Reapportionment and Redistricting in the United States of America

Congress

The Congress of the United States consists of the Senate and the House of Representatives.(1) The concurrence of both bodies is necessary to enact a law.(2)

The Senate is composed of two members from each State.(3) Under the Constitution of 1787, senators were elected by the state legislature. The Seventeenth Amendment, ratified in 1913, provides that senators are directly elected by the people of each State for a term of six years and that each senator has one vote.(4)

The number of members of the House of Representatives is prescribed by law. It has been at 435 since 1912. Each State is entitled to at least one representative, and the remaining members are apportioned among the States in accordance with their respective populations, which are determined by a census that the Constitution requires be taken every ten years.(5) The apportionment is made pursuant to a statutory formula.

Reapportionment

Over the years, four different apportionment formulas have been used.(6) From 1790 to 1840, Congress used a method proposed by Thomas Jefferson, sometimes called the "method of greatest divisors," which divided the total population by the number of seats and assigned each State its quota, disregarding any fractional remainder. The number of members was adjusted so that none were left over. From 1842 to 1850, Congress used a formula proposed by Daniel Webster, sometimes called the "method of major fractions," which gave an additional member to any State whose quota included a fraction greater than one-half. From 1850 to 1910, Congress used a formula that had originally been proposed by Alexander Hamilton for the apportionment of 1790. Under that formula, members were first apportioned according to each State's quota, disregarding any fractional remainders, and then any leftover seats were assigned to the States with the largest fractional remainders. Between 1911 and 1930, Congress reverted to using the Webster method. After the 1930 census, in accordance with a report from the National Academy of Sciences, Congress adopted the "method of equal proportions."(7) The formula uses the State's population divided by the geometric mean of that State's current number of seats and the next seat (the square root of n(n-1)). This formula allocates the remainders among the States in a way that provides the smallest relative difference between any pair of States in the population of a district and in the number of people per representative. Congress's choice of this method over the other possible methods has been upheld by the U.S. Supreme Court(8) and it remains in use today.

Redistricting

Each State's quota of representatives must be elected from single-member districts(9) of equal population.

Since the earliest days of the republic, redrawing the boundaries of congressional districts after the decennial census has been primarily the responsibility of the state legislatures. Only five States (Hawaii, Idaho, Montana, New Jersey, and Washington) assign the responsibility for redrawing congressional district boundaries to a body other than the legislature.(10)

Each State has its own constitution and laws, and the constitutional requirements for redistricting vary considerably from State to State. What little there is in the way of national law on the subject has been developed over the years in a series of cases decided by the U.S. Supreme Court.

Equality of Population

Following World War I, as the nation's population began to shift from rural to urban areas, many legislatures lost their enthusiasm for the decennial task of redistricting and failed to carry out their constitutional responsibility. As the populations of urban districts grew rapidly and some rural districts even declined, urban areas were denied the political representation their populations warranted. For decades, the U.S. Supreme Court declined repeated invitations to enter the "political thicket"(11) of redistricting and refused to order the legislatures to carry out their duty.

In 1962, however, in the case of *Baker v. Carr*,(12) the Court for the first time held that the federal courts had jurisdiction to consider constitutional challenges to redistricting plans. The next year, in *Gray v. Sanders*, Justice Douglas declared: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing--one person, one vote."(13) In 1964, in *Wesberry v. Sanders*, the Court held that congressional districts must be redrawn so that "as nearly as is practicable one man's vote in a congressional election is ... worth as much as another's."(14) Finally, in 1983, the Court developed a standard of equality for congressional districts that required them to be mathematically equal, unless justified by some "legitimate state objective."(15)

In 1975, Congress acted to facilitate drawing the new districts with equal populations by enacting Pub. L. No. 94-171, which required the Secretary of Commerce to report census results no later than April 1 of the year following the census to the governors and to the bodies or officials charged with state legislative redistricting.(16) It also required the secretary to cooperate with state redistricting officials in developing a nonpartisan plan for reporting census tabulations to them.

Equality of Opportunity for Minorities

When the courts began striking down redistricting plans for inequality of population, thus helping to provide urban areas with the political representation their populations warranted, Congress moved to the next step. In 1965, it enacted the Voting Rights Act(17) to provide equality of opportunity for racial minorities to vote. Section 2 of the Act prohibited any State or political subdivision from imposing a "voting qualification or prerequisite to voting, or standard, practice or procedure to deny or abridge the right to vote on account of race or color."(18) Section 5 required a covered jurisdiction to preclear any changes in its electoral laws, practices, or procedures with either the U.S. Department of Justice or the U.S. District Court for the District of Columbia before it could take effect.(19) The Justice Department began to use this new authority to require that redistricting plans be precleared before they could take effect.

In 1976, in *Beer v. United States*,(20) the Supreme Court said the Justice Department could refuse to preclear a redistricting plan if it would lead to a retrogression in the position of racial minorities, that is, if the plan would be likely to cause fewer minority representatives to be elected than before. The Court began the 1980s with *City of Mobile v. Bolden*,(21) saying that a plan would not be found to violate the Fourteenth Amendment or Section 2 of the Voting Rights Act unless the plaintiffs could prove that its drafters intended to discriminate against them. Congress was swift to react to this new limitation on how to prove racial discrimination. In 1982, after most of the redistricting plans based on the 1980 census had already been enacted, Congress amended Section 2 of the Voting Rights Act to make clear that it applied to any plan that results in discrimination against a member of a racial or ethnic minority group,(22) regardless of the intent of the plan's drafters.

How were the courts to determine whether a redistricting plan would have discriminatory results? In the 1986 case of *Thornburg v. Gingles*,(23) the Court set forth three preconditions a minority group must prove in order to

establish a violation of Section 2:

1. That the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;

2. That it is politically cohesive, that is, it usually votes for the same candidates; and

3. That, in the absence of special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.[(24)]

If the minority group could establish those three preconditions, it would be entitled to proceed to the next step: proving a Section 2 violation by "the totality of the circumstances." Those circumstances would have to show that the members of the minority group had "less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice."[(25)]

What did that mean, "less opportunity?" In North Carolina, where *Gingles* arose, it meant that multimember districts where Blacks were in the minority and had been unable to elect candidates to office had to be replaced with single-member districts where Blacks were in the majority. To the rest of the country, and to the state legislatures and commissions who were going to be drawing new districts after the 1990 census, it meant that wherever there was a racial or ethnic minority that was "sufficiently large and geographically compact to constitute a majority in a single-member district,"[(26)] the State would have to draw a district for them or risk having the plan thrown out, even if the State acted without any intent to discriminate.

Being forewarned of the effects of Section 2, drafters of redistricting plans after the 1990 census went to great lengths to draw majority-minority districts wherever the minority population counts seemed to justify it. In States where redistricting plans could not take effect until they had been precleared by the Justice Department, the Justice Department encouraged the State to draw districting plans that created new districts where members of a racial or language minority group (primarily African Americans or Hispanics) were a majority of the population. These new "majority-minority" districts were intended to protect the States from liability under Section 2 for failing to draw districts that the minority group had a fair chance to win. As States drew the plans, they discovered that the Justice Department had little concern that majority-minority districts be compact. In some cases, the department refused to preclear a plan unless the State "maximized" the number of majority-minority districts by drawing them wherever pockets of minority population could be strung together. As the plans were redrawn to obtain preclearance, some of the districts took on bizarre shapes that caused them to be labeled "racial gerrymanders."[(27)]

The racial gerrymanders were attacked in federal court for denying White voters their right to equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution.[(28)] The U.S. Supreme Court publicly rebuked the Justice Department for its maximization policy[(29)] and held that a racial gerrymander must be subjected to "strict scrutiny" to determine whether it was "narrowly tailored" to achieve a "compelling state interest" in complying with Section 2.[(30)] Many of the racial gerrymanders were struck down by the federal courts because their drafters had not followed "traditional districting principles,"[(31)] such as keeping districts compact, not splitting political subdivisions, and preserving communities of interest.

The States redrew the districts once again.

Traditional Districting Principles

For the round of redistricting that will follow the 2000 census, each State must decide for itself which "traditional districting principles" to adopt as its own when drawing congressional districts. None are required by federal law, except as evidence that the State has not used race as its "predominant motive" when drawing a district that a minority candidate has a fair chance to win. However, some "traditional districting principles" are required by a State's own constitution and many others have been adopted by law or resolution since the 1960s to

help defend the new redistricting plans against possible challenges in court. The districting principles used by each State in the 1990s are shown in the table below. (This table is a copy of a table that appears as Table 5 in *Redistricting Law 2000*, a publication of the National Conference of State Legislatures, Denver, Colorado, 1999.) They include requiring that districts be composed of contiguous territory, making districts geographically compact, respecting the boundaries of political subdivisions, preserving communities of interest, preserving the cores of prior districts, and avoiding contests between incumbent representatives.

1990s Districting Principles Used by Each State

(in addition to population equality)

State	Compact	Contiguous	Preserve Political Subdivisions	Preserve Communities of Interest	Preserve Cores of Prior Districts	Protect Incumbents	Voting Rights Act
Alabama	C, L	C, L	C, L	C, L	C, L		C, L
Alaska	L	L	L	L			
Arkansas			C, L		C, L	YC, YL	C, L
Arizona	C, L	C, L					C, L
California		L	L				
Colorado	L		L	L			L
Connecticut		L	L				
Delaware		L				NL	
Florida		L					
Georgia		C, L	C, L		C, L	YC, YL	C, L
Hawaii	L	L	L	L		NL	
Idaho	C, L	C, L	C, L	C, L		NC, NL	C, L
Illinois	L	L					
Indiana		L					
Iowa	C, L	C, L	C, L			NC, NL	C, L
Kansas	C, L	C, L	C, L	C, L	C	NL	L
Kentucky		C	C	C	C		C
Louisiana	L	L	L		L		
Maine	L	L	L				
Maryland	C, L	C, L	C, L	C, L	C, L	YC, YL	C, L
Massachusetts		L	L				
Michigan	L	L	L				
Minnesota	C, L	C, L	C, L	C, L			C, L
Mississippi	C, L	C, L	C, L				C
Missouri	C, L	C, L	C	C	C		C
Montana	L	L	L	L		NL	L
Nebraska	C, L	C, L	C, L	C, L		NC, NL	C, L
Nevada	C, L	L	C, L	L			C, L
New Hampshire		L	L				

New Jersey	L	C , L	L		C		C
New Mexico	L	L	L				
New York	L	L	L				
North Carolina		C, L	C, L		C	YC	C, L
North Dakota	L	L	L				
Ohio	L	L	L				
Oklahoma	L	L	L	L			
Oregon		C, L	C, L	C, L		NC, NL	C, L
Pennsylvania	L	L	L				
Rhode Island	L						
South Carolina	C, L	C, L	C, L	C, L	C, L	YC, YL	C, L
South Dakota	L	L	L				L
Tennessee		L	L				L
Texas		L	L				C, L
Utah	C, L	C, L	C, L	C, L		NC, NL	
Vermont	L	L	L	L		YL	
Virginia	C, L	C, L	L	L		YL	L
Washington	C, L	C, L	C, L	C, L		NL	
West Virginia	C, L	C, L	C, L				
Wisconsin	L	L	L				
Wyoming	C, L	C, L	C, L	L		NL	L

Key:

C = Required in congressional plans
L = Required in legislative plans
NC = Prohibited in congressional plans
NL = Prohibited in legislative plans
YC = Allowed in congressional plans
YL = Allowed in legislative plans

Note: A few states used additional districting principles, such as "convenience" (Minnesota), "understandability to the voter" (Hawaii, Kansas, Nebraska), and "preservation of politically competitive districts" (Colorado).

Source: NCSL, 1999.

Reporting the Census

The total population of each State is reported to the President by December 31 in the year of the census.[(32)] The population of each State's minor civil divisions, such as counties, cities, and towns, and its census tracts and blocks, is reported to the state officials responsible for redistricting before April 1 in the year following the census.[(33)] New districts are drawn in time for the next general election, which occurs in the year ending in two.

Drawing the Boundaries

Except in the five States that use redistricting commissions, the new districts are drawn by the state legislature and enacted in the form of a bill. The enactment of the bill is subject to whatever public hearing requirements may apply in the State. In every state legislature but Iowa, enactment of the bill is an intensely partisan issue, with the majority party attempting to gain a political advantage through the way the lines are drawn. Partisan gerrymandering is thus a fact of life in most American congressional redistricting. Equal population requirements and other "traditional districting principles" are limits the federal courts and state constitutions have imposed to restrain this natural tendency to gerrymander.

Role of the Courts

Where the majority has gone too far, or where partisan differences between the two houses of a state legislature, or between the legislature and the governor, look like they may prevent the legislature from enacting a redistricting bill in time for the general election in the year ending in two, any resident of a malapportioned district may bring suit in state or federal court and ask the court to correct an enacted plan or adopt a plan if none has been enacted. A federal court must defer to a state court, and both must defer to a legislature that is actively engaged in adopting a plan, but if the legislature fails to meet reasonable deadlines imposed by the court, the court may impose a redistricting plan of its own, to be effective until adoption of a valid plan by the legislature. (34)

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1. U.S. Const. art. I, § 1 .

2. U.S. Const. art. I, § 7 .

3. U.S. Const. art. I, § 3 .

4. U.S. Const. amend. XVII .

5. U.S. Const. art. I, § 2 .

6. *See U.S. Department of Commerce v. Montana*, 503 U.S. 442 (1992).

7. 2 U.S.C. §§ 2a , 2b .

8. *U.S. Department of Commerce v. Montana*, 503 U.S. 442 (1992).

9. 2 U.S.C. § 2c .

10. *Redistricting Law 2000*, appx. F , Denver, Colo.: National Conference of State Legislatures, 1999.

11. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

12. 369 U.S. 186 (1962).

13. 372 U.S. 368, 381 (1963).

14. 376 U.S. 1, 8 (1964).

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

16. Coded as amended at 13 U.S.C. § 141 (c).

17. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971 , 1973 to 1973bb-1 (1996).

18. 42 U.S.C. § 1973 (1965).

19. 42 U.S.C. § 1973c (1996).

20. 425 U.S. 130 (1976).

21. 446 U.S. 55 (1980).

22. Pub. L. No. 97-205, 3, June 29, 1982, 96 Stat. 134, coded as amended at 42 U.S.C. 1973 .

23. 478 U.S. 30 .

24. 478 U.S. at 50 -51.

25. 42 U.S.C. 1973 (b) .

26. 478 U.S. at 50 -51.

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

28. *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *United States v. Hays*, 115 S. Ct. 2431 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt (Shaw II)*, 116 S. Ct. 1894 (1996); and *Lawyer v. Dept. of Justice*, 117 S. Ct. 2186 (1997).

29. *Miller v. Johnson*, 115 S. Ct. 2475, 2492-93, slip op. at 22 (1995)

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

31. *Shaw v. Reno (Shaw I)*, 509 U.S. 630 (1993); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt (Shaw II)*, 116 S. Ct. 1894 (1996).

32. 13 U.S.C. § 141 (b).

33. 13 U.S.C. § 141 (c).

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

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