information systems (GIS) computer software, a variety of groups and individuals are capable of producing sophisticated district maps and participating in the redistricting process depending on state laws and procedures.⁶

Federal Law Controls a State Process: Rules for Congressional Redistricting

Congressional redistricting traditionally has been a state function, but the federal government has intervened in the process through statutory law and judicially imposed rules stemming from challenges to state-crafted plans. Currently, the redistricting process is dictated by a set of federal court rulings, federal statutory laws, state constitutions, state laws, and state court rulings.

⁵ For the 2010-2012 cycle of Congressional redistricting, commissions, rather than state legislatures are authorized to draw congressional plans in Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington. In addition, under state law, a commission may, under certain circumstances, play a role in the redistricting process in Indiana and Connecticut. See, National Conference of State Legislatures (NCSL), *Redistricting Law 2010*, Denver, CO, September 29, 2009, Appendix D, pp. 197-200; State of California, Citizens Redistricting Commission, *Final Report on 2011 Redistricting*, August 15, 2011, p. 1.

⁶ Brookings Institution, “Toward Public Participation in Redistricting,” A Government Studies Event, conference held January 20, 2011, Washington, at http://www.brookings.edu/events/2011/0120_redistricting.aspx. For a full assessment of this process, see Micah Altman, Karin MacDonald, and Michael McDonald, “From Crayons to Computers: The Evolution of Computer Use in Redistricting,” *Social Science Computer Review*, vol. 23, no. 3 (Fall 2005), pp. 334-346.

The following “rules” may constrain the drawing of the boundaries of congressional districts (and, to a large extent, state legislative district boundaries as well):⁷

1. equality of population size for districts within each state with two or more districts—U.S. Constitution, Article I, Section 2;
2. protection of the rights of racial and language minorities against vote dilution—Voting Rights Act of 1965 as amended, 42 U.S.C. Section 1973c;
 - 2a. race cannot be only factor used in districting—U.S. Constitution, 14th Amendment, Section 1, the “equal protection clause”;
3. geographic compactness of districts—(17 states require this in congressional districting);
4. contiguity of districts—(22 states require this in congressional districting);
5. preservation of the boundaries of political subdivisions (minimize the splitting of county and towns boundaries between congressional districts)—(18 states require this in congressional districting);
6. maintenance of “communities of interest”—(13 states require this in congressional districting);
7. protection of political incumbents—(7 states allow for this in congressional districting, but 5 states prohibit this.);
8. maintenance of current political representation by preserving the “core” of congressional districts—(7 states require and 3 states allow for this in congressional districting); and
9. the promotion of electoral competition or prohibition of partisan considerations within congressional districts—(7 states require this in congressional districting).^{8,9}

Historical Congressional Statutory Intervention

While the U.S. Constitution clearly authorizes the apportionment of the seats of the House of Representatives based on population counts, there is little or no guidance as to how this apportionment actually is to be accomplished, much less anything about the redistricting process. Presently, congressional redistricting is governed primarily by judicial interpretation of fundamental constitutional rights, rather than by federal statutory law (with the exceptions of Voting Rights Act standards and the law requiring that Members of Congress be elected from districts) and by state constitutional and statutory laws. This was not always true. Congressionally

⁷ The fact that the rules are listed in this manner is not meant to imply that some rules are more important in the redistricting process than others. For the purposes of congressional redistricting, however, rules 1 and 2 do carry significantly more weight than the others. The list is meant to display the possible constraints that all redistricting bodies may face in the 2011-2012 redistricting period.

⁸ Justin Levitt, *Redistricting Basics and Terminology*, National Conference of State Legislatures (NCSL), Presentation at NCSL National Redistricting Seminar, Washington, DC, January 22, 2011, p. 39, at <http://www.ncsl.org/legislatures-elections/redistricting/redistricting-basics-and-terminology-.aspx>.

⁹ NCSL, *Redistricting Law 2010*, pp. 125-127. The number of states is for the 2000-2002 plans, not the 2010-12 plans.

imposed standards providing that districts be compact, contiguous, and essentially equal in population existed throughout most of the 19th and early 20th centuries, until 1929.

Congress first passed federal districting standards in 1842, when it added a requirement to the Apportionment Act¹⁰ of that year that Representatives “should be elected by districts composed of contiguous territory ... no one district electing more than one Representative” (5 Stat. 491). The Apportionment Act of 1872 added another requirement to those first set out in 1842, saying that districts should contain “as nearly as practicable an equal number of inhabitants” (17 Stat. 492). A further requirement of “compact territory” was added when the Apportionment Act of 1901 was adopted, stating that districts must be made up of “contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants” (26 Stat. 736).

Although these standards were never enforced if the states failed to meet them, this language was repeated in the 1911 Apportionment Act and remained in effect until the adoption in 1929 of the Permanent Apportionment Act, which did not include any districting standards (46 Stat. 21).¹¹ After 1929, there were no congressionally imposed standards governing congressional districting until 1967, when the requirement that Members be elected from geographically based districts, rather than elected from at-large statewide positions, was re-imposed (81 Stat. 581, codified at 2 U.S.C. 2c).

Malapportionment and Gerrymandering

Malapportionment is the term used to describe the lack of equal representation by population within a state. Malapportioned congressional districts have existed in the United States since the First Congress, with the degree of malapportionment varying over time.¹² The series of court cases beginning in 1962 with *Baker v. Carr* (369 U.S. 186) relating to political equality were attempts at minimizing malapportionment in congressional and state legislative redistricting (see below).¹³

¹⁰ Prior to the passage of the Permanent Apportionment Act of 1929 (46 Stat. 21), the apportionment of the House of Representatives was established by specific statute, following each census for the decade. For a brief history of each apportionment act, see Laurence Frederick Schmeckebier, *Congressional Apportionment* (Washington: The Brookings Institution, 1941), pp. 107-126. Also see, Micah Altman, “Traditional Districting Principles: Judicial Myths vs. Reality,” *Social Science History*, vol. 22, no. 2 (Summer 1998), esp. pp. 166-173.

¹¹ As late as 1932, many people assumed the 1911 standards were still in effect. On October 18, 1932, the Supreme Court ruled in *Wood v. Broom* (287 U.S. 1) that because the Congress had not reenacted the 1911 standards in the Permanent Apportionment act of 1929, they were no longer in effect, even though they had not been expressly repealed.

¹² Micah Altman, “Traditional Districting Principles...,” pp. 173-179. Altman goes on to show that “by most measures, malapportionment in state congressional delegations was much greater at the time of the 88th Congress” (just prior to the *Wesberry* and *Reynolds* decisions by the Supreme Court) “than at the time of the 43rd Congress” at the time of the passage of the 14th Amendment, see pp.177-178.

¹³ *Baker v. Carr*, 369 U.S. 186 (1962), ended the Supreme Court’s reluctance to deal with state apportionment and redistricting issues, deciding that malapportioned state legislative (lower house) districts violated the Equal Protection Clause of the 14th Amendment of the U.S. Constitution. The decision resulted in a new test for the determination of this malapportionment, the “one-person, one-vote” standard for redistricting. *Wesberry v. Sanders*, 36 U.S. 1 (1964), applied the “one-person, one-vote” standard to congressional redistricting and deviations from this standard, such as Georgia’s 30% variation between the population size in two congressional districts, was deemed to violate the standard. The decision, however, was not deemed to be a violation of the Equal Protection Clause, but was a direct violation of Article I, Section 2, clause 1 of the U. S. Constitution. The court concluded that congressional district population size within a state needed to be as nearly equal as was practicable. *Reynolds v. Sims*, 37 U.S. 523 (1964), another state (continued...)

As noted above, the purpose of the apportionment and redistricting processes is to create “fair” representation. The “rules” for redistricting (see below for a discussion) are, in part, meant to assist (or constrain) in this process and to minimize “the deliberate manipulation of district boundaries to enhance the electoral prospects of a particular political interest.”¹⁴ In general, “enhancing the electoral prospects of a particular political interest” is often referred to as gerrymandering, combining the name of Massachusetts Governor Elbridge Gerry with the term “salamander,” describing the shape of the boundaries of a state legislative district drawn to favor Gerry’s political party in the 1800-1812 redistricting cycle.¹⁵

While some consider any construction of district boundaries to be, by its very nature, gerrymandering,¹⁶ the term usually implies an attempt to manipulate district boundaries to favor one’s own group interests.¹⁷ This is usually accomplished using two techniques: “packing” and “cracking.”¹⁸ “Packing” occurs when potential voters with similar expected voting behavior (e.g., Democrats, Republicans, African Americans, Hispanic Americans, etc.) are deliberately concentrated into fewer congressional districts.¹⁹ “Packing” of more than a majority of any such group into a congressional district creates “wasted votes,” as it only takes 50% plus one vote to elect a preferred candidate in the American system of single-Member, winner-take-all congressional elections. By concentrating more like-minded voters into fewer districts with super-majorities, rather than distributing smaller majorities across multiple districts, the group of like-minded voters will be able to elect fewer of their preferred candidates.

“Cracking” is the opposite of “packing” and occurs when like-minded voters are deliberately distributed among several districts such that there is no chance of a majority of these individuals in any one district. This *dilutes* the group’s voting strength, and means that the group of like-minded voters is less likely to elect a candidate of its own choice. “Cracking” disperses like-minded voters, while “packing” concentrates them.²⁰

(...continued)

legislative district case, ruled that all (both upper and lower) state legislative districts had to be roughly equal in size under the Equal Protection Clause. See below at page 7, and also see, CRS Report 96-732 A, *Congressional and State Reapportionment and Redistricting: A Legal Analysis*, Thomas M. Durbin and (name redacted), pp. 6-10, 27-28. Report is available from author upon request.

¹⁴ Benjamin Brickner, “Reading Between the Lines: Congressional and State Legislative Redistricting Their Reform in Iowa, Arizona, and California and Ideas for Change in New Jersey,” (A Policy Analysis Exercise and Major Writing Credit Submitted in Partial Fulfillment of the Requirements for the Concurrent Degree of Master in Public Policy and Juris Doctor, Eagleton Institute of Politics at Rutgers University, 2010), p. 17.

¹⁵ The term was coined by the Boston Globe in 1812 from “Gerry’s salamander.”

¹⁶ Robert G. Dixon, Jr., *Democratic Representation—Reapportionment in Law and Politics* (New York: Oxford University Press, 1968), pp. 459-460.

¹⁷ Brickner, p. 17.

¹⁸ *Ibid.*, pp. 17-19.

¹⁹ With respect to minorities, the creation of majority-minority districts is not meant to be a gerrymander, although some have used the term “racial gerrymander” to describe the creation of such a district. Majority-minority districts were meant to be a solution for minority vote dilution, usually attributed to “cracking.”

²⁰ These and other techniques are predicated on the ability of the “gerrymanderer” to predict how any group of individuals will, in fact, behave electorally. This is not an easy task, and many gerrymanders appear to fail. Some researchers have coined the term “dummymander” for such a failure. See, Bernard Grofman and Thomas L. Brunell, “The Art of the Dummymander: The Impact of Recent Redistricting on the Partisan Makeup of Southern House Seats,” in *Redistricting in the New Millennium*, ed. Peter F. Galderisi (Lanham, MD: Lexington Books, 2005), pp. 183-199.

Traditionally, gerrymandering has been used to describe what is now termed “partisan gerrymandering.” Partisan gerrymandering, as the name implies, is the process of manipulating the drawing of district boundaries to enhance the electoral chances of one political party above and beyond what would be expected based on statewide (or nationwide) partisan distribution of support. This is sometimes referred to as “partisan bias.”

“Racial gerrymandering” has two meanings. The first refers to the attempts by white legislatures to structure congressional districts so that minority voting strength was diluted, often using “cracking” (generally pre-Voting Rights Act as amended in 1982). The second meaning refers to the creation of oddly shaped congressional districts for the *sole* purpose of creating distinctly racial districts within a state (post-*Shaw v. Reno*, 509 U.S. 630 (1993)).

A third type of gerrymandering has been labeled “bipartisan” or “incumbent gerrymandering.” Simply put, this is a redistricting plan that favors incumbents, often without regard for their partisan affiliation, and aims to maintain the status quo with respect to the partisan distribution of seats within a state and to protect incumbents.

It should be noted that, with the exception of both types of racial gerrymandering, both partisan and bipartisan forms of gerrymandering are currently legal, and, in some cases, allowed specifically by law.²¹ Brickner summarizes the positives and negatives about gerrymandering:

While often criticized, gerrymandering can serve beneficial purposes. It can enhance minority representation by optimizing the proportion of minority voters in particular election districts. It can promote political stability by limiting the number of highly competitive districts in which turnovers are likely. And it can protect incumbents by avoiding district boundaries that group multiple incumbents together. Taken to its extreme, however, gerrymandering can serve less desirable purposes. It may be used to lock in undue partisan advantage for a decade (often the purpose of partisan gerrymandering). Or it may be used to eliminate all serious electoral competition (often the purpose of incumbent gerrymandering). Or it may be used to weaken the electoral strength of particular interest groups (often for the purposes of racial gerrymandering).²²

While most expert commentators on redistricting consider gerrymandering to be, by its very nature, “unfair” and a distortion of representation, a few would not reject all forms of partisan or incumbent gerrymandering as completely unredeemable. Gelman and King, for example, have shown that gerrymandering can have some positive (or, at least, some non-negative) effects.²³ For example, they show that the act of redistricting, in and of itself, increases electoral responsiveness over and beyond what it had been prior to redistricting.²⁴ And, while gerrymandering biases the election system in favor of the party in control of districting over that of the party not controlling the process, any type of redistricting reduces partisan bias as compared to an electoral system

²¹ *Davis v. Bandemer*, 106 S. Ct. 2797 (1986). Technically speaking, the court held that partisan gerrymandering was “justiciable,” essentially meaning that certain kinds of “partisan gerrymanders” could be held unconstitutional and illegal. However, the court has yet to determine an appropriate test to apply in determining whether or not a districting plan is an unfair partisan gerrymander. See CRS Report RS22479, *Congressional Redistricting: A Legal Analysis of the Supreme Court Ruling in League of United Latin American Citizens (LULAC) v. Perry*, by (name redacted).

²² Brickner, p. 20.

²³ Andrew Gelman and Gary King, “Enhancing Democracy Through Legislative Redistricting,” *American Political Science Review*, vol. 88, no. 3 (September 1994), pp. 541-559. It should be noted that their analysis does not necessarily apply to the post-2000 period and beyond, as their data reflect earlier periods.

²⁴ *Ibid*, p. 548.

without redistricting.²⁵ Redistricting (whether partisan or bi-partisan) tends, on average, to increase electoral responsiveness by “shaking up the political system in combination with the many constraints on the mapmakers” (see below) and by “creating high levels of uncertainty” for all participants, according to Gelman and King.²⁶ According to their analysis, “no matter how fair or biased the electoral system is to begin with, the typical redistricting plan, whether Democratic, Republican, or bi-partisan controlled, will produce a fairer electoral system initially.”²⁷

Re-establishment of the Rules and Constraints by the Federal Courts

Political Equality—“One Person, One Vote”

By tradition, courts initially stayed out of the “political thicket” of redistricting, arguing that such matters were “political questions,” best left to the legislatures.²⁸ Beginning in 1962, with the landmark *Baker v. Carr* decision (369 U.S. 186), the Supreme Court set a new course, which has led to more than 40 years of cases to establish a standard that congressional districts should be equal in population.

Five censuses have been taken since the Supreme Court declared “the command of Art. I, § 2, that Representatives be chosen ‘by the People of the several states’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”²⁹

States generally endeavor to redistrict once a decade, so one would expect that new districts would be enacted to take effect in the second Congress following a census in each decade.³⁰ This was not true in decades immediately following the *Baker v. Carr* decision and the subsequently related decisions (*Wesberry v. Sanders*), as the courts began developing new population standards for congressional districts. Court actions caused one or more states to alter their district boundaries in 12 of the 20 Congresses that have convened since 1964.

The theme of the Supreme Court’s decisions pertaining to congressional district population requirements has been to impose ever more strict equal population requirements.

For the purposes of congressional redistricting, the population equality rule appears to be paramount. States may take the chance of varying from the near absolute equality of district sizes,

²⁵ Ibid, pp. 550-551.

²⁶ Ibid., p. 543; also see, Janet Campagna and Bernard Grofman, “Party Control and Partisan Bias in 1980s Congressional Redistricting,” *Journal of Politics*, vol. 52, no. 4 (1990), pp. 1242-1257, and Gary King, “Representation through Legislative Redistricting: A Stochastic Model,” *American Journal of Political Science*, vol. 33, no. 4 (1989), pp. 787-824.

²⁷ Gelman and King, “Enhancing Democracy...,” p. 551.

²⁸ For an overview of this whole issue, see CRS Report 96-732 A, Durbin and Whitaker, *Congressional and State Redistricting*, p. 6-9. The report is available from author on request. Also see, NCSL, *Redistricting Law 2010*, pp. 28-37.

²⁹ *Wesberry v. Sanders* 376, U.S. 7, 8 (1964).

³⁰ The census is taken once each decade in years ending in zero. The data used for redistricting do not become available until the following April after a new Congress has convened. States have approximately a year and one half to redistrict in time for congressional elections in 2012.

but unless they do so for important and well-founded reasons, it is likely that, if challenged in the courts, the states will be forced to redraw the districts. Currently, population equality of congressional districts within a state, as a standard of redistricting, appears, for the most part, to trump all of the other standards.³¹

Protecting Racial and Language Minorities³² from Vote Dilution—The Voting Rights Act of 1965

The Voting Rights Act of 1965 was enacted to ensure racial minorities the right to vote in elections. In 1982, Congress amended Section 2 of the Voting Rights Act to prohibit election laws that had the effect of reducing minority voting power (vote dilution).³³ More broadly, Sections 2 and 5 of the act affect congressional redistricting, but how they are interpreted can have a significant impact on redistricting as illustrated by the post-1990 Census experience of the states.³⁴

In its 1986 *Thornburg v. Gingles* decision, the Supreme Court recognized that the Voting Rights Act as amended required that race be taken into account during the redistricting process in order to prevent the dilution of minority votes. Further, the Court specified that, in order for a minority to prove that its ability to elect one of its own had been diminished by redistricting (under Section 2) it had to be large enough to comprise a majority of a district, and live relatively close together; politically cohesive; and able to prove that bloc voting by the erstwhile majority usually defeated the minority's candidate.³⁵

Further, the Voting Rights Act (in Section 5, as interpreted by the U.S. Department of Justice and the courts) established the rule of “no retrogression,” which, in part, required that after redistricting, a minority group could not be worse off with respect to its voting power than it was before (although, as the Court subsequently ruled, this did not require the minority group to be better off).³⁶

³¹ For a classic discussion of the issues, see Robert G. Dixon, Jr., *Democratic Representation*. Also see, Charles S. Bullock, III, *Redistricting, The Most Political Activity in America* (New York: Rowman and Littlefield Publishers, 2010), pp. 25-48 and NCSL, *Redistricting Law 2010*, pp. 28-37. As noted above, historically, Altman finds that the level of political equality/population malapportionment (as measured by the population coefficient of variation) between congressional districts within the same state varied over time between 1789-1963. It [malapportionment] improved (less malapportionment, more equality) after the second apportionment, decreasing and converging around the time of the Civil War, reaching its lowest point at the time of the 43rd Congress (March, 1873-March, 1875) with the first redistricting after the passage of the 14th Amendment. After the war, malapportionment remained stable and then gradually got worse between 1903-1943. According to Altman's findings, population malapportionment in state congressional districts, by most measures, was worse in the 88th Congress at the time of the *Reynolds* and *Wesberry* Supreme Court decisions than in the 43rd Congress at the time of the passage of the 14th Amendment. See, Altman, “Traditional Districting Principles ...,” pp. 173-179.

³² Currently, for purposes of the Voting Rights Act as amended, racial minorities include African Americans. Language minorities include Asian Americans and Pacific Islanders, American and Alaskan Natives, and Spanish-heritage citizens.

³³ 42 U.S.C. §1973c.

³⁴ For an analysis of the Voting Rights Act, see CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by (name redacted), pp. 62-114.

³⁵ *Thornburg*, 478 U.S., at 50-51.

³⁶ CRS Report RS21593, *Redistricting and the Voting Rights Act: A Legal Analysis of Georgia v. Ashcroft*, by (name redacted), p. 1, and *Beer v. United States*, 425 U.S. 130 (1976).

In the post-1990 congressional redistricting cycle, the states (for the most part) and the Department of Justice attempted to implement the goals of the Voting Rights Act and interpreted this to mean that what have been characterized as “majority-minority” districts³⁷ would be created whenever possible. This effort resulted in some of the most peculiarly shaped districts in history, as line-drawers searched for ways to connect minority group members together while also complying with the population equality rule (as well as, in many cases, promoting and protecting partisan interests).

14th Amendment, the Equal Protection Clause

Some of these post-1990 census districts were shaped in such an unusual looking manner that some described the process to create such peculiar looking districts as “racial gerrymandering.”³⁸ It also brought about a reaction from the Supreme Court. On June 28, 1993, the Supreme Court (in a 5-4 split opinion) ruled that oddly shaped districts that concentrate a minority population may be a signal that congressional districts have been improperly drawn. Justice O’Connor delivered the Court’s opinion in *Shaw v. Reno*, saying, in part,

... we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.³⁹

Thus, while the Voting Rights Act as amended requires states to take race into account during the redistricting process to assure that racial and language minorities experience no vote dilution nor retrogression in representation, districts, according to the view of the majority of the Court, cannot be drawn taking race solely into account, as this would violate the equal protection clause of the 14th Amendment. Further, according to the Court, there is no requirement in the Voting Rights Act to maximize the number of majority-minority districts.⁴⁰

Thus, protecting racial and language minorities has become another criterion for redistricting within limits, and appears to be second only to the population equality standard in importance.⁴¹

Traditional Districting Principles

The phrase “traditional districting principles” was first coined by Justice Sandra Day O’Connor in *Shaw v. Reno*.⁴² Others have taken the phrase and expanded or contracted the list of “principles”

³⁷ NCSL, *Redistricting Law 2010*, pp. 80-84.

³⁸ NCSL, *Redistricting Law 2010*, pp. 64-65, 75-76, 84-92.

³⁹ *Shaw v. Reno*, p. 15, 16.

⁴⁰ NCSL, *Redistricting Law 2010*, pp. 74-75.

⁴¹ Bernard Grofman, “Would Vince Lombardi Have Been Right If He Had Said ‘When It Comes to Redistricting, Race Isn’t Everything, It’s the Only Thing’?,” *Cardoza Law Review*, vol. 14, no. 5 (April, 1993), p. 1264.

⁴² 509 U.S. 630 (1993). The principles identified there were compactness, contiguity and respect for political subdivisions.

to fit their needs. Apparent violation of these “traditional districting principles” was, according to the Court’s view, a potential indicator that all was not right with the districting process, and that the district plan needed to be scrutinized to determine whether or not “racial gerrymandering” had occurred.

The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going 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. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.⁴³

In general, the phrase refers to the set of “rules” used by states, historically, to draw district boundaries, whether congressional, state legislative, or local. The set of rules may be explicit in law, implicit in past behavior, or a mixture.⁴⁴ It is not so much that the opinions of the Supreme Court have been meant to promote “traditional districting principles.” It is the lack of evidence of the use of “traditional districting principles” in the districting process and evidence that racial considerations alone are the basis for the mapping of district boundaries that raises concerns about the districting process violating the equal protection clause.⁴⁵

The concept of “traditional districting principles” generally implies that a “fair” district would be “compact” in size, making it easy for voters to know which district they lived in and who represented them. A “fair” district would be drawn so it was “contiguous,” where one could go from one end of the district to another without leaving the district. A “fair” district would show “respect for community,” by attempting to limit the splintering of communities, providing a single representative for each community. Similarly, a “fairly” drawn district would attempt to “respect existing political boundaries,” and not split cities, towns, or counties unnecessarily.

Traditional districting principles might be construed as having a geographic component (compactness, contiguity) and a political component (preservation of political subdivisions and “communities of interest,” preservation of the cores of prior districts, and, consequently, the protection of incumbents).⁴⁶

Geographical Principles—Contiguity and Compactness—Does Shape Really Matter?

A congressional district (or state legislative district or school district, etc.) can be considered *contiguous* if none of the geography included within the district is entirely separated from the remainder of the district by intervening territory assigned to another district. Exceptions are often made for islands, separated by water. As noted above, contiguity was one of the first standards (along with single-member districts) established by congressional statute for congressional districts in the 1842 Act of Apportionment (5 Stat. 491), but not included as a requirement in the

⁴³ *Miller v. Johnson*, 515 U.S. 900 (1995).

⁴⁴ For a thorough discussion of the concepts, historical significance, and critique, see Altman, “Traditional Districting Principles ...,” pp. 159-200.

⁴⁵ *Bush v. Vera* 517 U.S. 952 (1996).

⁴⁶ NCSL, *Redistricting Law 2010*, pp. 105-106.

Permanent Apportionment Act of 1929 (46 Stat. 21). Further, according to the NCSL, contiguity, as a requirement for the drawing of congressional district boundaries, was included in the constitutions or laws of 22 states for the 2000-2002 redistricting cycle.⁴⁷

Historically, up until the political equality requirement was re-imposed and enforced by the Court, most congressional districts outside urban areas have been contiguous mostly because the district boundaries followed county boundaries.⁴⁸

As Brunell notes, the principle of contiguity is relatively non-controversial, and is, in part, implied by the single-member district standard.⁴⁹ Jeremy Buchman has summarized what he thought of as some of the possible benefits of contiguity in the redistricting process: it promotes geographic “cognizability”⁵⁰ by incumbents, challengers, and voters; supports the appearance of fairness; hinders the gerrymanderer; and provides an easily applied rule for the courts.⁵¹

Blatant violations of contiguity are readily apparent, but the violation of the spirit of the principle by the use of “point contiguity”⁵² is often a sign of some type of gerrymandering. Redistricting scholar Bernard Grofman filed an affidavit in the North Carolina 12th Congressional District case⁵³ in which he asserted that the proposed redistricting should be rejected on the grounds that it was non-contiguous.⁵⁴

It has, however, been noted by several redistricting scholars that the contiguity requirement alone is not likely to discourage a determined “gerrymanderer.”⁵⁵ Further, as Engstrom points out, more recent court decisions have made the meaning of contiguous more confusing.⁵⁶

The meaning of *contiguous* is overwhelmingly clear in comparison with attempts to define or describe *compactness*. Like Justice Potter Stewart’s definition of pornography, compactness, as

⁴⁷ NCSL, *Redistricting Law 2010*, pp. 106-107.

⁴⁸ Altman, “Traditional Districting Principles,” pp. 167-70. The political equality requirement led to many more split counties.

⁴⁹ Thomas L. Brunell, *Redistricting and Representation, Why Competitive Elections are Bad for America* (New York: Routledge, 2008), pp. 58-59.

⁵⁰ Grofman, “Would Vince Lombardi Have Been Right,” pp. 1261-1263. Grofman coins the phrase and defines it as “the ability to characterize the district boundaries in a manner that can be readily communicated to ordinary citizens of the district in commonsense terms based on geographical referents.”

⁵¹ Jeremy Buchman, *Drawing Lines in Quicksand—Courts, Legislatures & Redistricting* (New York: Peter Lang Publishing, 2003), pp. 202-203. Also see, Thomas W. Gilligan and John G. Matsusaka, “Public Choice Principles of Redistricting,” *Public Choice*, vol. 129, no. 3/4 (December 2006), pp. 382,389.

⁵² “Point contiguity,” with respect to congressional map drawing is where the geographic territory of a district is split in two or more parts, but the boundaries touch at a single point.

⁵³ *Pope v. Blue*, No. 3-92 Cv71-P (W.D.N.C. Apr. 15, 1992), aff’d, 113 S. Ct. 30 (1992). Grofman Aft’, *Pope* (No. 3-92 Cv71-P). This case subsequently was heard by the Supreme Court as *Shaw v. Reno*, 509 U.S. 630 (1993).

⁵⁴ As he states in his affidavit, “either Congressional District 12 splits Congressional District 6 into two discontinuous pieces or Congressional District 6 splits Congressional District 12 into two discontinuous pieces (or both).” *Id.*, p. 2. Also, see Timothy G. O’Rourke, “Shaw v. Reno and the Hunt for Double Cross-Overs,” *PS: Political Science and Politics*, vol. 28, no. 1 (March 1995), p. 37.

⁵⁵ Altman, “Traditional Districting Principles...,” p. 164; Daniel D. Polsby and Robert D. Popper, “The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering,” *Yale Law & Policy Review*, vol. 9, no. 2 (1991), pp. 330-331.

⁵⁶ Richard L. Engstrom, “The Post-2000 round of Redistricting: An Entangled Thicket within the Federal System,” *Publius*, vol. 32, no. 4 (Autumn 2002), pp. 67-68.

criteria for constructing congressional or state legislative districts, may only be knowable when it is seen.⁵⁷ From a geographic perspective, compactness is usually “defined” by reference to shapes (e.g., most compact shape is a circle, followed by a square or rectangle),⁵⁸ or references to geographic measures such as geographic dispersion, perimeter measures, and population measures.⁵⁹ Webster’s *New World College Dictionary* (4th ed.) defines “compact” as “closely and firmly packed or put together; dense; solid; taking little space; arranged neatly in a small space.”

According to Buchman, compact districts allegedly offer three benefits: they (1) promote better communications between representatives and constituents; (2) enhance “voter knowledge of one’s representatives and ‘political neighbors,’ thus facilitating community organization”; and (3) “insofar as it promotes the perception that the resulting congressional districting patterns are fair,” add legitimacy to the redistricting process.⁶⁰ In addition, compactness has also been defended as a preventive measure against gerrymandering.⁶¹ Compactness as a criterion for districting can also be defended because judges can easily apply the standard.⁶²

There appear to be three schools of thought about the role that compactness has to play in the drawing of congressional district boundaries. First, there are those who hold that the concept, despite the U.S. Supreme Court’s rulings, is relatively meaningless because there is no accepted operational definition or measure that does not have its shortcomings.⁶³ Second, there are those who think that next to political equality, the compactness of districts is the most effective way of preventing gerrymandering.⁶⁴ And third, there are those who believe that compactness, despite its shortcomings, may still be useful, along with other criteria, as a way of minimizing the opportunities for the gerrymanderer.⁶⁵

And, despite what some experts say, the fact is that because of U.S. Supreme Court decisions with respect to redistricting and district shapes, as well as state constitutional and legal

⁵⁷ “I know it when I see it,” attributed to Justice Potter Stewart, concurring opinion in *Jacobellis v. Ohio* 378 U.S. 184 (1964), regarding possible obscenity in *The Lovers*.

⁵⁸ Richard L. Morrill, *Political Redistricting and Geographic Theory* (Washington: Resource Publications in Geography, 1981), pp. 21-22; Bruce E. Cain, *The Reapportionment Puzzle* (Berkeley, CA: University of California Press, 1984), pp. 32-33; Bullock, *Redistricting*, pp. 90-91.

⁵⁹ H. Peyton Young, “Measuring the Compactness of Legislative Districts,” *Legislative Studies Quarterly*, vol. 13, no. 1 (February 1988), pp. 105-115; Richard G. Niemi, Bernard Grofman, and Carl Carlucci, et al., “Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering,” *The Journal of Politics*, vol. 52, no. 4 (November 1990), pp. 1155-1167; Micah Altman, “Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders,” *Political Geography*, vol. 17, no. 8 (1998), pp. 990-992; CRS Report 94-449 GOV, *Congressional Districts: Objectively Evaluating Shapes*, by (name redacted), pp. 3-23, available from author upon request.

⁶⁰ Bachman, *Drawing Lines*, p. 198.

⁶¹ Robert S. Stern, “Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence,” *University of Chicago Law Review*, vol. 41 (1974), pp. 398-416; Richard L. Morrill, “A Geographer’s Perspective,” in *Political Gerrymandering and the Courts*, ed. Bernard Grofman (New York: Agathon Press, 1990), pp. 212-239; Polsby and Popper, “The Third Criterion...,” pp. 301-353.

⁶² Bachman, *Drawing Lines*, p. 199.

⁶³ Young, “Measuring the Compactness...,” p. 112; Dixon, *Democratic Representation*, pp. 460-461; Brunell, *Redistricting and Representation*, p. 65-66.

⁶⁴ Polsby and Popper, “The Third Criterion...,” pp. 326-334.

⁶⁵ Niemi, et. al, “Measuring Compactness...,” pp. 1167-1179; Altman, “Modeling the Effect...,” pp. 996-1004; CRS Report 94-449GOV, “Congressional Districts...,” pp. 6-23.

requirements, shape still matters when it comes to redistricting. Exactly how it matters, however, appears to remain a mystery to many.

Political Principles—Preservation of Political Subdivisions and “Communities of Interest,” Preservation of the Cores of Prior Districts, and, Consequently, the Protection of Incumbents

As with the geographic principles discussed above, districting according to the political principles of preserving political subdivision boundaries (i.e., not splitting county, city, or township boundaries when constructing congressional boundaries) and “communities of interest” (attempting to minimize splitting neighborhood boundaries, traditional group boundaries, etc.) and preserving the cores of previous congressional districts are thought by some to prevent, or at least minimize the impact of, attempts at gerrymandering.

As noted by Altman, county boundaries, along with contiguity and compactness criteria, as the basis for the construction of congressional district boundaries have historically been state requirements.⁶⁶ It appears that it is the fact that many states had such a requirement that makes Altman note that “most congressional districts were contiguous...; and, with the exception of districts in large urban areas..., most congressional districts during this period [presumably, 1842-1963] were composed of whole counties.”⁶⁷ Courts have recognized that preserving political boundaries is a valid consideration for redistricting.⁶⁸ The splitting of county and city boundaries has primarily occurred as a result of the political equality requirement in the post-*Baker v. Carr* era and as a result of the Voting Rights Act redistricting requirements.⁶⁹ Nineteen states required that the preservation of political subdivision boundaries be a factor in congressional redistricting, and one state allowed it to be a factor in the 2000 redistricting cycle.⁷⁰

Districts should not be drawn completely arbitrarily, but, as the Supreme Court has specified, districts should contain “communities defined by actual shared interests.”⁷¹ For the 2000 redistricting cycle, nine states required and one state allowed the preservation of communities of interest to be used in congressional redistricting.⁷² It has been noted, however, that the concept of “communities of interest” can be difficult to define, and, consequently, making use of such an intangible concept in the actual constructing of boundaries may be difficult and arbitrary.⁷³

Brickner suggests that aside from making it somewhat more difficult to gerrymander a district, preserving “communities of interest” and political subdivision boundaries may make it “easier for

⁶⁶ Altman, “Traditional Districting Principles...,” pp. 167-170, esp. Table 4; also see Brickner, “Reading Between the Lines...,” p. 16.

⁶⁷ *Ibid.*, pp. 167-168.

⁶⁸ *Abrams v. Johnson*, 521 U.S. 74, 84 (1997); *Bush v. Vera*, 517 U.S. 952, 960 (1996); *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

⁶⁹ CRS Report, 93-1060 GOV, *Congressional Redistricting: Federal Law Controls a State Process* by (name redacted), pp. 13-16. This report is available from the author upon request.

⁷⁰ NCSL, *Redistricting Law 2010*, pp. 125-127, Table 8.

⁷¹ *Miller v. Johnson*, 515 U.S. 900, 919-20 (1995).

⁷² NCSL, *Redistricting Law 2010*, pp. 125-127, Table 8.

⁷³ Matthew J. Streb, *Rethinking American Electoral Democracy*, 2nd ed. (New York: Routledge, 2011), p. 111; Brunell, *Redistricting and Representation*, p. 66; Brickner, “Reading Between the Lines...,” p. 16.

a member to serve a homogenous district”; “undivided communities of interest may find strength in numbers”; they may make it easier to represent from a logistical standpoint (“fewer local officials to appease, parades to march in, and town halls to attend”); and, they can reduce the “complexity of running elections for a district office” as most election administration in this country is based on a “county-by-county or town-by-town basis.”⁷⁴ The strict promotion of the preservation of political subdivision boundaries and “communities of interest” may, however, run counter to the requirement for districts that are equal in population. Some type of trade-off is usually necessary, and currently, boundaries and “communities of interest” generally place second to political equality.

The courts have recognized the need to preserve the core of prior districts as legitimate redistricting criteria,⁷⁵ as well as the avoidance of contests between incumbents.⁷⁶ In both cases, it appears that using these criteria enhances the continuity of representation. In the 2000 redistricting cycle, seven states required preserving the core of prior districts and three states allowed for such preservation. However, no state required the protection of incumbents; seven states allowed it, but five states prohibited such protection altogether.⁷⁷ There is criticism, however, of the whole notion of protecting incumbents. Michael McDonald has pointed out that there is some evidence that such protection is widespread.⁷⁸ More so than partisan gerrymandering, incumbency protection has, for some, promoted calls for drawing congressional districts in a manner that enhances political competition and encourages elected officials to be more responsive to their constituents.

Promoting Political Competition

Political philosopher Dennis Thompson has written that “a competitive struggle for the people’s vote is for many political scientists and political theorists the very definition of democracy.”⁷⁹ Many feel that electoral competition promotes voter turnout,⁸⁰ is important in translating the desires of the voters into public policy,⁸¹ and promotes accountability and responsiveness of representatives.⁸² It has also been shown that competitive districts can produce more moderate

⁷⁴ Brickner, “Reading Between the Lines...,” p. 16.

⁷⁵ *Abrams v. Johnson*, 521 U.S. 74, 84 (1997).

⁷⁶ *Bush v. Vera*, 517 U.S. 952 (1996).

⁷⁷ NCSL, *Redistricting Law 2010*, pp. 125-127, Table 8.

⁷⁸ According to McDonald, after the 2000 census, 20 states produced what might be referred to as incumbency gerrymandered plans, affecting 231 congressional districts, see, Michael P. McDonald, “Drawing the Line: Redistricting and Competition in Congressional Elections,” *Extensions*, Fall 2004, p. 15.

⁷⁹ Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (Chicago: University of Chicago Press, 2002), p. 6. This same statement is not likely true for candidates or for the parties.

⁸⁰ Gary W. Cox and Michael C. Munger, “Closeness, Expenditures, and Turnout in the 1982 U.S. House Elections,” *American Political Science Review*, vol. 83, no. 1 (March 1989), pp. 217-231; Gary W. Cox, “Closeness and Turnout: A Methodological Note,” *Journal of Politics*, vol. 50, no. 3 (August 1988), pp. 768-775; Gregory A. Caldeira, Samuel C. Patterson, and Gregory A. Markko, “The Mobilization of Voters in Congressional Elections,” *Journal of Politics*, vol. 47, no. 2 (June 1985), pp. 490-509.

⁸¹ Streb, *Rethinking*, pp. 111-112.

⁸² “Introduction,” in *Party Lines: Competition, Partisanship and Congressional Redistricting*, ed. Thomas E. Mann and Bruce E. Cain (Washington, DC: Brookings Institution Press, 2005), p. 1. Also, see John D. Griffin, “Electoral Competition and Democratic Responsiveness: A Defense of the Marginality Hypothesis,” *Journal of Politics*, vol. 68, no. 4 (November 2006), pp. 911-921. The belief that competitive elections promote accountability does not appear to be the view of the public, see, The Pew Research Center for the People and the Press, “Lack of Competition in (continued...)”

candidates, which, some might argue, contributes to reducing the ideological polarization in Congress.⁸³

It has been noted by many that electoral competition in congressional races appears to be in steady decline.⁸⁴ Many blame gerrymandering, both partisan and incumbency, for this decline.⁸⁵

Others believe, however, that redistricting has had little or nothing to do with causing a decline in the competitiveness of congressional elections. For them, the evidence points to causes such as incumbency, and all that that implies (financial advantages, name recognition, etc.), as well as the fact that Americans are living in more homogenous communities than in the past.⁸⁶ Also, it should be noted that political competition has been declining in Senate elections as well, but redistricting cannot be having an effect in that case.

Regardless, there is no doubt that partisan competition in congressional elections has declined and reformers believe that using the redistricting process to help create competitive congressional districts may prove successful.⁸⁷ At this time, however, only a few states even mention promoting political competition in their redistricting process, although a few other states have provisions that would prevent districts from being drawn that favor one party or another in the redistricting process.⁸⁸

On the other hand, some students of the redistricting process argue that the promotion of partisan competition through the redistricting process has little chance of succeeding given (1) the power

(...continued)

Elections Fails to Stir the Public,” news release, Washington, DC, October 27, 2006, p. 5, <http://www.people-press.org>.

⁸³ Stephen Ansolabehere, James M. Snyder, Jr., and Charles Stewart III, “Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage,” *American Journal of Political Science*, vol. 44, no. 1 (January 2000), pp. 17-34. For a philosophical discussion of the role of political competition, see Michael P. McDonald and John Samples, “The Marketplace of Democracy: Normative and Empirical Issues,” in *The Marketplace of Democracy: Electoral Competition and American Politics*, ed. Michael P. McDonald and John Samples (Washington: Cato Institute and Brookings Institution Press, 2006), pp. 1-24.

⁸⁴ Gary C. Jacobson, “Competition in U.S. Congressional Elections,” in *The Marketplace of Democracy: Electoral Competition and American Politics*, ed. Michael P. McDonald and John Sides (Washington: Cato Institute and Brookings Institution Press, 2006). Also see, Alan Abramowitz, Brad Alexander, and Matthew Gunning, “Don’t Blame Redistricting for Uncompetitive Elections,” *PS*, vol. 34 (2006), pp. 87-90.

⁸⁵ David S. Broder, “No Vote Necessary: Redistricting Is Creating a U.S. House of Lords,” *Washington Post*, November 11, 2004, p. A37; Ronald Brownstein, “Close Races Go the Way of Rotary Phones, Newt Gingrich,” *Los Angeles Times*, April 15, 2002, p. A13; For some empirical evidence, see McDonald, “Drawing the Line on District Competition,” pp. 91-94; McDonald, “Drawing the Line: Redistricting and Competition...,” pp. 14-18; John W. Swain, Stephen A. Borelli, and Brian C. Reed, “Partisan Consequences of the Post-1990 Redistricting for the U.S. House of Representatives,” *Political Research Quarterly*, vol. 51, no. 4 (December, 1998), pp. 945-967.

⁸⁶ Abramowitz, Alexander, and Gunning, “Don’t Blame Redistricting...,” pp. 87-90; Bruce I. Oppenheimer, “Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competition,” in *Congress Reconsidered*, ed. Lawrence C. Dodd and Bruce I. Oppenheimer, 8th ed. (Washington: CQ Press, 2005), pp. 135-157; Amihai Glazer, Bernard Grofman, and Marc Robbins, “Partisan and Incumbency Effect of 1970 Redistricting,” *American Journal of Political Science*, vol. 31, no. 3 (August 1987), pp. 680-707; Robert S. Erikson, “Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections,” *American Political Science Review*, vol. 66, no. 4 (December 1972), pp. 1234-1245.

⁸⁷ Bernard Grofman and Gary King, “The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry,” *Election Law Journal*, vol. 6, no. 1 (2007), pp. 2-35.

⁸⁸ Michael P. McDonald, “Regulating Redistricting,” *PS: Political Science & Politics*, October 2007, p. 677; Michael P. McDonald, “Redistricting and Competitive Districts,” in *The Marketplace of Democracy: Competition in American Elections*, ed. Michael P. McDonald and John Samples (Washington, DC: Brookings Institution Press, 2006).

of incumbency and (2) the accepted and required rules of districting.⁸⁹ Others have gone so far as to question whether the promotion of politically competitive districts is a goal worth pursuing.⁹⁰ Brunell points out, for example, that the more competitive a district, the larger the group that is not represented by any winning candidate. A Member who is elected by a vote of 52% to 48% (a relatively competitive district) represents only 52% of the voters, while a Member who is elected by a vote of 75% to 25% represents 75% of the voters. Brunell has argued that packing congressional districts with partisan supporters in proportion to statewide political strength would eliminate the problems of gerrymandering, make most voters happy with the results and make them more supportive of the political system, and produce a better representative outcome.⁹¹

Who Draws the Lines?

As noted above, the responsibility for redistricting congressional districts is in the hands of the states, and, in most states, this authority lies with the state legislatures. However, in a few instances, usually due to the efforts of reform groups, the role of drawing the congressional, state legislative, and other local boundaries has been, seemingly, taken out of the hands of the politicians in the state legislature and given over to an “independent” commission.

State Legislators

As noted above, the authority for drawing the new boundaries for congressional districts resides with the states. For the bulk of the states (43),⁹² this authority primarily lies with the state legislature (with and without gubernatorial approval), which was the traditional authority for drawing congressional and state legislative district boundaries. And each state’s legislature will perform this function in its own way.⁹³

For the 2010-2012 redistricting cycle, there appears to be a good deal of transparency in the process, judged by an examination of the websites of the state legislatures or the state’s special redistricting websites.⁹⁴ This apparent transparency may be due to the increased usage by states of the Internet, public and press demand for such transparency, or changes in state laws over the decade.

⁸⁹ Abramowitz, Alexander, and Gunning, “Don’t Blame Redistricting...,” pp. 87-90; McDonald, “Redistricting and Competitive Districts,” p. 239.

⁹⁰ Brunell, *Redistricting and Representation*, pp. 8-14.

⁹¹ *Ibid.*, pp. 75-89.

⁹² It should be noted that Iowa, which has its own unique method of redistricting, is included in this number due to the fact that while the congressional district plans are generally drawn by the state’s legislative bureau, the actual plans (up to three) must be voted on by the state legislature and approved by the governor without amendments. Ultimately, though, if the first two plans are voted down, the state legislature does have the authority to amend parts of the third district plan. See, Iowa Legislative Service Agency, *Legislative Guide to Redistricting in Iowa* (Des Moines, IA: Iowa Legislative Service Agency, 2007), pp. 2, 13-16.

⁹³ NCSL, *Redistricting Law 2010*, pp. 150-153, shows an example of how districts were drawn in the 2000-2002 redistricting cycle.

⁹⁴ This author visited every state’s legislative website or the state’s special redistricting website and observed an attempt to, at least, advertise the places and times for any public hearing of the redistricting process. There was no attempt to measure this against the previous cycle’s perceived involvement of the public, so it is difficult to say whether this cycle’s public involvement is greater, lesser or the same as that in the 2000-2002 redistricting cycle.

To the extent that state legislatures are able and willing to participate in partisan gerrymandering, based on the results of the 2010 state legislative elections, it would appear that the Republican Party (by having 11 state legislatures switch to Republican control and retaining the control of 14 other state legislatures) is in a better position to influence the drawing of congressional district boundaries as compared to the Democratic Party (no state legislature switched control to the Democratic Party and the party retained the control of 16 state legislatures). Nine states saw their state legislatures change to divided-party control, remain in such split control as a result of the election, or remain in that status by virtue of there being no state legislative election.⁹⁵

Commissions – Bipartisan or Nonpartisan?

As was mentioned earlier, one of the ways that a few states have chosen to produce their redistricting plans is to place the process in the hands of a commission. In many cases, the goal for the creation of such commissions appears to be either minimizing partisan gerrymandering or promoting redistricting reform by creating districts that are more competitive and responsive to citizens and less likely to enable incumbents to retain their position for decades.⁹⁶

As noted by the NCSL, if, when, how, and under what limitations the states have given this authority to commissions is different for each state. For example, some states have commissions that only redistrict congressional districts, some only redistrict the state legislative districts, and some do both. Some states have commissions that only function if the state legislature fails to agree on a redistricting plan. Some commissions have complete control of the process, while the results of some commissions must be agreed to by either the state legislature or the governor, or both.

In addition, the selection process for the commission members will vary from state to state, as will the number of members. Some commissions are clearly bipartisan, while others might be, depending on the partisan characteristics of those selecting the membership of the commissions.⁹⁷ Generally, two states are currently considered to have non-partisan redistricting commissions: Arizona and California.⁹⁸

Aside from the institutional arrangements of the redistricting commissions, some states will impose goal requirements for the creation of the election districts.⁹⁹ This is not unique to states having redistricting commissions, but appears to occur more frequently when the laws adopting commissions are developed. Specific redistricting goals may be part of the constraints that state

⁹⁵ Election Data Services, Inc.-Congressional Quarterly *Roll Call*, “2010-2012 Redistricting Process Chart,” press release, December 2010, at <http://www.electiondataservices.com>.

⁹⁶ Andrew Karch, Corrine M. McConaughy, and Sean M. Theriault, “The Politics of Redistricting Commissions,” paper prepared for presentation at the annual meeting of the American Political Science Association, Philadelphia, PA, September, 2006, p 1-3.

⁹⁷ See the tables at the NCSL website for each state with commissions for a thorough review of the various arrangements the states have developed, at http://www.ncsl.org/programs/legismgt/redistrict/com_alter.htm.

⁹⁸ McDonald, “Drawing the Line on District Competition,” pp. 91-94

⁹⁹ McDonald, “Regulating Redistricting,” pp. 675-679. Some such goals or requirements are “contiguity,” “require districts to follow existing political boundaries, such as counties, cities, townships, precincts, and wards,” “compactness,” or “respecting ‘communities of interest.’” Arizona also restricted access to data on voter registration and voting participation so as to minimize partisan gerrymandering possibilities, although this may conflict with any requirement for determining majority-minority districts.

legislatures must face when developing redistricting plans, although, unlike commissions, the legislatures could remove such constraints unless they were imposed by referenda.

Many have suggested that allowing non- or bi-partisan redistricting commissions to draw congressional district lines will lead to congressional elections that are more competitive and reduce partisan polarization within Congress. Critics of legislatively drawn districts have argued that current redistricting procedures allow elected officials effectively to choose their constituents, violating democratic principles. Limited congressional turnover and declining numbers of competitive congressional races are offered as evidence by these critics that redistricting procedures require reform—that is, non- or bi-partisan redistricting commissions. A number of “good government” groups, including regular endorsements from Common Cause and the League of Women Voters, have been identified with supporting the adoption of redistricting commissions.¹⁰⁰

For the 2010-2012 redistricting cycle, seven states require congressional redistricting plans to be drawn by commissions (Arizona, California, Hawaii, Idaho, New Jersey, Washington, and Montana, which has only one congressional seat for this cycle). In addition, two states specify that a state commission is the backup mechanism for the creation of a new congressional map if the state legislature fails to agree on a map by a specified date.¹⁰¹

Proposed Congressional Legislation

There is little question that the U.S. Congress has the authority to pass federal legislation affecting the redistricting standards of congressional districts.¹⁰² As noted above, there is a long history of such legislation.

93rd-107th Congresses

For much of the period of time since the early 1970s (93rd Congress), proposed federal legislation relating to the redistricting process focused on three areas related to redistricting. First, legislation was introduced requiring states to redistrict using some type of redistricting commission rather than allowing state legislatures to develop congressional redistricting plans. In addition, legislation mentioned specific standards that had to be used. Second, legislation was introduced that only specified specific standards or restrictions on redistricting. And, third, legislation was introduced that specified the exact schedule for the provision of census counts to the states, so that they would be able to redistrict by the first election after census figures were announced. Only this third series of proposed laws subsequently became law.

Commissions

In the 93rd Congress, Representative James M. Hanley of New York introduced identical bills, H.R. 5042 and H.R. 10925. Both proposed requiring each state to create a five member bi-

¹⁰⁰ Karch, McConaughy, and Theriault, “The Politics of Redistricting Commissions,” pp.1-3; Ibid, p. 678.

¹⁰¹ NCSL, *Redistricting Law 2010*, Appendix D, pp. 169-171.

¹⁰² CRS Report RS22628, *Congressional Redistricting: The Constitutionality of Creating an At-Large District*, by (name redacted).

partisan redistricting commission, specified that district population counts could differ by no more than 1%, specified that the commission must take communities of interest into account and minimize splitting county and city boundaries, and required that any challenges to the redistricting plans within a state fell under the jurisdiction of the federal courts. In the 95th Congress, he introduced a more limited proposal, H.R. 14262, which required only the five member redistricting commission. In the 96th Congress, Representative James M. Hanley reintroduced H.R. 14262 as H.R. 2653. Also in the 96th Congress, Senator John Danforth of Missouri introduced S. 596, which required each state to have a redistricting commission, specified that districts within states could not have a population difference of more than 2%, prohibited the dilution of the voting strength of any racial or language minority group, and required public hearings of the commission.

Changing Just the Standards

In the 97th Congress, Representative Robert McClory of Illinois introduced H.R. 5529. The proposed legislation would, among other things, have prohibited the drawing of “boundaries of districts for: (1) the purpose of favoring any political party or individual.” In the 98th Congress, Representative Matthew J. Rinaldo of New Jersey introduced a similar bill as H.R. 3468, which also authorized “any qualified voter in a particular congressional district to bring an action in district court to enforce State compliance with such boundaries.” In addition, the bill “prohibited the court from invalidating certain State-drawn district boundaries unless it found that substantial compliance with statutory standards had not been achieved.”

Scheduled Transmission of Census Data to States for Purpose of Redistricting

As a result of the fact that many state legislatures, either by state constitutions or by state statutes, were often responsible for redistricting congressional and state legislative districts on a fixed schedule, the fact that the U.S. Census Bureau had no such requirement to supply census counts to the state by a specified date led state governments to complain to their Representatives in Congress. As a result, in the 93rd Congress, Representative Harold L. Runnels from New Mexico and Representative Richard C. White of Texas introduced proposed legislation to require the U.S. Census Bureau to transmit the necessary census counts and demographic data to the states by a specified time schedule (H.R. 9290 by Representative Runnels, and H.R. 11869 and H.R. 13340 by Representative White). No bill passed in the 93rd Congress. In the 94th Congress, however, Representative White introduced H.R. 1753 (also the identical bill H.R. 5035) that became law as P.L. 94-171 (89 Stat. 1023).¹⁰³

¹⁰³ According to the Census Bureau, P.L. 94-171 requires that,

The Census Bureau will inform state governors and legislative leaders at least 4 years before each census of technical guidelines they must follow to obtain population totals for their locally defined voting districts (e.g., election precincts). The Census Bureau will also make public announcements of this program in the Federal Register. States/Governments wishing to participate in this nonpartisan, voluntary program will submit to the Census Bureau specific boundaries for their voting districts, legislative districts, and desired census block boundaries, following technical criteria established by the Census Bureau, under the provisions of P.L. 94-171. The Census Bureau will provide small-area population totals to the legislature and governor of each state in a nonpartisan manner, by one year after the census (e.g., April 1, 2011)

Texas Redistricting: 2001 and 2003

In the 2001 redistricting process in Texas, as that state's legislature was unable to come to an agreement, state courts were forced to draft the redistricting plan.¹⁰⁴ Rather than make major changes, the courts kept most of the cores of the existing districts, equalized the population, and added the two additional seats that Texas was due because of population growth. However, with respect to the state legislature, the impact of the redistricting plan in the 2002 election was dramatic. The state legislature went from a divided legislature, with Democrats controlling the Texas Senate and Republicans controlling the State House, to two chambers strongly held by a single party. As a result of this partisan rearrangement and concerns by many Republicans that the 2001 redistricting plan failed to recognize the proper electoral strength of the Republican party within Texas, it was determined by the Republican-controlled state legislature that a second redistricting process would occur. The drama of this whole process was played out in the national media.¹⁰⁵

Partly as a result of the situation in Texas (as well as in a few other states), three relevant bills were introduced in the 108th Congress. Each bill essentially prohibited states from redistricting more than one time in a 10-year period unless ordered to by a court judgement (H.R. 2090 introduced by Representative Maxine Waters of California, H.R. 3856 introduced by Representative Gene Green of Texas, and H.R. 5101 introduced by Representative Carolyn B. Maloney of New York).

Representative Waters re-introduced her bill from the 108th in the 109th Congress as H.R. 830. In addition, in both the 109th and the 110th Congresses, the same two proposals were introduced, which went beyond restricting the number of times a state could redistrict in the same decade. In the 109th, the two bills were H.R. 2642 and the companion bill, S. 2350, introduced by Representative John S. Tanner and Senator Tim Johnson, respectively, and H.R. 4094, introduced by Representative Zoe Lofgren. In the 110th, the same bills were re-introduced as H.R. 543 and S. 2342 and H.R. 2248.

The Tanner/Johnson proposal, among other things, prohibited states from carrying out more than one redistricting per decade except under court order, much as the earlier legislation had done. In addition, though, the proposal required that any redistricting that occurred must be based on a plan developed by an independent redistricting commission established by the state, or the state's highest court. The proposal required that each state establish an independent commission, specified how the members were to be selected, and delineated the eligibility requirements for each member. The proposal further specified the criteria that the commission must use to develop the plan, including "one person, one vote," equal district size, adherence to any requirements from the Voting Rights Act of 1965, continuity of counties, parishes, municipalities, and neighborhoods, compactness of the districts, and contiguity. State commissions were prohibited under the proposal from using information on the voting history of the population of a district (unless required by state law to create competitive districts), information on the partisan affiliation of the population of the district, and information about the addresses of the residences of the incumbents of the House.

¹⁰⁴ For the fascinating history of the redistricting process in Texas after the 2000 census, see Steve Bickerstaff, *Lines in the Sand: Congressional Redistricting in Texas and the Downfall of Tom Delay* (Austin, TX: University of Texas Press, 2007).

¹⁰⁵ *Ibid.*

The Lofgren proposal was very similar to the legislation proposed by Representative Tanner¹⁰⁶ and Senator Johnson. However, the Lofgren proposal included a provision for expedited judicial review of any plans as well as a section on the availability of a private right of action.

For both bills, and in both Congresses, no action was taken on any of the proposals.

111th Congress

Again in the 111th Congress, Representative Tanner and Senator Johnson reintroduced their proposal as H.R. 3025 and S. 1332, as did Representative Lofgren in reintroducing her proposal as H.R. 5596. Again, there was no action on either bill other than committee referral. In addition, Representative Devin Nunes from California introduced H.R. 6250, a bill that not only specified standards that states were required to use in the redistricting of congressional districts within the states, but also specified the order in which the standards were to be applied by the redistricting agency. The required standards were political equality, contiguity, appropriate provisions of the Voting Rights Act of 1965 as amended, no vote dilution of the voting strength of any group, and compactness. The bill also specified that the actions of redistricting were to be transparent and involve the public. Activity on the Nunes proposal was limited to the assignment to committee.

112th Congress

Representative John Tanner chose not to seek reelection to the 112th Congress. In honor of his work in the area of redistricting reform, Representative Heath Shuler reintroduced the Tanner bill in the 112th Congress as H.R. 453, renaming it the “John Tanner Fairness and Independence in Redistricting Act.” Senator Johnson reintroduced his duplicate bill as S. 694, but, did not change the name of the proposed act. Representative Lofgren reintroduced her bill as H.R. 590.

In addition, Representative Jim Cooper introduced H.R. 419, the “Redistricting Transparency Act of 2011.” The bill proposes that states be required to allow for public participation in the congressional redistricting process by establishing an official state redistricting website, allowing for submission of plans by the public, allowing the public to respond to final districting plans, and requiring for full public notification of the final plans by the appropriate state districting authority.¹⁰⁷

Representative Earl Blumenauer introduced proposed legislation, H.R. 3846, that would take the congressional redistricting process out of the hands of the states, entirely. The “National Commission for Independent Redistricting Act of 2012,” as its name implies, establishes a 14-member bi-partisan commission, not more than 7 of whom may be from the same political party. Members are appointed by the House leadership (Speaker, minority leader—four each) and the Senate leadership (majority and minority leaders—three each). At the time of appointment, a member of the commission cannot be an appointed or elected official of the federal government, and the appointee must certify in writing, under penalty of perjury, that he or she will not seek

¹⁰⁶ It should be noted that Representative Tanner also introduced a House Resolution (H.Res. 1365) stating that it was the sense of the House that commissions were the best way to redistrict congressional seats. The resolution never got out of committee.

¹⁰⁷ H.R. 419 does not apply to state legislative or other local redistricting.

any elected office until three years after the date the commission terminates its existence. Members will serve for the life of the commission.

According to the proposed act, the National Commission will produce a redistricting plan for each state (a map, a detailed statement of why “the plan will best serve the public interest,” and “the assumptions, scenarios, and alternatives considered in” developing the plan) not later than two years after the President publishes the apportionment of seats for the House of Representatives based on the most recent census figures. In producing such plans, the commission must consider the following criteria: to the extent possible, population equality between districts in the state; consistency with the applicable provisions of the Voting Rights Act of 1965 as amended; to the “greatest extent possible,” maintenance of the geographic continuity of the political subdivisions of the state (in the following order of priority: counties or parishes, municipalities, neighborhoods within the same district); geographical compactness; and geographical continuity. The bill restricts the use of information about the voting history of the population of any district, prohibits the use of information about the partisan affiliation of the population of the district, and prohibits the use of the addresses of incumbents or potential challengers in the districting process. The bill also requires the ability of the public to participate at certain stages and also requires transparency in the whole process.

It should be noted that, if enacted, Representative Blumenauer’s bill would provide a major change in the redistricting process, but if the pattern relating to the impact of bi-partisan commissions is correct, it would likely not lead to major changes in the makeup of the House membership.¹⁰⁸

None of the bills addressing redistricting has received any action other than referral to the appropriate committee or subcommittee thus far in this Congress.

Conclusion and Summary

The apportionment process determines the number of seats in the House of Representatives that will be assigned each state, based on population counts. The redistricting process determines where those seats are geographically located within each state. Redistricting draws the maps.

Redistricting is a state process that is governed by federal law. Much of this law is judicially imposed because, in 1929, Congress let lapse its standards requiring districts to be made up of “contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants.” If Congress chooses to legislate again in this area, its mandate will come from Article I, Section 4 of the Constitution, granting the authority to Congress to change state laws pertaining to congressional elections.

The goal of redistricting is to draw boundaries around geographic areas such that each district results in “fair” representation. An effort to favor one group of interests over another by using the redistricting process to distort this fairness is referred to as gerrymandering. Aside from distorting

¹⁰⁸ Thomas E. Mann, “Redistricting Reform: What is Desirable? Possible?,” in *Party Lines: Competition, Partisanship, and Congressional Redistricting*, ed. Thomas E. Mann and Bruce E. Cain (Washington, DC: The Brookings Institution Press, 2005), pp. 107-110.

representation, it is believed by some that such gerrymandering diminishes electoral responsiveness by minimizing political competition among the parties.

Many of the “rules” or criteria for drawing congressional boundaries are meant to enhance fairness and minimize the impact of gerrymandering. These rules, standards, or criteria include assuring population equality among districts within the same state, protecting racial and language minorities from vote dilution while at the same time not promoting racial segregation, promoting geographic compactness and contiguity when drawing districts, minimizing the number of split political subdivisions and “communities of interest” within congressional districts, and preserving historical continuity in the cores of previous congressional districts.

Most redistricting is currently done by state legislatures. Some believe that allowing redistricting to be the purview of state legislators promotes, at best, status quo districts protecting incumbents and, at worst, blatant partisan gerrymandering, which can lead to a decade of one-party dominance. Reform efforts mostly have aimed at taking the redistricting task from state legislatures and assigning it to independent redistricting commissions. Efforts at creating these commissions have been successful at the state level. However, efforts to enact federal legislation to create such commissions within all states have proved less successful.

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