

# A Beginner's Guide to Redistricting

By

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Perhaps even more than any single election, the redistricting process can determine the chances for policy change. One expert compared redistricting to another politically charged issue: "Redistricting, like reproduction, combines lofty goals, deep passions about identity and instincts for self-preservation, increasing reliance on technology, and often a need to 'pull [and] haul' rather indelicately at the very end. And of course, it often involves somebody getting screwed."<sup>1</sup>

Because redistricting is such an integral part of politics, legislative behavior is governed by several constraints. One can divide these constraints into what legislators must do in the process and what they desire to do. The first group of constraints are constitutional mandates, which include mandates from the courts or pre-existing law. These rules help ensure that the rights of citizens are not ignored or subverted by decision-makers. Foremost among the requirements is maintaining population equality among election districts. Beginning with *Baker v. Carr*, the Supreme Court read into the Constitution the right to have one's vote count equally in the election process.<sup>2</sup> Known as the "one-person one-vote doctrine," the cases following *Baker* have required states to accurately reflect population changes reported in each Census.<sup>3</sup> Today, legislatures engaged in Congressional redistricting must adhere as closely as possible to absolute equal populations (zero deviation) among those districts.<sup>4</sup>

The second major directive for legislative redistricting has to do with geographic contiguity. Working in concert with the equal populations constraint is the statutory requirement that every U.S. Representative be elected from a single-member district.<sup>5</sup> In states with more

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<sup>1</sup> Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 733 (1998) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

<sup>2</sup> *Baker v. Carr*, 369 U.S. 186, 199 (1962).

<sup>3</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

<sup>4</sup> See *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983).

<sup>5</sup> 113 CONG. REC. 25, 34364-70 (1967). Article I, Section 4 of the Constitution describes the duties of a U.S. Representative, but it originally left to states the responsibility of choosing how they will be selected. At various points during our history, many states have elected Representatives using at-large instead of individual

than one House seat, federal law requires state legislatures to divide the population into districts electing one representative each. In common practice, this law and its analogous state provisions prevent the overly-creative map-drawer from connecting populations that are dispersed geographically. The contiguity mandate institutionalizes a geographical limit and compactness as criteria for how districts can be drawn.<sup>6</sup>

Finally, a state legislature must take racial fairness principles into account when it maps election districts. At least three different provisions of law are important in this regard. The 15<sup>th</sup> Amendment, which prohibits the denial or abridgement of voting on account of race, has traditionally been the cornerstone of defining these parameters.<sup>7</sup> In practice, judges have also expanded the 14<sup>th</sup> Amendment Equal Protection doctrine to address cases where state action dilutes or prevents voting among minority communities.<sup>8</sup>

Congress passed and amended the Voting Rights Act pursuant to this Constitutional authority. The statute permits the Justice Department to review legislative plans and their effect on minority political rights. The Attorney General's power to invalidate proposals with the purpose or effect of harming black political rights comes from Section 5. Under Section 2, minorities can sue jurisdictions in federal court if a district plan unduly limits their influence in elections.<sup>9</sup> Thus, even after a legislature attains population equality, the federal government can examine whether districts unnecessarily disperse or over-concentrate the votes of black communities.

Despite these core principles that limit their autonomy, state legislators are still compelled by the same pressures that normally bear on their political decision-making. Within the aforementioned rules, state legislators try to protect themselves and their party. The paramount interest of any elected politician is ensuring that a new plan contains a district that will re-elect him.<sup>10</sup> In Congressional redistricting, an incumbent state legislator may draw lines to facilitate his future campaign for a congressional seat. In this light, redistricting is just as much about politicians selecting voters as it is about voters choosing candidates during elections.

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election districts. In 1967, though, Congress enacted legislation to establish a uniform election system of filling House seats.

<sup>6</sup>See REDISTRICTING LAW 2000 (Nat'l Conference of State Legislatures, 1999). Georgia, New Jersey, North Carolina and Oregon require their congressional districts to be contiguous. Alabama, Arizona, Idaho, Minnesota, Mississippi, Missouri, Nebraska, Nevada, South Carolina, Utah, Virginia, Washington, West Virginia, Wyoming also have both contiguity and compactness standards.

<sup>7</sup> *Smith v. Allwright*, 321 U.S. 649, 662 (1944).

<sup>8</sup> See *Gomillion v. Lightfoot*, 364 U.S. 339, 346-47 (1960).

<sup>9</sup> 28 C.F.R. § 51.2 (1999).

<sup>10</sup> DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 105 (1974).

Incumbent legislators know the neighborhoods where supporters live; trading-off these communities for less familiar people from other districts is rarely helpful. Drastic boundary changes lead to electoral uncertainty, which invites a strong challenger in the primary or general election. Both are serious threats to any incumbent seeking re-election.

Aside from the personal concerns in crafting a redistricting plan, thinking about the party's overall standing also comes into play. The dominance of the two-party system in most states means that zero-sum politics usually define the inputs and outcomes in redistricting.<sup>11</sup> One party's gain in the share of legislative seats always means a loss for the other. This party-centered strategy sometimes works hand-in hand with the concern about personal gain, but not always.

Party interests are somewhat less parochial than those of the individual politician. Ideally, a party distributes voters to control seats with little regard to which of its incumbents is secured. To achieve this end, parties adopt one of two basic strategies when drawing districts: securing or maximizing seats. Essentially, the choice depends on the party's popularity in the state electorate. Spikes in party registration or a favorable showing in statewide elections might indicate the need for an aggressive maximization strategy. On the other hand, stable or declining trends in these measures might signal that a more defensive securing-seats approach is ideal.<sup>12</sup>

The overall picture that emerges about district-drawers is that a few constitutional rules restrict what they may do, yet pressures arising from partisanship also compel them to adopt plans that help themselves and their allies. The essential point to understand about this process is how the attention to race fits in with other concerns. First, complying with racial fairness standards is necessary since it is one of the established constraints on legislative behavior. Knowledge of a plan's racial effects is crucial to avoid violating the Constitution or the Voting Rights Act. Second, there are strategic reasons that a legislator would want to be aware of race in drawing electoral lines. If a specific racial group tends to support an incumbent's party, then he would want to pay close attention to the districts where members of that group will reside. So long as that focus does not violate the Constitution, legislators can use race to advantage themselves and their party in virtually any way they see fit.

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<sup>11</sup> Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Effects in Congressional Elections in the 1970s and 1980s*, 54 J. POL. 565-72 (1992).

<sup>12</sup> *But see* Donald Ostidick, *Congressional Redistricting and District Typologies* J. POL. 533-43 (1995). It is important to note that these strategic options are not mutually exclusive. On the one hand, a party wants to capture as many new seats as possible to control the legislative process, favoring maximization. But pure maximization strategies can be limited by the share of the electorate that will support the party in future elections. Gaining too many seats may make them all less secure, which is equally important to gaining and retaining a voting majority. If every district has a bare majority of supporters (say, 51% Democrats), every candidate is vulnerable to strong challengers. Thus, parties must also take care that the districts they create are secure, offering a comfortable margin of victory to their incumbents.

While courts insist that they possess jurisdiction to review district maps and intervene when redistricting runs amuck, they are quite selective about when they will apply it. The judiciary more readily upholds legislative plans that might violate notions of partisan fairness than when they threaten a core constitutional principle. Usually, the losing party seeks judicial remedy for what it believes are unfair redistricting plans, or gerrymanders. Most gerrymanders attempt to extend one group's voters to capture new seats, concentrating the opposition's voters in a few conceded districts.<sup>13</sup> The result is that one group – either a political party or a racial community – is severely under-represented. Accordingly, the courts can intervene to protect the political rights of these unfairly disadvantaged citizens. As Justice Douglas described it, “The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it.”<sup>14</sup> Yet the judiciary's record indicates that it finds some types of gerrymanders more distasteful than others.

Judicial action is all but assured when a gerrymander threatens one of the core redistricting principles. Without an equally weighted vote, for example, people cannot rely on equal protection of the laws from their representatives. Substantial differences in district population mean that one person's vote carries more influence than another. From as early as *Baker v. Carr*, the courts have observed that vote dilution is inconsistent with the 14<sup>th</sup> Amendment. Doctrines like one-person-one-vote, which requires population equality, establish a clear rule to distinguish the proper from the illegal. Further, the clarity permits lower courts and legislatures themselves to apply this rule and limit uncertainty. Since the doctrine is based on a quantifiable measure, identifying violations is a simple matter of comparing population deviations. Finally, the remedy, requiring the legislature to equalize district populations, is readily available to judges once a violation is identified.

On the other hand, judges are more hesitant to second-guess redistricting plans because of the complexities involved in fashioning a remedy. For one thing, the Constitution does not accord representational rights to political parties. Also, the concept of legal harm is more complex to define and prove in these cases. Partisan gerrymandering does not prevent anyone from casting votes, though it can limit the effect of support given to certain parties. Further, judges repeatedly accepted the notion that party competition is a legitimate component of the political system. Line-drawing, just like any other policy choice, creates political winners and losers. To derive a legal standard to distinguish between an acceptable and an unwarranted level of partisanship, for many, as elusive as defining pornography.

Perhaps most important, judges are loath to address such questions because of their institutional resolve to remain above the rancor of politics. While judges tolerate partisan bias among elected legislators, they reject it as an element of their own decision-making. Thus, Justice O'Connor dissented in one redistricting case: “To turn these matters over to the federal

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<sup>13</sup> Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 321 (1985).

<sup>14</sup> *Whitcomb v. Chavis*, 403 U.S. 124, 177 (1971) (Douglas, J., dissenting in part and concurring in part).

judiciary is to inject the courts into the most heated partisan issues.”<sup>15</sup> For these reasons, the Court maintains a hands-off approach to legislatures engaging in partisan gerrymanders relative to other types of unfair redistricting.

<b>Commonly Used Variables In Redistricting</b>		
<b>Demographic</b>	<b>Economic</b>	<b>Political</b>
Total Population	Income	Presidential Vote
Voting Age Population	% College Graduates	Gubernatorial Vote
Age	% Home Owners	County/ Local Jurisdictions
Race		Location of Incumbents

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<sup>15</sup>*Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O’Connor, J., concurring).