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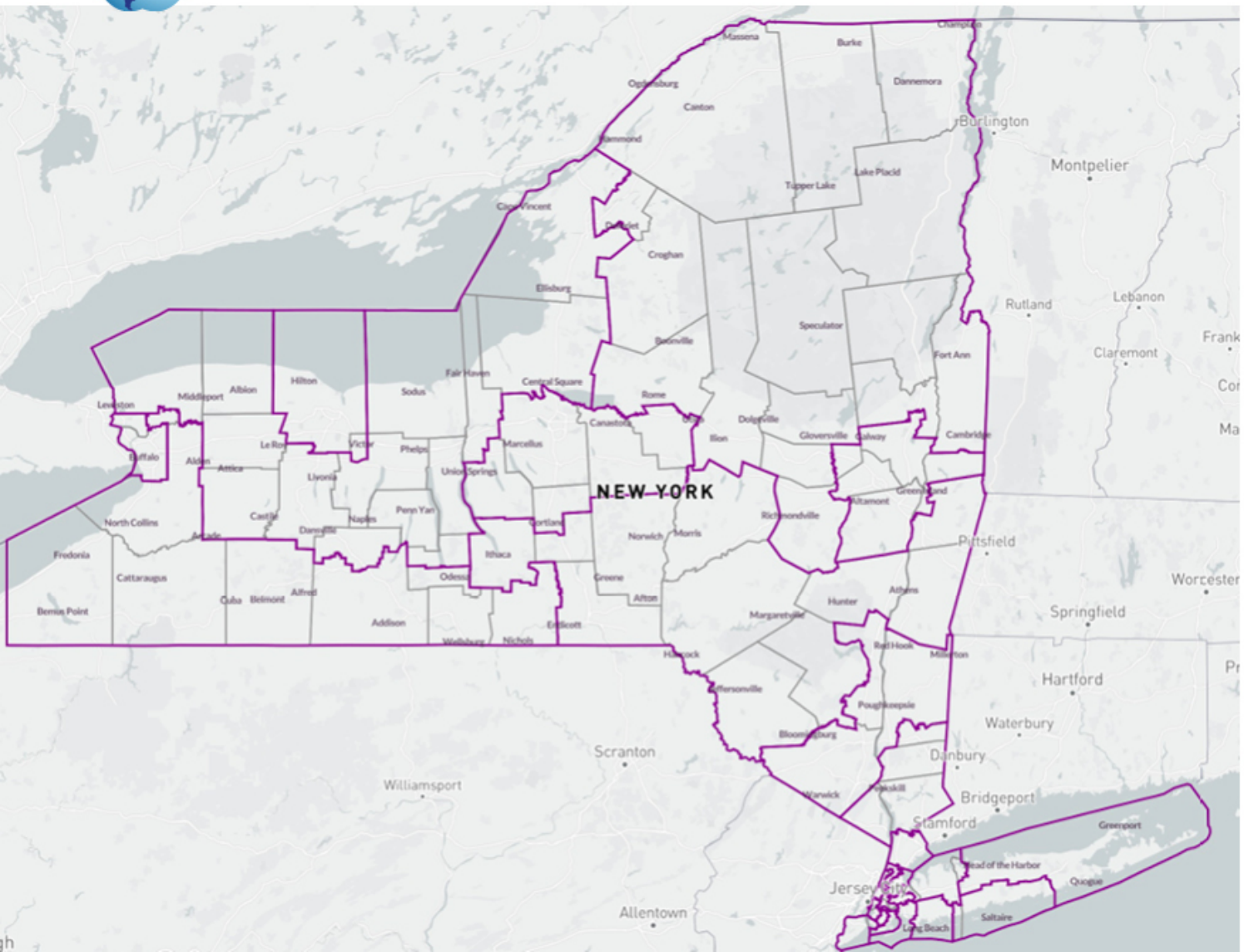

NEW YORK REDISTRICTING:

What Happened and What's Next?

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New York Redistricting: What Happened & Where Are We Going?

Tuesday June 18, 2024, 9:30 AM-12:30 PM, New York Law School
Center for NYC Law; NY Elections, Census & Redistricting Institute

9:30 Welcoming Remarks - Dean Anthony Crowell, New York Law School

9:35 Conference Overview - Prof. Jeffrey M. Wice, New York Law School

9:45 Keynote Remarks - 'Special Master' Dr. Jonathan Cervas, Carnegie Mellon University

10:00 Mapping Presentation - Steven Romalewski, CUNY Graduate Center

10:15 Panel 1 - The 2014 Constitutional Amendment and Post-2020 Redistricting Process

-Ken Jenkins, Chair, NYS Independent Redistricting Commission
-Hon. John Faso
-Ben Weinberg, Citizens Union
-Esmeralda Simmons, Esq.
-Jerry Vattamala, Asian American Legal Defense & Education Fund and New York Law School
-Cesar Ruiz, LatinoJustice
-Jeffrey M. Wice, New York Law School (moderator)

11:15 Panel 2 - Redistricting Reform: What Needs to Be Done Before 2030

-Hon. David Imamura, former Chair, NYS Independent Redistricting Commission
-Laura Bierman, NYS League of Women Voters
-Liz OuYang, APA VOICE
-Mohamed Q. Amin, Caribbean Equality Project
-Grace Pyun, former General Counsel, NYC Districting Commission
-Lucia Gomez, NYC Central Labor Council
-Ben Max, New York Law School (moderator)

12:15 Remarks - Brigid Bergin, WNYC/Gothamist

12:30 Closing Comments - Jeffrey M. Wice, New York Law School

New York Redistricting: What Happened and Where Are We Going?

June 7, 2024 (https://www.citylandnyc.org/new-york-redistricting-what-happened-and-where-are-we-going/)

Image Credit: Darren McGee- Office of Governor Kathy Hochul.

By Jeffrey M. Wice and Piper Benedict

New York State's redistricting process following the 2020 Census failed to live up to the reforms envisioned by voters who endorsed the 2014 constitutional changes. Instead, the redistricting process proved unworkable, missed constitutional deadlines, and resulted in judicially-imposed districts. The time to fix the state's redistricting process starts now, before the 2030 redistricting cycle gets underway.

Redistricting is a major building block of American democracy. It determines the boundaries of the districts for the people we elect to represent us in Washington, D.C., Albany, and localities across the state. Following each decennial census, every state's congressional, state legislative, and local legislative bodies must have their district lines redrawn to reflect population shifts.

In 2014, New York voters approved an amendment to the state constitution to create a new process for congressional and state legislative redistricting. The purpose of the reform was to eliminate the Legislature's exclusive control over redistricting that had resulted in politically motivated and unfairly gerrymandered districts. The 2014 constitutional amendment created a new bipartisan advisory commission, the Independent Redistricting Commission ("Commission"). The amendment empowered the Commission to hold public hearings and draw maps of new election district lines and to submit those maps for either approval or redrawing by the Legislature.

The proponents of the 2014 constitutional amendment argued that the new redistricting process would make redistricting transparent, encourage public input, and discourage political and racial gerrymandering. The constitutional amendment, however, included substantive and procedural inadequacies and compromises that led to the drawn-out, litigation-filled cacophony of the past two-and-a-half years.

The now four-year record of confusion and litigation makes clear that the process created by the 2014 amendment was deeply flawed and is in urgent need of substantive reforms. The next redistricting cycle will follow the 2030 Census and is now just a short seven years away. Without reform, New York will likely end up with the same sort of chaotic and unsatisfactory redistricting process it experienced following the 2020 census.

New York now has final maps in place for congressional and State Assembly districts drawn by the Commission and tweaked by the Legislature. The State Senate map was drawn by the state court. These maps will remain in place through the 2030 election cycle. Now that the post-2020 cycle dust has settled, we should consider what happened, what went wrong, what finally worked, and what to do before 2030.

The 2014 Constitutional Amendment

The adoption by voters of the 2014 constitutional amendment culminated a decade of reform efforts**.** The amendment, to promote impartiality, created a new ten-member Independent Redistricting Commission to prepare district lines and included strict eligibility criteria for the members of the Commission. Persons appointed to the Commission must not have, during the prior three-year period, held state legislative, congressional, or statewide elected office. The amendment provided that two commissioners must be appointed by each of the four top partisan legislative leaders from the Senate and Assembly (for a total of eight). The final two appointees, “shall not have been enrolled in the preceding five years in either of the two [largest] political parties” and are to be appointed by the first eight commissioners. This partisan selection process had the effect in 2021 of creating a partisan Commission consisting of five members who voted together on the Democratic side and five members who voted together on the Republican side, with no tiebreaker.

The 2014 amendment specified that the number of votes required for the Commission to adopt a redistricting plan depended upon which parties controlled the New York Senate and Assembly. This voting scheme was designed to ensure the minority party had a say in the final maps. If the same party controlled both houses (as is currently the case with two Democratic supermajorities), the plan must be approved by at least seven Commission members, including at least one member appointed by each of the legislative leaders. If different parties control each house, the plan must be approved by “at least seven members including at least one member appointed by the speaker of the assembly and one member appointed by the temporary president of the senate.” In practice, the voting scheme gave the minority party a veto over any plan recommended by the Commission.

If the Commission cannot reach seven votes on any plan, it is still able to submit to the Legislature the plan that received the highest number of votes. If more than one plan receives the same number of votes, “the commission shall submit all plans that obtained such number of votes.”

The 2014 amendment lacked clear guidance for drawing district lines. It set out a list of unprioritized and unranked criteria for drawing district lines that the Commission must follow. The absence of a ranking or prioritization was a major omission and left the Commission and ultimately the Legislature and courts without constitutional guidance or limitations for district lines.

The 2014 amendment contemplated that the Commission would get two separate opportunities to submit proposed sets of maps to the State Legislature for consideration. If the Legislature rejected the first submission, the Commission would regroup and submit a second set of maps.

The 2014 amendment anticipated litigation concerning district lines and required a decision by the trial court within 60 days. In fact, the trial court and appellate reviews were not speedy. They missed the 60-day deadline by large margins and helped contribute to the confusion.

The Legislature added a substantive provision to the constitutional amendment stating that any changes the Legislature made to a Commission map could not impact “more than two percent of the population of any district contained in such plan.” This limitation too proved unenforceable.

2020 Redistricting Cycle

The Independent Redistricting Commission had its first opportunity to carry out the new process in 2021, following the 2020 Census. The redistricting process got off to a bad start, however, by the delay in the census data due to the pandemic. The Commission's efforts were also delayed by Governor Andrew Cuomo's inappropriate attempt to control the Commission's budget and staffing. Governor Cuomo attempted to staff the Commission with SUNY employees whom he controlled. The Commission eventually gained an independent staff.

Once functioning, the Commission process fractured along political lines. The Commission could not agree on a single redistricting plan submission, so it submitted a partisan offering that included *two* sets of congressional and state legislative maps, one approved by Commission Republicans and one approved by Commission Democrats.

The Legislature rejected both the Republican and the Democratic maps and sent the process back to the Commission. The Commission, however, was utterly deadlocked and unable to reach an agreement. It failed to even submit a second round of proposed plans.

Without a second submission, the Democratic-controlled Legislature enacted its own congressional map. This action by the Legislature was later judged by the courts in 2022 to have been a critical mistake.

Several Republican voters immediately challenged the Democratic-controlled Legislature's congressional district map in *Harkenrider v. Hochul,* filed in rural Steuben County state Supreme Court (New York's trial court). They alleged that the congressional map was improperly enacted and politically gerrymandered by the Democratic-controlled Legislature in violation of the state constitution. Steuben County Supreme Court Justice Patrick F. McAllister agreed with the Republican plaintiffs. Judge McAllister ruled that the Legislature did not have authority to enact the map and found that the map was overtly partisan in favor of Democrats. He also found that the map violated one of the unprioritized constitutional criteria: that a map shall not favor or disfavor political parties or candidates.

The Democratic parties appealed, and the case reached the state's highest court, the Court of Appeals, which agreed with the Republican litigants and overturned the congressional map approved by the Democratic-controlled Legislature. The Court held in a 4-3 ruling that the congressional district plan was substantively and procedurally unconstitutional and sent the matter back to Judge McAllister to appoint a special master to redraw the congressional map.

Chief Judge Janet DiFiore, writing for the majority, ruled that the Legislature lacked the procedural authority under the constitutional redistricting process to act on its own without first rejecting a *second* Commission submission. The Court further faulted the Legislature for violating the 2012 statute enacted in conjunction with the 2014 amendment that had restricted the Legislature from making changes to Commission maps that would impact more than two percent of the population in any district. The majority ruled that the congressional map drawn by the Legislature was substantively unconstitutional as it was "drawn with impermissible partisan purpose."

Judges Michael Garcia, Madeline Singas, and Anthony Cannataro concurred with Chief Judge DiFiore, while Judges Shirley Troutman, Rowan Wilson, and Jenny Rivera wrote individual dissenting opinions.

The dissents favored the Legislature over the courts with respect to redistricting. One dissent argued that the court should have adopted a remedy that corresponded to the procedural error by giving the Legislature a full and reasonable opportunity to correct the maps rather than dictate a judicial remedy. The dissenting judges would have preferred to put the Legislature on a strict timetable and with limited power to amend the maps rather than give ultimate authority to a single trial court judge. The dissenting judges objected to subjecting New Yorkers to the possibility of ten years of district lines drawn by, as one dissenting judge put it, "an unelected individual, with no apparent ties to this State" (the media had reported extensively on the special master's background).

The dissenting judges would have upheld the Legislature's map. As one judge asserted, there was in fact no procedural violation because the Commission did submit two plans, they just happened to be submitted at once, and regardless, the Legislature is not required to approve a Commission plan as drafted.

The Court of Appeals' majority ruling nonetheless sent the matter back to Judge McAllister to appoint a special master. Judge McAllister chose Dr. Jonathan Cervas, a talented redistricting expert from Carnegie Mellon University and charged him to draw new district maps for the U.S. House of Representatives and State Senate districts. Working on a tight timeframe due to the 2022 election calendar, Dr. Cervas crafted new maps that Judge McAllister accepted and ordered to be used for the 2022 elections. The new congressional map saw Republican gains in several New York districts, though Republican candidates may have won new districts even if the rejected Democratic map had been used. Democrats, however, retained their supermajority in the State Senate under the court's map.

In June 2022, before the November 2022 congressional elections, a group of Democratic voters filed *Hoffmann v. IRC* in Albany County state Supreme Court, seeking to compel the Commission to return to the drawing board to fulfill its constitutional duty by submitting to the Legislature a second congressional map. State Supreme Court Judge Peter Lynch rejected the request to redraw congressional districts, ruling that the congressional mapping process was complete and could not be revisited until after the 2030 Census. Judge Lynch ruled that the Commission lacked authority to issue a second redistricting plan after the deadline set by the 2014 constitutional amendment.

The Democratic voters appealed, and the case also made its way to the state's highest court, the composition of which had changed since it handed down the *Harkenrider* decision. On December 12, 2023, in another 4-3 decision, the Court of Appeals this time sided with the Democratic litigants and ordered the Commission to "comply with its constitutional mandate by submitting to the legislature, on the earliest possible date, but in no event later than February 28, 2024, a second congressional redistricting plan." The date was chosen so that the Legislature and Governor could approve the districting plan for the 2024 election cycle.

Newly-appointed Chief Judge Rowan Wilson wrote the majority opinion. Drawing partially from the perspectives of the *Harkenrider* dissenting judges (including his own dissent), Chief Judge Wilson reasoned that court-drawn districts are disfavored because redistricting is predominantly a function of legislatures—a sentiment shared by numerous U.S. Supreme Court opinions. He also explained that courts should not be in the map-drawing business and court-drawn redistricting plans should be used "only to the extent it is required to remedy a violation of law." The majority — contrary to the Republican litigants' contention— ruled the *Harkenrider* decision was limited to only the 2022 election.

Judge Cannataro, who had been in the majority in the Harkenrider opinion, penned the dissent, in which Judges Garcia and Singas concurred. Judge Cannataro asserted that the judicial intervention in *Harkenrider* (the special master's plan) was consistent with the constitutional process and that the constitution mandated that the district lines approved in the earlier case should have remained in place until after the next U.S. Census in 2030.

The Commission, ordered by the second Court of Appeals decision, began work to develop a new congressional district map to send to the Legislature. Surprising to many, the Commission successfully completed its mission, and by a 9 to 1 vote, submitted a new plan.

Most of the Commission's work on the second plan took place behind closed doors, limiting public input. However, on December 28, 2023, the Commission held a short public meeting to fill a personnel vacancy and to formally re-engage the mapping consultants and a racial and ethnic minority voting rights expert who had worked with the Commission on the new Assembly map that was also the subject of similar earlier litigation. Several good government and voting rights groups criticized the lack of public hearings, arguing that the last public hearing was held in December 2021 and much had changed since then.

On February 15, 2024, the Commission sent a single, bipartisan congressional map to the Legislature along with enacting legislation, thus fulfilling its constitutional duty as ordered by the Court of Appeals' second opinion. Prior to the vote, Commission Chair Ken Jenkins noted that while the Commission did not hold additional public hearings prior to drafting this final submission, in October 2023 the Democratic commissioners had called for public input while the Court of Appeals' decision was pending. Chair Jenkins highlighted that this invitation yielded over 2,700 written submissions.

On February 27, 2024, the Legislature yet again rejected the bipartisan Commission map. The Legislature then drew its own map pursuant to the constitutional provision that permits the Legislature to amend the Commission map "as it deems necessary" subject to the Governor's approval. The Assembly and State Senate approved the new map (Chapter 92 of the Laws of 2024) with supermajority votes and support from several minority party legislators in both chambers.

The Legislature, in approving the new map, demolished its own rule on the population criteria, overriding the statute that prohibited the Legislature from changing any single Commission map district by more than two percent. That would have limited district changes by no more than about 15,000 out of 770,000 people. Instead, the map adopted by the Legislature changed some of the Commission-drawn districts by as much as nearly eight percent from the 2022 court-drawn map.

The new map went into effect in time for the November 2024 election cycle. The start of ballot petitioning for the June 25 primary, however, was delayed from February 27 to February 29, 2024. Republicans who had challenged the 2022 map have not sought judicial review of the 2024 map.

With approval of the new 2024 congressional map and no legal challenges on the horizon, the chaotic and prolonged post-2020 Census line-drawing process appears to have come to an end, two years later than anticipated by the 2014 constitutional amendment.

Redistricting Reform Still Necessary

New York State must reform its redistricting process before the 2030 cycle gets underway. Constitutional reforms are needed in three overall areas: a new redistricting process; tighter redistricting rules and criteria to be followed by the Commission; and standards to be followed by state courts in reviewing redistricting plans.

Redistricting Rules

The *Independent* Redistricting Commission is far from independent. As Albany County State Supreme Court Judge Patrick McGrath wrote in *Leib v. Walsh* (a challenge to the text of the 2014 ballot proposal before it went before voters), "the Commission cannot be described as 'independent' when eight of ten members are the handpicked appointees of the legislative leaders and the two additional members are essentially political appointees by proxy." The Commission is only independent by name, a strategic move by the drafters to make the public believe it was something it wasn't.

Additionally, because the Legislature was permitted to draft its own plan after twice rejecting Commission proposals, the Commission was more akin to an advisory commission than an independent one.

A new and improved redistricting process would involve a revamped commission composed of volunteer citizens who are not appointed by political leaders and who are selected after a robust vetting process by an independent actor. Two models could be considered: 1) A commission with final authority and fully independent of the Legislature, or 2) A bi-partisan commission with final authority and a neutral tiebreaker. With either of these two frameworks, congressional and state legislative maps would not be subject to approval by the State Legislature.

Prospective candidates for the commission could be "vetted" by a disinterested third party, such as the State Comptroller who, although an elected official, would serve a limited and narrowly defined administrative role. Furthermore, future commissions should be required to conduct all business, including map-

ping sessions, in full public view. No mapping sessions or other meetings should be conducted by small groups of commissioners with less than a quorum to avoid the state's Open Meetings Law requirements. The redistricting process should be transparent, fair, and accessible to the public, similar to how the process is conducted in California and Michigan where all actions are open to the public.

The 2014 amendment's rules for approving maps by the commission and the Legislature should be changed to permit simple state legislative majority approval (as is required to pass regular legislation) and the elimination of complicated voting rules controlled by the political party with a majority in the Assembly and Senate.

Voting by the commission should be structured much differently. The arcane rules establishing the approval process for new maps set out in the 2014 amendment should be scrapped in favor of majority voting by commission members. Membership should also be set at an odd number to assure a needed tie-breaker.

Adequate funding and staffing levels, independent from interference by the Governor, must be provided by the Legislature in the state budget. The Legislature can lend administrative assistance to the commission, but its operations and map drawing should be fully independent.

Obsolete provisions left in the state constitution from 1938 and earlier should be removed. The 2014 amendment left in place outdated and irrelevant language that only serves to confuse people. For example, confusing and hard to understand block-on-border restraints on State Senate districts are no longer relevant and should be eliminated. A new amendment should be written in clear language so it is understandable by the public.

Criteria

New York's constitution currently sets out the redistricting criteria in an unranked order, meaning there is no guidance as to which principles should be prioritized over others. As former Commission Chair David Imamura explained, one of the components of map-making that the 2021 commission struggled to agree upon was "how various communities of interest should be respected in accordance with the constitutional criteria." Navigating redistricting criteria is difficult in any scenario as the principles are often in conflict with one another, but without any guidance as to prioritization, it can prove impossible to comply with each criterion simultaneously.

To remedy this, criteria should be ranked in priority order, similar to requirements placed on the state's local government redistricting processes in the state's Municipal Home Rule Law. Prioritized criteria help guide decisions as higher ranked criteria are given greater weight and precedence over lower ranked criteria. Population equality, minority voting rights, a prohibition on partisan gerrymandering, and maintaining communities of interest should be the top-ranked criteria. This kind of prioritization has worked particularly well for New York City Councilmanic redistricting for over 30 years.

There should also be a permanent cap on the number of state senators, similar to the limit of the Assembly's 150 districts. Without a cap, future commissions and legislatures could manipulate the number of Senate districts for partisan purposes, as had been done for several decades up to the 2012 redistricting. A new amendment should also make permanent an end to so-called "prison gerrymandering," so that incarcerated individuals can be counted for congressional and state legislative districts from their homes of record before incarceration (the current state statute addressing this left out reallocation for congressional districts, limiting the change to the state legislative districts).

Court Review

The courts should be provided better guidance on the standard for reviewing redistricting plans. As Todd Breitbart and Jeff Wice pointed out in the 2016 book "New York's Broken Constitution," plaintiffs seeking judicial review of a map should only be required to demonstrate that a new map or the process by which it

was developed “is clearly erroneous in its application of the rules, not that the error resulted from an act of bad faith, and that they must prove this only by clear and convincing evidence, not beyond a reasonable doubt.”

The Legislature has already taken one important step toward reform. In 2023, it enacted a new statute that requires all judicial challenges to redistricting maps be filed in one of four counties (New York, Westchester, Albany, and Erie) in order to limit “judge shopping” for a favorable court. Further consideration could be given to have all challenges heard in the capital-based Albany County courts with direct appeals to the Court of Appeals.

Redistricting laws in California, Michigan, and Arizona can serve as statewide models. These states enacted redistricting reforms that are independent of state legislative approval. Recent redistricting reforms adopted in Syracuse and Albany County can also serve as models of commission efforts. These reforms created commissions that were mostly independent of the local legislatures and have been successful.

In light of the New York Court of Appeals holding in the *Hoffman* decision that under the current state constitution it is the responsibility of the Legislature and not the courts to draw maps, consideration should also be given to what would happen if a truly independent state commission failed to develop final maps. Some suggest that given this possibility, reform legislation should contemplate an appropriate role for the State Legislature in this scenario. That will likely be one of the major reform issues for debate. Since most of the final 2024 congressional map was similar to the Commission’s proposal (which was also similar to the 2022 court-drawn map), perhaps New York’s legislators should be more amenable to creating a completely independent process. The Assembly map approved in 2023 was also similar to the Commission map proposal.

When To Reform Redistricting?

To amend the state constitution, an identical amendment must be approved by two successively elected state legislatures before being submitted to the state’s voters for approval. Since a new amendment should be in place before 2029, the legislatures elected no later than in 2024 and 2026 must develop and approve an amendment so it can be approved by voters in the November 2028 election or sooner. Discussion is already underway to enact a new redistricting process and new proposals should be considered by the Legislature by next year. It’s important that the redistricting reform effort gets well underway before the 2025 state legislative session starts. After two years of chaos and uncertainty over the post-2020 maps, New York can ill-afford a repeat performance after 2030.

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Piper Benedict is a 2024 graduate of New York Law School.

← DOT Flags Impending Deadline for Restaurants to Apply for Outdoor Dining Program (https://www.citylandnyc.org/dot-flags-impending-deadline-for-restaurants-to-apply-for-outdoor-dining-program/)

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chosen for the office of president and vice president of the United States shall be entitled to vote in this state solely for such electors, provided such person is otherwise qualified to vote in this state and is not able to qualify to vote for such electors in any other state. The legislature may also, by general law, prescribe special procedures whereby every person who is registered and would be qualified to vote in this state but for his or her removal from this state to another state within one year next preceding such election shall be entitled to vote in this state solely for such electors, provided such person is not able to qualify to vote for such electors in any other state. (New. Added by vote of the people November 5, 1963; amended by vote of the people November 6, 2001.)

ARTICLE III
LEGISLATURE

[Legislative power]
Section 1. The legislative power of this state shall be vested in the senate and assembly.

[Number and terms of senators and assemblymen]
§2. The senate shall consist of fifty members[4], except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of one hundred and fifty members. The assembly members elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years. (Amended by vote of the people November 2, 1937; November 6, 2001.)

[Senate districts]
§3. The senate districts[5], described in section three of article three of this constitution as adopted by the people on November sixth, eighteen hundred ninety-four are hereby continued for all of the purposes of future reapportionments of senate districts pursuant to section four of this article. (Formerly §3. Repealed and replaced by new §3 amended by vote of the people November 6, 1962.)

[Readjustments and reapportionments; when federal census to control]
§4. (a) Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes, the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts. In the reapportionment of senate districts, no district shall contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

(b) The independent redistricting commission established pursuant to section five-b of this article shall prepare a redistricting plan to establish senate, assembly, and congressional districts every ten years commencing in two thousand twenty-one, and shall submit to the legislature such plan and the implementing legislation therefor on or before January first or as soon as practicable thereafter but no later than January fifteenth in the year ending in two beginning in two thousand twenty-two. The redistricting plans for the assembly and the senate shall be contained in and voted upon by the legislature in a single bill, and the congressional district plan may be included in the same bill if the legislature chooses to do so. The implementing legislation shall be voted upon, without amendment, by the senate or the assembly and if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without amendment. If approved by both houses, such legislation shall be presented to the governor for action.

If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. Within fifteen days of such notification and in no case later than February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan. Such legislation shall be voted upon, without amendment, by the senate or the assembly and, if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without amendment. If approved by both houses, such legislation shall be presented to the governor for action.

If either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary. All such amendments shall comply with the provisions of this article. If approved by both houses, such legislation shall be presented to the governor for action.

All votes by the senate or assembly on any redistricting plan legislation pursuant to this article shall be conducted in accordance with the following rules:

(1) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, approval of legislation submitted by the independent redistricting commission pursuant to subdivision (f) of section five-b of this article shall require the vote in support of its passage by at least a majority of the members elected to each house.

[4] State Law §123 sets forth current number of senators.

[5] State Law §124 currently sets forth 63 senate districts.

(2) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, approval of legislation submitted by the independent redistricting commission pursuant to subdivision (g) of section five-b of this article shall require the vote in support of its passage by at least sixty percent of the members elected to each house.

(3) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, approval of legislation submitted by the independent redistricting commission pursuant to subdivision (f) or (g) of section five-b of this article shall require the vote in support of its passage by at least two-thirds of the members elected to each house.

(c) Subject to the requirements of the federal constitution and statutes and in compliance with state constitutional requirements, the following principles shall be used in the creation of state senate and state assembly districts and congressional districts:

(1) When drawing district lines, the commission shall consider whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights. Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice.

(2) To the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants. For each district that deviates from this requirement, the commission shall provide a specific public explanation as to why such deviation exists.

(3) Each district shall consist of contiguous territory.

(4) Each district shall be as compact in form as practicable.

(5) Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. The commission shall consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest.

(6) In drawing senate districts, towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants. The requirements that senate districts not divide counties or towns, as well as the 'block-on-border' and 'town-on-border' rules, shall remain in effect.

During the preparation of the redistricting plan, the independent redistricting commission shall conduct not less than one public hearing on proposals for the redistricting of congressional and state legislative districts in each of the following (i) cities: Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties: Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk. Notice of all such hearings shall be widely published using the best available means and media a reasonable time before every hearing. At least thirty days prior to the first public hearing and in any event no later than September fifteenth of the year ending in one or as soon as practicable thereafter, the independent redistricting commission shall make widely available to the public, in print form and using the best available technology, its draft redistricting plans, relevant data, and related information. Such plans, data, and information shall be in a form that allows and facilitates their use by the public to review, analyze, and comment upon such plans and to develop alternative redistricting plans for presentation to the commission at the public hearings. The independent redistricting commission shall report the findings of all such hearings to the legislature upon submission of a redistricting plan.

(d) The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations, and for the formation of assembly districts.

(e) The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.

A reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order. (Amended by vote of the people November 6, 1945; further amended by vote of the people November 4, 2014.)

[Apportionment of assemblymen; creation of assembly districts]

§5. The members of the assembly shall be chosen by single districts and shall be apportioned pursuant to this section and sections four and five-b of this article at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

The assembly districts[6], including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town

[6] State Law §121 sets forth 150 assembly districts.

at any time on or before March first, nineteen hundred forty-six. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same. The court shall render its decision within sixty days after a petition is filed. In any judicial proceeding relating to redistricting of congressional or state legislative districts, any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part. In the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities. (Amended by vote of the people November 6, 1945; further amended by vote of the people November 4, 2014.)

[Definition of inhabitants]

§5-a. For the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term "inhabitants, excluding aliens" shall mean the whole number of persons. (New. Added by vote of the people November 4, 1969.)

[Independent redistricting commission]

§5-b. (a) On or before February first of each year ending with a zero and at any other time a court orders that congressional or state legislative districts be amended, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices. The independent redistricting commission shall be composed of ten members, appointed as follows:

(1) two members shall be appointed by the temporary president of the senate;

(2) two members shall be appointed by the speaker of the assembly;

(3) two members shall be appointed by the minority leader of the senate;

(4) two members shall be appointed by the minority leader of the assembly;

(5) two members shall be appointed by the eight members appointed pursuant to paragraphs (1) through (4) of this subdivision by a vote of not less than five members in favor of such appointment, and these two members shall not have been enrolled in the preceding five years in either of the two political parties that contain the largest or second largest number of enrolled voters within the state;

(6) one member shall be designated chair of the commission by a majority of the members appointed pursuant to paragraphs (1) through (5) of this subdivision to convene and preside over each meeting of the commission.

(b) The members of the independent redistricting commission shall be registered voters in this state. No member shall within the last three years:

(1) be or have been a member of the New York state legislature or United States Congress or a statewide elected official;

(2) be or have been a state officer or employee or legislative employee as defined in section seventy-three of the public officers law;

(3) be or have been a registered lobbyist in New York state;

(4) be or have been a political party chairman, as defined in paragraph (k) of subdivision one of section seventy-three of the public officers law;

(5) be the spouse of a statewide elected official or of any member of the United States Congress, or of the state legislature.

(c) To the extent practicable, the members of the independent redistricting commission shall reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence and to the extent practicable the appointing authorities shall consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission.

(d) Vacancies in the membership of the commission shall be filled within thirty days in the manner provided for in the original appointments.

(e) The legislature shall provide by law for the compensation of the members of the independent redistricting commission, including compensation for actual and necessary expenses incurred in the performance of their duties.

(f) A minimum of five members of the independent redistricting commission shall constitute a quorum for the transaction of any business or the exercise of any power of such commission prior to the appointment of the two commission members appointed pursuant to paragraph (5) of subdivision (a) of this section, and a minimum of seven members shall constitute a quorum after such members have been appointed, and no exercise of any power of the independent redistricting commission shall occur without the affirmative vote of at least a majority of the members, provided that, in order to approve any redistricting plan and implementing legislation, the following rules shall apply:

(1) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, approval of a redistricting plan and implementing legislation by the commission for submission to the legislature shall require the vote in support of its approval by at least seven members including at least one member appointed by each of the legislative leaders.

(2) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, approval of a redistricting plan by the commission for submission to the legislature shall require the vote in support of its approval by at least seven members including at least one member appointed by the speaker of the assembly and one member appointed by the temporary president of the senate.

(g) In the event that the commission is unable to obtain seven votes to approve a redistricting plan on or before January first in the year ending in two or as soon as practicable thereafter, the commission shall submit to the legislature that redistricting plan and implementing legislation that garnered the highest number of votes in support of its approval by the commission with a record of the votes taken. In the event that more than one plan received the same number of votes for approval, and such number was higher than that for any other plan, then the commission shall submit all plans that obtained such number of votes. The legislature shall consider and vote upon such implementing legislation in accordance with the voting rules set forth in subdivision (b) of section four of this article.

(h) (1) The independent redistricting commission shall appoint two co-executive directors by a majority vote of the commission in accordance with the following procedure:

(i) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, the co-executive directors shall be approved by a majority of the commission that includes at least one appointee by the speaker of the assembly and at least one appointee by the temporary president of the senate.

(ii) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, the co-executive directors shall be approved by a majority of the commission that includes at least one appointee by each of the legislative leaders.

(2) One of the co-executive directors shall be enrolled in the political party with the highest number of enrolled members in the state and one shall be enrolled in the political party with the second highest number of enrolled members in the state. The co-executive directors shall appoint such staff as are necessary to perform the commission's duties, except that the commission shall review a staffing plan prepared and provided by the co-executive directors which shall contain a list of the various positions and the duties, qualifications, and salaries associated with each position.

(3) In the event that the commission is unable to appoint one or both of the co-executive directors within forty-five days of the establishment of a quorum

of seven commissioners, the following procedure shall be followed:

(i) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, within ten days the speaker's appointees on the commission shall appoint one co-executive director, and the temporary president's appointees on the commission shall appoint the other co-executive director. Also within ten days the minority leader of the assembly shall select a co-deputy executive director, and the minority leader of the senate shall select the other co-deputy executive director.

(ii) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, within ten days the speaker's and temporary president's appointees on the commission shall together appoint one co-executive director, and the two minority leaders' appointees on the commission shall together appoint the other co-executive director.

(4) In the event of a vacancy in the offices of co-executive director or co-deputy executive director, the position shall be filled within ten days of its occurrence by the same appointing authority or authorities that appointed his or her predecessor.

(i) The state budget shall include necessary appropriations for the expenses of the independent redistricting commission, provide for compensation and reimbursement of expenses for the members and staff of the commission, assign to the commission any additional duties that the legislature may deem necessary to the performance of the duties stipulated in this article, and require other agencies and officials of the state of New York and its political subdivisions to provide such information and assistance as the commission may require to perform its duties. (New. Added by vote of the people November 4, 2014.)

[Compensation, allowances and traveling expenses of members]

§6. Each member of the legislature shall receive for his or her services a like annual salary, to be fixed by law. He or she shall also be reimbursed for his or her actual traveling expenses in going to and returning from the place in which the legislature meets, not more than once each week while the legislature is in session. Senators, when the senate alone is convened in extraordinary session, or when serving as members of the court for the trial of impeachments, and such members of the assembly, not exceeding nine in number, as shall be appointed managers of an impeachment, shall receive an additional per diem allowance, to be fixed by law. Any member, while serving as an officer of his or her house or in any other special capacity therein or directly connected therewith not hereinbefore in this section specified, may also be paid and receive, in addition, any allowance which may be fixed by law for the particular and additional services appertaining to or entailed by such office or special capacity. Neither the salary of any member nor any other allowance so fixed may be increased or diminished during, and with respect to, the term for which he or she shall have been elected, nor shall he or she be paid or receive any other extra compensation. The provisions of this section and laws enacted in compliance therewith shall govern and be exclusively controlling, according to their terms. Members shall continue to receive such salary and additional allowance as heretofore fixed and provided in this section, until changed by law pursuant to this section. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended by vote of the people November 4, 1947; November 3, 1964; November 6, 2001.)

[Qualifications of members; prohibitions on certain civil appointments; acceptance to vacate seat]

§7. No person shall serve as a member of the legislature unless he or she is a citizen of the United States and has been a resident of the state of New York for five years, and, except as hereinafter otherwise prescribed, of the assembly or senate district for the twelve months immediately preceding his or her election; if elected a senator or member of assembly at the first election next ensuing after a readjustment or alteration of the senate or assembly districts becomes effective, a person, to be eligible to serve as such, must have been a resident of the county in which the senate or assembly district is contained for the twelve months immediately preceding his or her election. No member of the legislature shall, during the time for which he or she was elected, receive any civil appointment from the governor, the governor and the senate, the legislature or from any city government, to an office which shall have been created, or the emoluments whereof shall have been increased during such time. If a member of the legislature be elected to congress, or appointed to any office, civil or military, under the government of the United States, the state of New York, or under any city government except as a member of the national guard or naval militia of the state, or of the reserve forces of the United States, his or her acceptance thereof shall vacate his or her seat in the legislature, providing, however, that a member of the legislature may be appointed commissioner of deeds or to any office in which he or she shall receive no compensation. (New. Derived in part from former §§7 and 8. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 2, 1943.)

[Time of elections of members]

§8. The elections of senators and members of assembly, pursuant to the provisions of this constitution, shall be held on the Tuesday succeeding the first Monday of November, unless otherwise directed by the legislature. (Formerly §9. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Powers of each house]

§9. A majority of each house shall constitute a quorum to do business. Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members; shall choose its own officers; and the senate shall choose a temporary president and the assembly shall choose a speaker. (Formerly §10. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938. Amended by vote of the people November 5, 1963.)

[Journals; open sessions; adjournments]

§10. Each house of the legislature shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days. (Formerly §11. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Members not to be questioned for speeches]

§11. For any speech or debate in either house of the legislature, the members shall not be questioned in any other place. (Formerly §12. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Bills may originate in either house; may be amended by the other]

§12. Any bill may originate in either house of the legislature, and all bills passed by one house may be amended by the other. (Formerly §13. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Enacting clause of bills; no law to be enacted except by bill]

§13. The enacting clause of all bills shall be "The People of the State of New York, represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill. (Formerly §14. Renumbered by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Manner of passing bills; message of necessity for immediate vote]

§14. No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final

Redistricting Law 2020

Prepared by the National Conference of State Legislatures

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

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

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

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Foreword

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Acknowledgments

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 8 | Federalism and Redistricting: Ted Booth.

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

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

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

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

Executive Summary

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

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

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

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

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

What Is Redistricting?

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

CHAPTER 1: THE CENSUS

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

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

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

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

CHAPTER 2: EQUAL POPULATION

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

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

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

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

CHAPTER 3: RACIAL AND LANGUAGE MINORITIES

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

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

In general, the VRA prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any U.S. citizen's right to

vote on account of race, color or status as a member of a language minority group. Section 2 is specific in prohibiting vote dilution—when minority voters are dispersed or "cracked" among districts so that they are ineffective as a voting bloc, or so concentrated or "packed" in a district as to constitute an excessive majority.

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

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

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

CHAPTER 4: REDISTRICTING PRINCIPLES AND CRITERIA

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

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

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

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

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

CHAPTER 5: REDISTRICTING COMMISSIONS

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

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

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

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

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

CHAPTER 6: PARTISAN REDISTRICTING

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

likely to continue in state courts, and states are likely to reform their own line-drawing processes, as a handful of states already have done.

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

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

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

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

CHAPTER 7: LEGISLATIVE PRIVILEGE IN REDISTRICTING CASES

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

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

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

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

CHAPTER 8: FEDERALISM AND REDISTRICTING

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

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

In this edition, the content of this chapter has been significantly updated because of two monumental cases decided since 2010. The first is *Shelby County v. Holder* (2013), where the Supreme Court struck down Section 4 of the VRA, effectively precluding the enforcement of Section 5. Section 5 requires that, for certain "covered" jurisdictions, all state law electoral practice changes must be pre-cleared before going into effect by a special federal district court in Washington, D.C., or by the U.S. Department of Justice. Section 4 set forth the formula which determined the jurisdictions which would be subject to Section 5. The Court concluded that the "federalism costs" (a statutory scheme that treats some states differently than others) of the formula no longer could be justified.

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

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

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

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

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

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

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

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

CHAPTER 10: ENACTING A REDISTRICTING PLAN THROUGH THE LEGISLATIVE PROCESS

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

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

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

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

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

1 | The Census

INTRODUCTION

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

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

THE LEGAL UNDERPINNING OF THE CENSUS

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

U.S. Constitutional Provisions

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

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

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

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

Federal Law—For Apportionment of Congressional Seats

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

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

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

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

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

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

EXHIBIT 1.1 Congressional Apportionment, 2000 and 2010

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

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

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

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

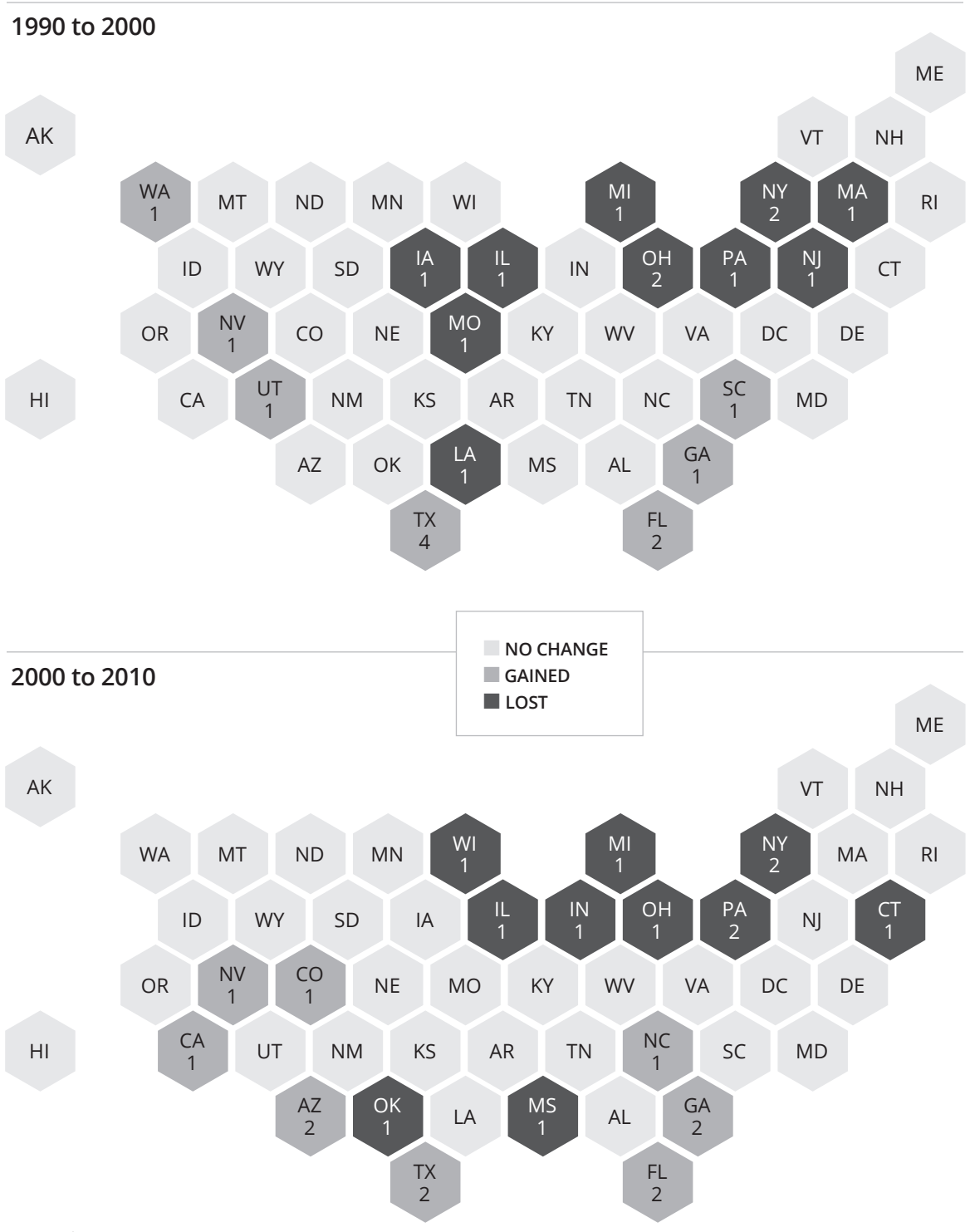
Seat	2000		2010	
436	Utah	-856	North Carolina	-15,754
437	New York	-47,249	Missouri	-15,029
438	Texas	-86,273	New York	-107,058
439	Michigan	-50,888	New Jersey	-63,277
440	Indiana	-37,056	Montana	-10,002

Source: Election Data Services Inc., 2019

Federal Law—For Redistricting by the States

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

EXHIBIT 1.2 Congressional Apportionment Maps



Source: Election Data Services Inc.

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

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

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

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

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

State Laws—Use of the Census for Redistricting

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

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

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

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

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

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

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

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

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

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

HOW THE CENSUS WILL COLLECT AND REPORT DATA

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

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

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

Census Operations

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

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

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

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

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

Adjusting the Census: Sampling, Undercounts and Overcounts

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

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

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

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

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

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

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

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

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

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

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

Data Collection and the New Internet Self-Response Option

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

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

Nonresponse and Imputation

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

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

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

Building the Census Address List

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

American Community Survey

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

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

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

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

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

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

2020 Census Redistricting Data Program

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

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

EXHIBIT 1.3 2020 Census Redistricting Data Program Phases

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

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

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

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

Residence Criteria and Situations

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

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

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

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

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

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

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

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

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

Adjustments to federal census regarding prisoners

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

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

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

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

Wording for Questions on Race and Ethnicity

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

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

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

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

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

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

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

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

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

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

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

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

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

The Proposed (but not Adopted) Citizenship Question

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

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

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

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

CENSUS-RELATED LEGAL ISSUES

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

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

CONCLUSION

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

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

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

Burns v. Richardson[28]

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

Kirkpatrick v. Preisler[31]

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

Ely v. Klahr[32]

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

Wisconsin v. City of New York[34]

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

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

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

Utah v. Evans[36]

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

Evenwel v. Abbott[39]

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

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

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

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

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

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

CHAPTER NOTES

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

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

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

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

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

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

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

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

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

10. U.S. Census Bureau, "Census Bureau Releases Estimates of Undercount and Overcount in the 2010 Census," https://www.census.gov/newsroom/releases/archives/2010_census/cb12-95.html.

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

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

13. *Ibid*. at 467.

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

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

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

17. U.S. Census Bureau, "Group Quarters/Residence Rules," https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html.

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

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

20. The Voting Rights Act (VRA), 52 USCS § 10303 (2006).

21. The Voting Rights Act (VRA), 52 USCS § 10503 (2006).

22. U.S. Department of Commerce (DoC), "Using Two Separate Questions for Race and Ethnicity in 2018 End-to-End Census Test and 2020 Census" (Washington, D.C.: U.S. DoC, Jan. 26, 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02.pdf.

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

24. *Ibid*.

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

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

27. See note 4.

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

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

30. *Ibid*. at 90-92.

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

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

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

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

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

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

37. *Ibid*. at 457.

38. *Ibid*. at 473-74.

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

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

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

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

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

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

2 | Equal Population

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- State redistricting statutes are not subject to the stricter standard of Article 1, Section 2, that is applied in congressional redistricting cases,[13] and

- Minor deviations from mathematical equality do not make out a prima facie case under the Equal Protection Clause.[14]

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

MEASURING POPULATION EQUALITY AMONG DISTRICTS

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

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

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

EXHIBIT 2.1 Statistical Terminology for Redistricting

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

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

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

Source: NCSL 2019

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

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

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

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

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

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

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

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

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

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

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

Justifications for Population Deviations in Congressional Maps

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

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

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

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

- If plaintiffs succeed in meeting their burden, the state must "bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal."[27] "...Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory..."[28]

- "The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the [s]tate's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors."[29]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rational State Policies that Could Justify Exceeding the 10% Standard

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

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

Maintaining Political Subdivision Lines and Deviation for Legislative Districts

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

Further, the Court stated:

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

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

PROVING DISCRIMINATION WITHIN THE 10% RANGE

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

Regional Interests and Incumbent Protection

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

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

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

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

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

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

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

Compliance with the Voting Rights Act

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

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

CONCLUSION

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

CASES RELATING TO EQUAL POPULATION (IN CHRONOLOGICAL ORDER)

Reynolds v. Sims[59]

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

Wesberry v. Sanders[61]

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

Kirkpatrick v. Preisler[62]

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

Gaffney v. Cummings[64]

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

Mahan v. Howell[66]

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

White v. Regester[67]

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

White v. Weiser[69]

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

Chapman v. Meier[72]

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

Connor v. Finch[73]

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

Karcher v. Daggett[74]

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

Larios v. Cox[75]

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

Tennant v. Jefferson County[76]

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

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

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

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

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

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

CHAPTER NOTES

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

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

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

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

5. *Ibid*. at 2.

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

7. *Ibid*. at 7-8.

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

9. *Ibid*. at 569.

10. *Ibid*. at 579.

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

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

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

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

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

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

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

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

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

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

21. *Ibid*.

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

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

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

25. *Ibid*. at 738.

26. *Ibid.* at 730–731.

27. *Ibid.* at 731.

28. *Ibid*. at 740.

29. *Ibid*. at 741.

30. *Ibid*. at 731.

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

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

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

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

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

36. *Ibid*. at 765.

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

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

39. *Ibid*. at 418.

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

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

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

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

44. *Ibid*. at 329.

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

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

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

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

49. *Ibid.* at 1352.

50. *Ibid.*

51. *Ibid*. at 1347.

52. *Ibid.* at 1329-31.

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

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

55. *Ibid.* at 1306.

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

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

58. *Ibid*. at 1309-10.

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

60. *Ibid*. at 579.

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

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

63. *Ibid*. at 531.

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

65. *Ibid*. at 745.

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

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

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

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

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

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

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

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

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

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

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

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

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

3 | Racial and Language Minorities

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

THE 15TH AMENDMENT: A BRIEF SUMMARY

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

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

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

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

THE VOTING RIGHTS ACT: A BRIEF SUMMARY

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

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

Section 2 of the VRA

Section 2 prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any U.S. citizen's right to vote on account of race, color or status as a member of a language minority group.[20] Section 2 was originally a basic restatement of the 15th Amendment as it applies to all jurisdictions. Based on a 1982 amendment, courts apply a "totality of circumstances" test for determining whether a challenged practice results in an abridgment of the right to vote. A violation of Section 2 is established if:

> *"[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of ... [a racial, color, or language minority class] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected ... is one circumstance*

> *which may be considered:* Provided, *That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."*[21]

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

Section 5 of the VRA

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

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

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

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

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

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

Section 3 (Bail–In or Pocket Trigger Provision)

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

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

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

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

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

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

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

RACIAL GERRYMANDERING CHALLENGES UNDER THE 14TH AMENDMENT

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

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

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

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

Standing

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

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

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

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

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

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

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

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

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

Proving a Racial Gerrymander

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

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

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

gerrymanders, the Court has made it clear that it "never has held that race-conscious state decision making is impermissible in *all* circumstances."[60] Indeed, the Court acknowledges that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race-consciousness does not lead inevitably to impermissible race discrimination."[61]

PROOF THAT RACE WAS THE PREDOMINANT MOTIVE IN REDISTRICTING IS SUFFICIENT

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

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

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

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

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

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

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

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

EVIDENCE FOR PROVING A RACIAL GERRYMANDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Strict Scrutiny

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

DOES THE STATE HAVE A COMPELLING STATE INTEREST?

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

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

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

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

IS THE REDISTRICTING PLAN NARROWLY TAILORED?

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

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

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

CHALLENGES UNDER THE VOTING RIGHTS ACT

The Evolution of Section 2 Cases

Since the *Shelby County* decision, Section 2 of the VRA remains applicable to all jurisdictions. Section 2 prohibits any state or political subdivision from imposing any voting qualification, standard, practice or procedure that results in the denial or abridgment of any U.S. citizen's right to vote on account of race, color or status as a member of a language minority group. Courts apply the "totality of circumstances" standard for determining a violation of Section 2.

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

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

Discriminatory Effect Versus Discriminatory Intent

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

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

THORNBURG V. GINGLES

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

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

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

1. The extent of the history of official discrimination touching on the minority group participation in the democratic process;

2. Racially polarized voting;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti single-shot provisions, or other voting practices that enhance the opportunity for discrimination;

4. Denial of access to the candidate slating process for members of the group;

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

6. Whether political campaigns have been characterized by racial appeals;

7. The extent to which members of the protected class have been elected;

8. Whether there is a significant lack of responsiveness by elected officials to the particular needs of the group; and

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

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

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

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

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

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

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

POST-*GINGLES* ISSUES AND QUESTIONS

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

Application of the *Gingles* Preconditions

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

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

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

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

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

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

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

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

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

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

Application of the Totality of Circumstances Test

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Source: NCSL, 2019

CONCLUSION

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

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

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

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

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

City of Mobile v. Bolden[155]

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

Thornburg v. Gingles[156]

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

Growe v. Emison[157]

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

Voinovich v. Quilter[158]
Pursuant to the Ohio Constitution, a reapportionment board proposed a plan that included eight majority-minority districts. It was alleged that the plan illegally packed black voters into a few districts where they constituted a supermajority. The Supreme Court said a state is free to draw majority-minority districts, if doing so does not otherwise violate the law. Further, plaintiff's Section 2 claims failed because they did not satisfy the third prong of the *Gingles* test: sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice.

Shaw v. Reno[159]
North Carolina gained an additional congressional seat and a new district was created after the 1990 census. The new district was extremely narrow and over 150 miles long. Plaintiffs argued that a North Carolina congressional district was so bizarrely shaped that it amounted to a "racial gerrymander," which they claimed violated the Equal Protection Clause. The Court rejected the state's defense that the district was justified as a so-called "majority-minority district," holding that the Voting Rights Act required no such district to be drawn where one did not previously exist. The Supreme Court recognized a right to participate in a color-blind electoral process and a new claim of "racial gerrymandering." The Court said it is a legitimate Equal Protection claim to assert that a district is so extremely irregular on its face that it could rationally be viewed only as an effort to segregate races for purposes of voting, without regard to traditional districting principles and without sufficiently compelling justification.

Johnson v. De Grandy[160]
In Florida, plaintiffs objected to a legislative redistricting plan because it was possible to draw additional districts in Dade County that would have Hispanic majorities. The state argued that, because the number of majority-minority districts was proportionate to the number of minorities in the population, there could be no vote dilution. The Supreme Court upheld the plan where minority voters had formed effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population, even though more minority districts could have been drawn. The Court said Section 2 did not require maximization of minority districts. However, the Court issued caveats about the role of proportional representation: dilution. While proportionality is an indication that minority voters have equal political and electoral opportunity in spite of racial polarization, it is no guarantee, and it cannot serve as a shortcut to determining whether a set of districts unlawfully dilutes minority voting strength.

United States v. Hays[161]
The state of Louisiana created a new congressional districting plan that contained two majority-minority districts. One of the two districts, District 4, was of irregular shape and contained all or part of 28 parishes and five of Louisiana's largest cities. A group of District 4 voters challenged the districting plan as being a racial gerrymander under the state and federal constitutions and the Voting Rights Act. While an appeal was pending, the Louisiana Legislature repealed the districting plan and enacted

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

Miller v. Johnson[162]

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

Bush v. Vera[163]

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

Easley v. Cromartie[164]

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

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

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

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

Bartlett v. Strickland[167]

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

Shelby County v. Holder[168]

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

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

Alabama Legislative Black Caucus v. Alabama[169]

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

Wittman v. Personhuballah[170]

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

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

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

Cooper v. Harris[172]

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

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

Abbott v. Perez[173]

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

North Carolina v. Covington[174]

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

CHAPTER NOTES

1. U.S. Const. Amend. XIV, § 1.

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

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

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

5. *Shaw I* at 640.

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

7. *Ibid.* at 643.

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

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

10. *Ibid.*

11. *Ibid.*

12. U.S. Const. Amend. XV, § 1.

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

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

15. *Ibid.* at 313.

16. *Ibid.* at 314.

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

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

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

20. See 52 U.S.C. § 10301(a).

21. 52 U.S.C. § 10301(b).

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

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

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

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

26. See note 19.

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

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

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

30. See 52 U.S.C. § 10303(b).

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

32. *Ibid.*

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

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

35. *Ibid.* at 556-57.

36. *Ibid.* at 557.

37. *Ibid.* at 534.

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

39. 52 U.S.C. § 10302(a), (b), (c).

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

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

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

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

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

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

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

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

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

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

50. *Ibid.* at 744-45.

51. *Ibid.* at 745.

52. *Ibid.*

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

54. *Ibid.*

55. *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

67. *Ibid.*

68. *Ibid.* at 1265.

69. *Ibid.*

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

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

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

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

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

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

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

77. *Ibid.* at 913.

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

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

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

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

82. *Ibid.* at. 962.

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

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

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

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

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

88. *Ibid.* at 962.

89. *Ibid.* at 962-63.

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

91. *Ibid.*

92. *Ibid.*

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

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

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

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

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

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

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

100. *Ibid.* at 916.

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

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

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

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

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

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

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

108. *Ibid*. at 46.

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

110. *Ibid*.

111. *Ibid.* at 36-37.

112. *Ibid*. at 50-51.

113. *Ibid.* at 80.

114. *Ibid*. at 77.

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

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

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

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

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

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

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

122. *Ibid.* at 6.

123. *Ibid*. at 14.

124. *Ibid*. at 20.

125. *Ibid*. at 24.

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

127. *Ibid*. at 432

128. *Ibid*. at 433.

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

130. *Ibid.* at 1469.

131. *Ibid.* at 1472.

132. *Ibid.*

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

134. *Ibid.* at 1017.

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

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

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

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

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

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

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

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

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

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

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

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

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

148. *Ibid.* at 57.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

166. *Ibid*. at 435.

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

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

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

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

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

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

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

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

4 | Redistricting Principles and Criteria

INTRODUCTION

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

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

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

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

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

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

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

FEDERAL REQUIREMENTS

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

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

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

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

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

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

See Chapter 2, Equal Population, for more information.

Prohibition on Racial Discrimination

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

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

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

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

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

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

TRADITIONAL REDISTRICTING PRINCIPLES

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

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

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

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

Geographic Principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Role of Geographic Criteria in Courts

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

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

Other State Principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Traditional Redistricting Principles

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

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

Emerging Criteria

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

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

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

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

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

This criterion often is subordinate to others.

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

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

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

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

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

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

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

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

PRIORITIZING PRINCIPLES

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

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

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

CONCLUSION

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

CASES RELATING TO PRINCIPLES AND CRITERIA (IN CHRONOLOGICAL ORDER)

Reynolds v. Sims[56]

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

Wesberry v. Sanders[57]

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

Karcher v. Daggett[58]

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

Davis v. Bandemer[61]

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

Miller v. Johnson[62]

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

Bush v. Vera[63]

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

Abrams v. Johnson[64]

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

Larios v. Cox[65]

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

as keeping districts compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts.

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

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

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

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

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

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

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

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

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

Cooper v. Harris[71]

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

CHAPTER NOTES

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

2. *Ibid*. at 568.

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

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

5. *Ibid*. at 577-81.

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

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

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

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

10. *Ibid*. § 10301.

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

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

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

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

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

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

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

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

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

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

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

22. *Ibid.* at 433.

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

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

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

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

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

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

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

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

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

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

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

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

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

36. *Ibid.* at 972-76.

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

38. *Ibid*. at 412.

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

40. *Ibid*. at 84.

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

42. *Ibid*.

43. *Ibid*.

44. *Ibid*.

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

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

47. *Ibid.*

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

49. Fla. Const. art. III, §§ 20, 21.

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

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

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

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

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

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

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

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

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

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

60. *Ibid.* at 755-56.

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

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

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

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

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

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

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

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

69. *Ibid.* at 375.

70. *Ibid.* at 375-76.

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

5 | Redistricting Commissions

INTRODUCTION

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

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

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

TYPES OF COMMISSIONS

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

1. **Commissions that have primary authority** to create and adopt maps that become law. These maps, once adopted by the commission, are not reviewed by the legislature. At publication, 14 states have commissions with primary responsibility for legislative maps, and eight have commissions with primary responsibility for congressional maps.

2. **Advisory commissions** that make recommendations—including submitting initial plans—to the legislature. The legislature retains authority to adopt the plans that become law, and the legislature can use, modify or ignore the work of the advisory commission. The initial plans developed by a commission can be important in establishing the overall architecture of a redistricting plan, even if they are not adopted. Six states have advisory commissions for legislative plans, five of which also advise on congressional plans.

3. **Back-up commissions** that become active only if the legislature is either unable to agree on a redistricting plan or misses the deadline to do so. In most cases, these commissions are appointed by the legislature, although in Ohio some members are constitutionally designated.

See Exhibit 5.1 for details on commissions.

In Maryland, the governor has a constitutional mandate to deliver a state legislative map to the General Assembly. To do this, longstanding practice has involved forming an advisory commission for the governor. The Maryland governor's advisory commission is not included in the NCSL list of commissions because its existence is not specifically required by law, but is voluntarily formed each decade to satisfy the state constitutional requirement that Maryland conduct public hearings on the map.

EXHIBIT 5.1 Redistricting Commissions in Effect for the 2020 Cycle

REDISTRICTING COMMISSIONS	LEGISLATIVE DISTRICTS	CONGRESSIONAL DISTRICTS
Commissions that have primary responsibility	Alaska,* Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Michigan, Missouri,** Montana,* New Jersey, Ohio, Pennsylvania, Washington	Arizona, California, Colorado, Hawaii, Idaho, Michigan, Montana, New Jersey, Washington
Advisory commissions (that submit their plans to the legislature for approval)	Maine, New York, Rhode Island, Vermont,* Virginia, Utah	Maine, New York, Rhode Island, Virginia, Utah
Back-up commissions (that come into being only if the legislature is unable to complete its work)	Connecticut, Illinois, Mississippi, Oklahoma, Texas	Connecticut, Indiana, Ohio

*Alaska, Montana and Vermont have had only one congressional seat through the 2010 cycle; therefore, they are not addressed in the congressional column.

**Missouri has two legislative commissions, one for the Senate and one for the House.

Source: NCSL, 2019

Many observers mistakenly believe Iowa has a commission, but that is inaccurate. In Iowa, legislative staff draw the maps for the General Assembly's consideration. The General Assembly may approve or reject plans but not modify them. If it votes the first set down, the staff submit revised plans. If those are rejected, staff submit a third set, and these can be modified by the General Assembly if it so desires. See NCSL's webpage on Iowa's redistricting method, www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx.

HOW COMMISSIONS ARE CREATED

Three methods exist for creating a commission. The first is by a legislature crafting a constitutional amendment to create a commission and referring it to the voters for approval. The second is through statute, which has been used in the case of some advisory or back-up commissions but for no commissions with primary authority. The third is through a citizens' initiative, which 24 states permit. Rules for how this is done are state-specific.

- The majority of commissions with primary authority to create legislative and/or congressional maps were established through a legislative referral, also known as a legislative referendum. Ohio and Colorado used this avenue most recently. In 2015, Ohio voters approved a

legislatively referred constitutional amendment to create its legislative commission, and in 2018 voters approved another legislatively referred constitutional amendment that created a hybrid model for congressional redistricting that employs a mix of legislative authority and a commission to assist if needed, should strict standards for bipartisan approval not be met. In 2018, Colorado voters approved two amendments to create commissions to undertake congressional and legislative redistricting.

- Commissions with primary responsibility have been established in four states via a citizens' initiative, in which citizens gathered signatures to put the idea to a vote of the people. See Appendix G, Redistricting Commissions, for details.

Twice, courts have addressed the use of citizens' initiatives in regard to redistricting. In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' referendum that was filed in response to the Ohio General Assembly's enactment of a plan for congressional districts.[1] In supporting a lower court's decision allowing the referendum to go forward, the Court noted that Congress had specifically authorized states to adopt plans for districts "in the manner provided by the laws [of each state]...."[2] Because a referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state.[3]

Whether a state can empower a commission to draw its congressional districts was decided by the U.S. Supreme Court in 2015 in *Arizona State Legislature v. Arizona Independent Redistricting Commission*. In that case, the Arizona Legislature maintained that the Arizona commission could not have authority over its congressional district lines on the basis that the Elections Clause of the U.S. Constitution empowered state legislatures only with the authority to draw congressional districts. The Court rejected the Arizona Legislature's argument and held that a state's legislative power to regulate the time, place and manner of federal elections—such as creating a commission—includes alternate legislative processes outlined in a state's constitution such as the citizen's initiative: "We resist reading the Elections Clause to single out federal elections as the one area in which States may not use citizen initiatives as an alternative legislative process."[4]

SCOPE OF RESPONSIBILITY FOR CONGRESSIONAL, LEGISLATIVE OR BOTH TYPES OF MAPS

Most commissions are charged with drawing state and congressional districts, but several are charged only with legislative districts. The Alaska and Montana commissions have not drawn congressional districts since, to date, both states have had only one district. Should Montana receive a second congressional seat after the 2020 census and reapportionment, its commission will draw those districts as well.

In Missouri, separate commissions draw state Senate and state House lines. With the passage of a citizens' initiative in 2018, a state demographer will provide maps to these two existing commissions for their approval.

Some commissions have responsibility for other state entities. California's commission is also responsible for the state's Board of Equalization, and Utah's commission will be responsible for its state Board of Education.

ELIGIBILITY TO SERVE ON A COMMISSION

The eligibility requirements to serve on a redistricting commission vary considerably among the states. Many commissions permit the appointing authority to select anyone who is a registered voter in the state. In these states it would not be uncommon to have legislators selected to serve.

Several commissions are specific about who can and cannot serve based on potential conflicts of interest. Most frequently, this prohibition applies to anyone who has held an elected office. Arizona, for example, specifies that anyone who has held elected office in the previous three years does not qualify to serve on the commission. In California, that limit is set at 10 years. Both states also specify that a commissioner may not run for any public office in their respective state for a period of three and 10 years after redistricting, respectively.

States also may stipulate that commissioners cannot be a political party officer, lobbyist or a family member of anyone who falls into these categories. Some applicants are asked to disclose campaign contributions above a certain amount during a specific timeframe preceding the selection process.

California adds a list of attributes it seeks in its applicants, such as an appreciation of the diversity of the state and analytical ability. Other more newly created commissions do so as well.

See individual state laws and constitutions for the varying eligibility requirements, or Appendix G for a summary of membership requirements and prohibitions.

METHOD OF SELECTION FOR COMMISSIONERS

The most common selection method is by appointment, typically by legislative leaders, although governors and political parties can have responsibility for some appointments. In recent years, the state auditor or other state officials also may have a role.

It also is common for certain office holders to be designated as ex officio members. Ohio's commission designates the governor, state auditor and secretary of state as members, along with others. In Arkansas, the governor, secretary of state and attorney general are the sole members of its commission.

In Arizona and California, the selection process includes initial vetting by state agencies.

- In Arizona, the Commission on Appellate Court Appointments is responsible for soliciting and reviewing applications for the redistricting commission. It is made up of five attorneys, 10 members of the public and the chief justice of the Arizona Supreme Court, who serves as chair. The five attorney members are nominated by the board of governors of the state bar of Arizona and appointed by the governor, with the advice and consent of the Senate. The members of the public are appointed by the governor, with the advice and consent of the Senate.

  The commission winnows the applicants down to a pool of 25 qualified applicants, including 10 from each of the two largest parties and five who are unaffiliated. That applicant pool then is sent to the Arizona Legislature, where each of the four legislative leaders chooses a commission member. These four appointed commissioners then select a fifth member from the unaffiliated pool of applicants, who serves as chair of the commission.

- California's process is more complex. The selection process starts with the state auditor, which is a quasi-executive position appointed by the governor. California's constitution then requires the auditor to eliminate applicants with obvious conflicts of interest from the initial pool. The remaining applicants are invited to fill out a detailed supplemental application and document their qualifications on three major selection criteria: their ability to be impartial, appreciation for California's diverse demographics and geography, and relevant analytical skills.

  Three independent auditors from the Bureau of State Audits review the applications and select 120 of the most qualified applicants from three sub-pools: 40 Democrats, 40 Republicans, and 40 who are not affiliated with a major party. These 120 applicants are interviewed in person. Following the interviews, the total pool is reduced to 60, again with equal sub-pools. These 60 names are sent to legislative leadership, where leaders from the majority and minority parties can remove up to 24 applicants from the pool.

  After the sub-pools are created, the state auditor randomly draws the names of three Democrats, three Republicans and two "Decline to State" or unaffiliated applicants to become the first eight members of the commission. These eight then select the final six commissioners, two from each group.

Newly created commissions in Colorado and Michigan will use similar selection processes for commission members. In Colorado, a panel of retired judges serves. In Michigan, the secretary of state's office serves this screening role.

COMPOSITION OF COMMISSIONS

The size of each commission is established in each state's constitution. Arkansas' is smallest, with three members, and Missouri's is largest, where a commission of 18 draws the state Senate lines, and a separate commission of 10 draws the House lines. California's commission has 14 members.

In some states, the two major political parties are assured an equal number of commissioners. For Idaho's six-member commission, majority and minority legislative leaders appoint the first four members, and the next two are appointed by the chairs of the state's two largest political parties, all but ensuring an equally divided bipartisan commission.

Several commissions explicitly include members who are unaffiliated with either party. In Arizona, for instance, each of the majority and minority leaders in both chambers select a member from a pool, and these four select an unaffiliated person as the chair of the commission. In California, of the 14 members, five are Republicans, five are Democrats and four are unaffiliated. Colorado's commission will have 12 members, including four Republicans, four Democrats and four commissioners who are unaffiliated with a major party.

Geographic diversity of commission members is required in Arizona, California and Colorado as well.

The term, "independent," is applied to some commissions; however, that term can have different meanings. For some, "independent commissions" are those on which members of the legislature cannot serve. For others, "independent commissions" have no elected officials, former elected officials, party officials or lobbyists. Ultimately, even in the states with commissions that are considered to be the most independent, independence is not absolute. In Arizona, California and Colorado, for example, legislative leaders can appoint or strike candidates from pools created by other entities. In New York, a court rejected the use of the term "independent" in its independent redistricting commission ballot description as misleading because the ultimate outcome was subject to control by the Legislature.[5]

VOTE REQUIREMENT TO PASS A PLAN

For most commissions, a simple majority is required to enact a plan. For some of the more recently adopted commissions however, a requirement for broader support has been adopted. For legislative plans in Ohio, a simple majority of the commission is required, but of that simple majority, two affirmative votes are required by commission members from each of the two largest political parties

in the General Assembly, thus assuring some measure of bipartisan support. In California, nine of the commission's 14 members must approve a map. In Colorado, an affirmative vote by eight of the 12 members is required, including at least two from the unaffiliated members.

PUBLIC INPUT REQUIREMENTS

For more recently adopted commissions, requirements for public input have been included in the constitutional amendments. These have included specifying the number of hearings to be held across the state, as well as any requirements for public comment avenues. Public input can be helpful in establishing what are communities of interest and where they are located.

In Colorado, a redistricting plan must be publicly available for at least 72 hours before the commission may vote on it. Other states have similar requirements.

CRITERIA

Commissions also must comply with their state's redistricting criteria and legal requirements. For commissions created since 2000, the plans have included amendments to criteria and emerging criteria related to competitiveness or not favoring or disfavoring incumbents, parties or candidates. Some states, such as California, have ranked their criteria in order of priority. More on principles and criteria is available in Chapter 4, Redistricting Principles and Criteria.

CONCLUSION

Traditionally, and still overwhelmingly, state legislatures are responsible for redistricting for congressional and legislative seats. And yet, in an increasing number of states, commissions have been delegated that responsibility. In the 2010 decade in particular, movement toward commissions picked up considerably. Commissions, like legislatures, must comply with federal standards and state laws.

Several commissions have been created by citizens' initiatives, but more have been created by legislative referrals. Although each commission is unique, they can be grouped into three categories: commissions with primary authority, advisory commissions, and back-up commissions.

How members are selected, who is eligible to serve, what criteria they must meet, and what vote is required to pass a plan are some of the many ways commissions can vary.

CASES RELATING TO COMMISSIONS

Ohio ex rel. Davis v. Hildebrant[6]

In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' initiative. The citizens filed in response to the Ohio General Assembly's enactment of a plan for 22 additional congressional districts. The voters disapproved the redistricting act by a referendum vote. In supporting a decision that the referendum should go forward, the Court noted that Congress had specifically authorized states to adopt plans for districts in the manner provided by the laws of each state. The referendum law was part of the legislative power of the state, made so by the state constitution. Since the referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state. "For redistricting purposes, *Hildebrant* thus established, 'the Legislature' did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people."[7]

Arizona State Legislature. v. Arizona Independent Redistricting Commission[8]

In 2000, Arizona voters adopted an amendment to the Arizona Constitution via ballot initiative that removed the Legislature's authority to draw legislative and congressional districts. The amendment vested this power instead with the Independent Redistricting Commission (IRC). In 2012, the Arizona Legislature challenged the constitutionality of removing what they considered to be their constitutional powers and giving them to another entity. The argument was based on the Elections Clause of the U.S. Constitution, which gives this power to the legislatures to draw congressional districts. The Supreme Court held that the Constitution protects the IRC created by the Arizona public initiative vote. The Supreme Court held that the reference to the "Legislature" in the Elections Clause encompassed citizen initiatives in states like Arizona, where the state constitution explicitly includes the people's right to bypass the Legislature and make laws directly through such initiatives. Although "[t]he Framers may not have imagined the modern initiative ... the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power."[9] The decision found that the initiative process adopted by the state allows for the commission's map to become the official map.

CHAPTER NOTES

1. *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565 (1916).

2. *Ibid.* at 568.

3. *Ibid.* at 570; U.S. Const. Art. 1, sec. 4. Interestingly, the Court cites the legislative history of Congress' addition, 1911, of the phrase "in the manner provided by the laws thereof" in the federal law authorizing states to establish procedures for redistricting, concluding that the phrase was inserted explicitly to ensure that redistricting plans could be subject to a state's initiative or referendum procedure. *Hildebrant*, 241 U.S. at 569-70.

4. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

5. *Leib v. Walsh, 992 N.Y.S.2d 637 (Sup. Ct. 2014).*

6. *Ohio ex rel. Davis v. Hildebrant,* 241 U.S. 565 (1916).

7. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n,* 135 S. Ct. 2652, 2666 (2015).

8. *Ibid.*

9. *Ibid.* at 2674.

6 | Partisan Redistricting

INTRODUCTION

Partisan redistricting, often called "partisan gerrymandering," refers to the practice of drawing electoral district lines to intentionally benefit one political party over others. While courts historically have recognized that politics is inherent in the act of redistricting, the question of when drawing district lines for partisan purposes violates federal or state law has persisted for decades. The question had always been whether there was a judicially manageable measurement or standard for a federal court to apply in these cases. Without a workable standard, partisan gerrymandering cases would not be justiciable by a court.

In June 2019, after several decades of searching for a standard with no success, the U.S. Supreme Court declared partisan gerrymandering to be a "political question" that is not appropriate for federal judicial action. This chapter reviews:

- Justiciability of electoral maps in federal courts
- Justiciability of partisanship in redistricting
- The U.S. Supreme Court decision that closes the door on justiciability for partisan redistricting under the U.S. Constitution
- The potential for partisanship challenges on state constitutional grounds

JUSTICIABILITY OF ELECTORAL MAPS IN FEDERAL COURTS

Up until 1962, the U.S. Supreme Court considered "apportionment issues" as generally a matter of policy for the legislative branch and thus "non-justiciable."[1] The intrinsically political nature of the redistricting process made the Court reticent to hear claims against redistricting maps; in 1946, the Court warned that it was a "political thicket"[2] into which courts should not enter. In light of this ruling, challenges to electoral maps generally were regarded as non-justiciable political questions until the 1960s.[3]

Equal population and voting rights concerns prompted the Court to acknowledge in 1962 in *Baker v. Carr* that Equal Protection challenges to electoral maps were justiciable. The Court began actively considering redistricting challenges after this,[4] resulting in a line of decisions regarding population equality (one person, one vote) and, after passage of the Voting Rights Act of 1965, minority voting rights. In these foundational cases, the Court had determined that protecting certain individual rights (the right to vote and the right to equal treatment regardless of race) limited a state's freedom to redraw (or in some cases decline to redraw) electoral lines, requiring a balance between the political prerogative of a legislature and the equal protection rights of individuals. See Chapters 2, Equal Population, and 3, Racial and Language Minorities, for detailed discussions of Equal Population and Voting Rights Act cases.

In many of these early cases adjudicating equal population and voting rights claims, the Court spoke (without deciding) on the question of whether redistricting plans could be impermissibly partisan or "minimize or cancel out the voting strength of racial or political elements."[5] Nevertheless, the Court always invalidated these maps on the basis of equal population or other voting rights concerns, despite the partisan undertones evident in many of the cases.

Partisanship in redistricting would not garner the full attention of the Court again for several decades.

JUSTICIABILITY OF PARTISANSHIP IN REDISTRICTING

In *Davis v. Bandemer*,[6] a majority of the justices agreed that, in order for the Court to adjudicate these claims, a reliable standard of measurement would be necessary. The case, brought by a group of Democrats, challenged Indiana's 1980-cycle legislative plans, arguing that the maps unconstitutionally diluted their votes on account of their party affiliation.[7] For a successful claim, the *Bandemer* majority required proof of intentional discrimination against an identifiable group and an actual discriminatory effect on that group. Unconstitutional partisan gerrymandering would occur when it "consistently degrades a voter's or group of voters influence on the political process as a whole."[8] The Court acknowledged that partisan gerrymandering claims were justiciable (in other words, they were not political questions outside of the purview of a court) with the caveat that justiciability rested on finding a workable standard to first, differentiate between constitutionally permissible and impermissible partisan line-drawing, and second, to measure the extent to which doing so disadvantaged a political group. Thus, the justiciability of partisan gerrymandering is connected to whether a workable standard can be found to adjudicate the claim.

Going forward, developing a workable legal standard proved difficult. The traditional partisan gerrymandering claims were based on the 14th Amendment, but for many years after declaring this category of cases justiciable, no federal court declared a map an unconstitutional partisan gerrymander,

mainly because no satisfactory legal standard or measurement presented itself for determining when the inherently political process of drawing maps became so excessive that it violated the Constitution.

Nearly two decades later, in *Vieth v. Jubelirer*,[9] after accepting the partisan gerrymander claim (or, as the Court called it in this case, the political gerrymandering claim) as a justiciable one, a plurality of justices gave up on finding a workable standard. The *Vieth* plurality opinion noted that lower courts applying the general discriminatory intent and effect test that was supported by a plurality in *Bandemer* all had failed to find a partisan gerrymander during the years between *Bandemer* and *Vieth*—the same result as if the claim had been nonjusticiable.[10]

> *"Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by* Bandemer *exists. . . . [n]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that* Bandemer *was wrongly decided."*[11]

The Court's difficulty stemmed from the fact that, unlike racial gerrymanders, partisan gerrymanders are not created based on a suspect class such as that of race. Under the 14th Amendment, minority voters are protected from unwarranted classifications based on race. In the political context, party affiliation has no equivalent protection under the 14th Amendment. Indeed, the Supreme Court has recognized legislatures' broad authority to redistrict with partisan motive.[12] Although the *Bandemer* plurality had previously recognized, in principle, that there is some limitation on this authority under the Equal Protection Clause, defining these limits proved difficult.

According to the *Vieth* plurality, because a "judicially manageable" standard for considering a partisan gerrymander had not been found to exist, this category of cases was not, after all, "justiciable" by any court. Justice Kennedy concurred in the Court's decision to reverse the lower court, but departed from the plurality on the justiciability issue. He held out the possibility that perhaps the First Amendment would be an effective vehicle for the Court's measurement problem when it came to the partisan gerrymander in future cases.

In his concurrence, Justice Kennedy cautioned the Court on two points: 1) suitable standards for measuring the burden a given partisan classification imposes on representational rights are critical to court intervention; and 2) "[because] no such standard ha[d] emerged in that case [it] should not be taken to prove that none will emerge in the future . . . in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation."[13]

Specifically, Justice Kennedy's concurrence outlined the possibility that a workable standard existed in the Court's free speech jurisprudence. In his view, the First Amendment was more appropriate for litigating partisan gerrymandering cases because it offered a more prospective and balanced approach to determining injury. Equal Protection theory under the 14th Amendment proved to be too categorical by requiring discriminatory intent and effect to be proved in election outcomes or potential outcomes. First Amendment theory offered the possibility of expanding the inquiry into every component of party activity with an eye on whether a particular map burdens the associational rights of individuals and political parties.

Kennedy's concept spurred a resurgence in partisan gerrymandering claims that featured a First Amendment claim. Many cases were filed under this evolving First Amendment framework, including cases in Maryland,[14] Michigan,[15] Ohio,[16] North Carolina[17] and Wisconsin.[18]

THE U.S. SUPREME COURT DECISION THAT CLOSES THE DOOR ON JUSTICIABILITY FOR PARTISAN REDISTRICTING UNDER THE U.S. CONSTITUTION

In June 2019, the Supreme Court's decision in two consolidated cases foreclosed partisan redistricting claims based on the First and 14th amendments, the Elections Clause, and Article 1, Section 2, of the Constitution.

The first case, *Rucho v. Common Cause* from North Carolina, involved a challenge against the state's congressional map drawn by a Republican-controlled legislature. The second case, *Benisek v. Lamone* from Maryland, involved a challenge to the state's Sixth Congressional District drawn by a Democratic-controlled legislature. In both cases, the lower federal district court held the challenged district(s) to be unconstitutional partisan gerrymanders under both the First and 14th amendments.

In the consolidated case, known as *Rucho*,[19] the Court set out its reasoning for why there is no workable standard under the U.S. Constitution from which a partisan gerrymandering claim can be adjudicated. Key to its analysis is the unique role that partisanship plays in redistricting and elections in general. The decision grappled with the adversarial role of parties inherent in our political system of government and how this is at odds with developing a coherent theory of fairness in redrawing election boundaries.

The Founding Fathers Intended for State Legislatures and Congress to Share Responsibility for Addressing Controversies in Redistricting

Since *Bandemer*, establishing a framework in the courts for distinguishing between constitutional and unconstitutional partisan gerrymandering has proved unsuccessful. The *Rucho* Court found that constitutional history confirms that controversies in drawing congressional electoral boundaries was an issue assigned to state legislatures in the first instance, with ultimate authority reserved for Congress. The Court explained that "[a]t no point was there a suggestion that the federal courts had a role to play."[20]

> *"The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961)."*[21]

Measuring Fairness Has Proven to Be a Political Question Beyond the Reach of Federal Courts

According to the *Rucho* Court, the fundamental difficulty with formulating a standard for adjudicating partisan gerrymandering claims is determining what is "fair" in a politically adversarial system of government. The Court pointed out that "there is a large measure of 'unfairness' in any winner-take-all system;" thus, "the initial difficulty in settling on a 'clear, manageable and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context."[22] The single-member district system and winner-take-all election format for electing representatives in the United States is a reflection of the nation's rejection of proportional representation for political parties, and the Court has on many occasions made clear that the U.S. Constitution does not guarantee proportional representation of political parties.[23] Without "proportionality" as a measure of fairness, the Court was unable to fashion any rational framework for making objective determinations of political fairness in districting.

Several possibilities for measuring fairness had been introduced in lower court proceedings and offered by dissenting Justices, but the Court found that "deciding among just these different visions of fairness . . . poses basic questions that are political, not legal."[24] For example, if fairness is meant to mean a greater number of competitive districts, making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. In the Court's words, "'[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.'"[25]

The idea of fairness requiring as many safe seats for each party as possible—an approach discussed in *Bandemer* and *Gaffney*—also was rejected because it "comes at the expense of competitive districts and of individuals in districts allocated to the opposing party."[26] The often-discussed approach of adhering to traditional districting criteria also is unworkable as a standard according to the Court because traditional criteria such as compactness and contiguity "cannot promise political neutrality."[27] For instance, the "natural political geography" of a state can lead to lopsided partisan advantages among

districts, given the fact that "urban electoral districts are often dominated by one political party."[28] A decision under this standard of fairness would "unavoidably have significant political effect, whether intended or not."[29]

Beyond Defining Fairness, Measuring Fairness Is Not Within the Competencies of the Court

The determinative question in the partisanship context has been: at what point does permissible partisanship become unfair, or more precisely, unconstitutional? Or, as the Court cast it, "How much is too much?"[30]

The Court demonstrated the difficulty of measuring partisanship, as well as determining a threshold, in terms of the standards of fairness that had been offered. In the traditional criteria context, the question would be "how much deviation from those traditional criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria?"[31] In the context of competitive districts as the standard, the measure would contemplate the question of how close the split needs to be for the district to be considered competitive.[32] Thus, even assuming the Court could define fairness in the political context, it has found "no discernible and manageable standards for deciding whether there has been a violation." [33]

The Lower Court's Equal Protection Analysis Did not Define a Reliable Standard or Measure for Partisanship Claims

Absent any workable definition or measure of fairness, the Court assessed the *Rucho* district court's intent and effects test that it used to determine that North Carolina's 2016 congressional map was a partisan gerrymander. The district court had required plaintiffs to prove that map drawers had the predominant intent to "subordinate adherents of one political party and entrench a rival party in power."[34] Plaintiffs also were made to prove discriminatory effect by showing "[vote dilution] of a disfavored party in a particular district—by virtue of cracking or packing— [that] is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party."[35]

Upon review, the Court held that this intent and effects test under the 14th amendment's Equal Protection Clause was insufficient. First, the Court pointed out that "predominant partisan intent" is permissible. Unlike predominant intent in racial gerrymandering cases, securing partisan advantage is not inherently suspect, nor is it constitutionally impermissible.[36] In addition, requiring that a plaintiff show that the partisan vote dilution is "likely to persist" into future elections—to the extent that an elected representative from the favored party in the district will be apathetic to the concerns of constituents of the disfavored party—was a precarious test:

> *"[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites 'findings' on matters as to which neither judges nor anyone else can have any confidence."* [W]*e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." And the test adopted by the* Common Cause *court[37] requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread."[38]* (internal citations omitted)

First Amendment Theory Does not Offer a Workable Standard to Distinguish Impermissible from Permissible Partisanship in Redistricting

Both district courts concluded that the districting plans at issue violated the plaintiffs' First Amendment right to association. Evidence offered included difficulty raising money, attracting candidates and mobilizing voters, and a general lack of enthusiasm, indifference to voting and sense of disenfranchisement.[39] A basic three-part test was used by both district courts: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden.[40]

The Supreme Court, however, rejected the notion that mere political viewpoint discrimination against supporters of the opposing party is sufficient harm to support a claim under the First Amendment. In the Court's view, "under that theory, *any* level of partisanship in districting would constitute an infringement of their First Amendment rights." Further, the Court pointed out the difficulty—if not the impossibility—of measuring the "chilling effect or adverse impact" on any First Amendment activity:[41]

> *"How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? . . . These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation."[42]*

In concluding that partisan gerrymandering is a political question outside the reach of the federal judiciary, the Court made the point that its decision on justiciability did not imply that excessive partisan line-drawing is an acceptable practice:

> *"Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," Arizona State Legislature, 576 U. S., at ___ (slip op., at 1), does not mean that the solution lies with the federal*

> *judiciary. . . Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions."*[43]

Even though the *Rucho* Court established that the U.S. Constitution does not provide a suitable remedy for federal courts to consider, it acknowledged that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."[44] See Exhibit 6.1 for a timeline of Partisan Redistricting Decisions.

EXHIBIT 6.1 Timeline of Partisan Redistricting Decisions

1946	Supreme Court generally finds "apportionment" cases non-justiciable. *Colegrove v. Green*
1962	Supreme Court decides Equal Protection claims regarding apportionment maps are justiciable. Noting that, if "discrimination is sufficiently shown, the right to relief under the Equal Protection Clause is not diminished by the fact that the discrimination relates to political rights." *Baker v. Carr*
1986	Supreme Court declares partisan gerrymandering claims to be justiciable in theory. In practice, courts were unsuccessful in determining a workable legal standard to adjudicate these claims. *Davis v. Bandemer*
2004	A plurality of justices on the Supreme Court determine that partisan gerrymandering claims are nonjusticiable because no reliable standard exists to determine whether a map is unconstitutionally gerrymandered for partisan advantage. *Vieth v. Jubilier*
2016	A Wisconsin federal district court invalidates the states' legislative districts based on both the First and 14th amendments. *Gill v. Whitford*
2018-2019	Federal courts invalidate redistricting maps in Maryland, Michigan, North Carolina and Ohio, based on the First and 14th amendments. The Pennsylvania Supreme Court invalidates the Pennsylvania congressional map on state constitutional grounds. The U.S. Supreme Court denies certiorari in *Common Cause v. Rucho,* holding that this category of claims are not justiciable in federal courts.

Source: NCSL, 2019

The Potential for Partisanship Challenges on State Constitutional Grounds

With *Rucho* foreclosing claims based on partisanship in redistricting in federal courts, future plaintiffs and reformers likely may turn to state courts. The *Rucho* Court noted "[n]umerous States are actively addressing the issue through state constitutional amendments and legislation placing power to draw electoral districts in the hands of independent commissions, mandating particular districting criteria for their mapmakers, or prohibiting drawing district lines for partisan advantage."[45]

Since 2010, state courts in Pennsylvania[46] and Florida[47] overturned maps as partisan gerrymanders on state constitutional grounds. In Florida, the state Supreme Court found both the congressional and state Senate map to be partisan gerrymanders in violation of that state's constitutional amendments adopted

in 2010 prohibiting the "intent to favor or disfavor a political party or an incumbent."[48] In Pennsylvania, however, the state Supreme Court's ruling rested upon a state constitutional provision known as a "free and equal elections clause" that does not specifically address electoral maps. See sidebar.

Free and Equal Election Clauses

Thirty states have some version of a "free and equal" election clause in their constitutions. Arizona,[49] Arkansas,[50] Delaware,[51] Illinois,[52] Indiana,[53] Kentucky,[54] Oklahoma,[55] Oregon,[56] Pennsylvania,[57] South Dakota,[58] Tennessee,[59] Washington[60] and Wyoming[61] use the exact phrase, "free and equal." Other states have different wording with similar meanings. See NCSL's webpage, "Free and Fair Election Clauses in State Constitutions," www.ncsl.org/research/redistricting/free-equal-election-clauses-in-state-constitutions.aspx.

In 2018, the Pennsylvania Supreme Court invalidated the state's 18 congressional districts drawn by a Republican-controlled General Assembly in 2011. The court's opinion emphasized at the outset that, while the federal Constitution may not supply a remedy to the partisan gerrymandering conundrum, the Pennsylvania Constitution's free and fair elections clause did.

> *". . . our founding document is the ancestor, not the offspring, of the federal Constitution. We conclude that, in this matter, it provides a constitutional standard, and remedy, even if the federal charter does not. Specifically, we hold that the 2011 Plan violates Article I, Section 5—the Free and Equal Elections Clause—of the Pennsylvania Constitution."*[62]

The court held that the 2011 map not only subordinated traditional redistricting principles to gain an unfair partisan advantage, but also undermined voters' ability to exercise their right to vote freely and fairly.

It observed that any map that could not be shown to comply with traditional redistricting requirements as a statistical matter is sufficient to establish that it violates the free and equal elections clause of Pennsylvania's Constitution. Much of the evidence regarding nonconformity with traditional principles involved the lack of compactness and excessive splits of local jurisdiction boundaries. The court commented on the overall objective of the state constitution's free and fair elections clause by noting that its purpose was to "prevent dilution of an individual's vote by mandating that the power of his or her vote . . . be equalized to the greatest degree possible with other Pennsylvania citizens."

The U.S. Supreme Court declined certiorari in the case.[63] A special master directed by the state Supreme Court completed a remedial map in February 2018.

In 2019, a lower court in North Carolina held that the state legislative maps violated the equal protection, free elections, freedom of speech and freedom of assembly clauses of North Carolina's Constitution. *Common Cause v. Lewis* is the first state court decision on partisan redistricting since the U.S. Supreme Court's ruling in *Rucho*. At the time of publication, it is unknown whether the decision will be appealed.

These state court decisions have the potential to persuade courts in other states—many of which have a similar clause in their constitutions—to ascribe similar rights to aggrieved voters in future partisan gerrymandering cases.

CONCLUSION

The Supreme Court has closed the door on federal court review of partisan gerrymandering claims on the grounds that they are nonjusticiable political questions. According to the Court, "Federal judges have no license to reallocate political power between the two major political parties, with . . . no legal standards to limit and direct their decisions."[64]

The Court did not express the view, however, that excessive partisan line-drawing was acceptable or that it was compatible with democratic principles. Instead, the Court pointed to recent actions by states to address this issue and the possibility of congressional action.

CASES RELATING TO PARTISAN GERRYMANDERING (IN CHRONOLOGICAL ORDER)

Colegrove v. Green[65]

This suit was filed in federal court to restrain Illinois elections officers from arranging for a congressional election under an electoral map that had not been redistricted since 1901. The suit alleged that, by reason of later changes in population, the congressional districts created by the 1901 Illinois law lacked compactness of territory and approximate equality of population in violation of the U.S. Constitution and in conflict with the Reapportionment Act of 1911, as amended. The Court held that the Reapportionment Act had been superseded by the 1929 act, which did not include compactness and population equality as requirements, and that these types of cases are nonjusticiable political questions. "Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[66]

Baker v. Carr[67]

The Tennessee General Assembly had failed to reapportion seats in either legislative chamber since 1901. By 1960, population shifts in Tennessee made a vote in a small rural county worth 19 votes versus one vote in a large urban county. For decades, the U.S. Supreme Court declined repeated invitations to enter the "political thicket" of redistricting (*Colegrove v. Green*.)[68] This Court, for the first time, held

that a federal district court had jurisdiction over reapportionment claims and that claims alleging a map violated the Equal Protection Clause of the 14th Amendment are justiciable by courts. The Court distinguished its previous holding in *Colegrove* by indicating that decision had been based on the Guaranty Clause of the U.S. Constitution.

Fortson v. Dorsey[69]

In 1965, registered voters in Georgia challenged Georgia's 1962 Senatorial Reapportionment Act, which apportioned the state's 54 senatorial seats mostly along existing county lines. Thirty-three of the senatorial districts were comprised of portions of one to eight counties each, and voters in these districts elected senators by a district-wide vote. The remaining 21 senatorial districts were wholly contained within each of the seven most populous counties; however, voters in these districts elected senators at large by a county-wide vote instead of within individual districts. The Court held that the Equal Protection Clause does not require single-member districts, and that a redistricting plan that includes at-large voting in multi-district counties did not, on its face, deny residents in those counties a vote approximately equal in weight to that of voters in a single-member district. The court cautioned that the Equal Protection Clause would prohibit voting schemes similar to the one at issue if they "operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population."[70]

Karcher v. Daggett[71]

This case was an equal population challenge to the New Jersey Legislature's 1982 congressional plan that had a total deviation of 3,674 people, or 0.6984%.[72] The Supreme Court held that parties challenging a congressional plan bear the burden of proving that population differences among districts were not a good-faith effort to draw districts of equal population. If the plaintiffs carry their burden, the state then must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate state objective. While the case also included an allegation of political gerrymandering of the districts, the Court did not directly rule this claim. In his concurrence, however, Justice Stevens pointed to evidence in the record that the decision-making process leading to adoption of the challenged plan was highly partisan. His concurrence went on to lay out how political gerrymandering could violate the Equal Protection Clause as "[another] species of vote dilution."[73]

Gaffney v. Cummings[74]

Connecticut voters challenged the 1971 redrawing of Senate and House districts by the Apportionment Board on the basis of excessive population deviations among districts as a result of a bipartisan gerrymander of Connecticut legislative districts. The maximum deviation between districts was 7.83% for the House and 1.8% for the Senate. Under the plan, the Apportionment Board "took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats."[75] The Court ruled that the plan's deviations alone did not constitute a violation under the Equal Protection

Clause, nor did the board's use of a "political fairness principle" to roughly approximate the statewide political strength of the two major parties.

Davis v. Bandemer[76]

Democrats challenged Indiana's 1981 state legislative reapportionment plan, claiming it was a political gerrymander prohibited by the Equal Protection Clause of the 14th Amendment. While the Supreme Court found "political gerrymandering to be justiciable,"[77] by courts in general, it reversed the trial court's ruling that the Indiana map was a political gerrymander because evidence at trial was insufficient to establish an Equal Protection Clause violation. The Court found that the key evidentiary basis for the trial court's decision—lack of proportional representation—was insufficient to prove unconstitutional discrimination. Plaintiffs had relied on the results of a single election to support their claim, which the Court stated was unsatisfactory. The Court explained that unconstitutional political gerrymandering occurs only when the electoral system operates as a whole to consistently degrade or disadvantage effective participation by a voter or group of voters based on political affiliation.

Vieth v. Jubelirer[78]

The plaintiffs, registered Democratic voters, challenged Pennsylvania's congressional redistricting plan as a political gerrymander in violation of Article I of the U.S. Constitution and the Equal Protection Clause. The majority of justices in this case held that this particular challenge failed to make out a violation. Four of the five justices in the majority went further, stating that they believed no reliable standard existed for adjudicating partisan gerrymandering claims and, as a result, this category of claims are nonjusticiable political questions that are not addressable by federal courts. However, the fifth justice in the majority—Kennedy—did not go that far. In his view, a workable standard for assessing partisan gerrymandering claims could be developed, possibly under the First Amendment.

Larios v. Cox[79]

In 2004, the Supreme Court summarily affirmed a Georgia district court ruling in *Larios v. Cox* that Georgia's state legislative district plan violated the one-person, one-vote principle based on the Equal Protection clause of the 14th Amendment.[80] While the new lines were drawn to create districts with population deviations of less than 10%, the districts were found to be "systematically and intentionally created" to under-populate certain districts and over-populate others for the partisan advantage of Democratic candidates. The Court found that favoring certain geographic areas and protecting Democratic incumbents were not rational, evenly applied state policies.

League of United Latin Am. Citizens v. Perry[81]

In this challenge to Texas' 2003 congressional map, plaintiffs included a partisan gerrymandering claim in addition to various other legal claims regarding the legislatures' mid-decade redistricting subsequent to the election of a newly Republican-controlled legislature. The Supreme Court upheld the lower district ruling that found no partisan gerrymander. The Court declined to accept the plaintiff's

theory that mid-decade redistricting creates a presumption that the resulting maps are the outcome of a purely partisan motive, and reiterated the need to prove discriminatory effect regardless of the circumstances surrounding the map-drawing process. This includes showing an "actual" burden on the representational rights of plaintiffs, a burden that can be measured by a reliable standard.

Common Cause v. Rucho[82]

Plaintiffs alleged that North Carolina's 2016 congressional plan constituted a partisan gerrymander. The legislative defendants did not dispute that the North Carolina General Assembly intended for the 2016 plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates, nor that the plan had its intended effect. Rather, they argued that a partisan gerrymander was not prohibited by the U.S. Constitution. On remand, the three-judge district court held that at least one of the plaintiffs residing in each of the state's 13 congressional districts had standing to assert a partisan vote dilution challenge under the Equal Protection Clause, and that 12 of the 13 districts in the 2016 plan violated the Equal Protection Clause, the First Amendment and Article I of the U.S. Constitution. The court enjoined the use of the 2016 plan in any election after the 2018 election. In a 5-4 opinion that included the consolidated case of *Benisek v. Lamone*, the Supreme Court vacated the decision and remanded the case, with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral"[83] to measure fairness are not available.

Benisek v. Lamone[84]

Six years after the Maryland General Assembly redrew the Sixth Congressional District, plaintiffs sued to enjoin Maryland's election officials from holding congressional elections under the 2011 map. They alleged lawmakers intentionally used information about voters' histories and party affiliations to replace large numbers of Republican voters with Democratic voters in the Sixth District, thus flipping the district from a reliable Republican seat into a safe Democratic one. On remand, the district court found that the state specifically targeted voters who were registered as Republicans and who historically had voted for Republican candidates. That court held that Maryland's 2011 redistricting law "violates the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history."[85] It enjoined the use of the 2011 congressional plan in future elections and directed the state to submit to the court a remedial plan. It then stayed its decision pending an expedited appeal to the U.S. Supreme Court. In a 5-4 opinion consolidated with *Common Cause v. Rucho*, the Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral"[86]to measure fairness are not available.

League of Women Voters of Florida v. Detzner[87]

The plaintiffs alleged in state court that the congressional redistricting plan was drawn in violation of the Fair Districts Amendment, which prohibited political consideration in redistricting. The trial court found that the 2012 "redistricting process" and the "resulting map" apportioning Florida's 27 congressional districts were "taint[ed]" by unconstitutional intent to favor the Republican Party and incumbent lawmakers. The Florida Supreme Court upheld the finding that the 2012 congressional plan was drawn with the intent to favor a party or incumbent. Subsequently, the Florida Senate stipulated that the 2012 Senate plan similarly violated the law and would not be enforced or used for the 2016 elections.

League of Women Voters of Pa. v. Pennsylvania[88]

The League of Women Voters of Pennsylvania and a group of Democratic Pennsylvania voters challenged the state's 2011 congressional map in state court as an unconstitutional partisan gerrymander under the state constitution. The Pennsylvania Supreme Court found that "the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania"[89] and enjoined its use in future elections. In its opinion, the court reviewed the historical development of Pennsylvania's constitutional limits on the drawing of legislative districts, such as requirements that they be compact, contiguous and maintain the boundaries of political subdivisions, and adopted these standards "as appropriate in determining whether a congressional redistricting plan violates the Free and Equal Elections Clause…"[90] The court held that, when drawing congressional districts, if these neutral criteria are subordinated to gerrymandering for unfair partisan political advantage, whether intentional or not, the plan violates the Free and Equal Elections Clause of the state constitution. The court adopted a remedial plan in 2018 after the Pennsylvania General Assembly failed to submit a congressional redistricting plan to the governor by the court's deadline.

CHAPTER NOTES

1. *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

2. *Ibid*. at 556.

3. *Baker v. Carr*, 369 U.S. 186 (1962); although this decision appears to reverse course on justiciability for reapportionment issues, the actual opinion distinguishes *Colegrove* by clarifying that that case was decided on Guaranty Clause grounds, which presented political questions. Fourteenth Amendment claims provided they are "not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself" are justiciable. *Ibid.* at 227.

4. *Ibid*.

5. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

6. *Davis v. Bandemer*, 478 U.S. 109 (1986).

7. *Ibid.* at 114-15.

8. *Ibid.* at 110.

9. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

10. *Ibid*. at 281.

11. *Ibid*.

12. "The reality is that districting inevitably has and is intended to have substantial political consequences." *Davis v. Bandemer*, 478 U.S. 109, 129 (1986).

13. *Vieth* at 311-12.

14. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

15. *League of Women Voters of Mich. v. Benson*, No. 2:17-CV-14148, 2019 U.S. Dist. LEXIS 6914 (E.D. Mich. Jan. 15, 2019); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019); *Mich. Senate v. League of Women Voters*, 139 S. Ct. 2635 (2019).

16. *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019); *Chabot v. Ohio A. Philip Randolph Inst.*, 204 L. Ed. 2d 280 (2019).

17. *Common Cause v. Rucho*, 240 F. Supp. 3d 376 (M.D.N.C. 2017); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018).

18. *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016); vacated and remanded, *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

19. *Rucho v. Common Cause*, No. 18–422, 588.U.S. ___ (2019). (In June 2019, the United States Supreme Court consolidated *Rucho v. Common Cause*, No. 18-422, and *Lamone v. Benisek*, No. 18-726, into *Rucho v. Common Cause*.)

20. *Rucho v. Common Cause*, No. 18–422, slip op. at 11 (June 27, 2019).

21. *Ibid.* at 10-11.

22. *Ibid.* at 17.

23. *Ibid.* at 16-17.

24. *Ibid.* at 19.

25. *Ibid.* at 18 (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986)).

26. *Ibid*.

27. *Ibid*.

28. *Ibid*.

29. *Ibid.* at 19.

30. *Ibid*.

31. *Ibid*.

32. *Ibid*. at 20.

33. *Ibid.*

34. *Ibid.* at 22.

35. *Ibid*.

36. *Ibid.* at 23.

37. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 867 (M.D.N.C. 2018).

38. *Rucho v. Common Cause*, No. 18–422, slip op. at 23.

39. *Ibid.* at 25.

40. See *Common Cause*, 318 F. Supp. 3d, at 929; Benisek, 348 F. Supp. 3d, at 522.

41. *Rucho v. Common Cause*, No. 18–422, slip op. at 26.

42. *Ibid*. (Internal citation omitted).

43. *Ibid.* at 30.

44. *Ibid.* at 31.

45. *Rucho v. Common Cause*, No. 18–422, syllabus at 5.

46. *League of Women Voters of Pa. v. Commonwealth* (also *Turzai v. Brandt*), 644 Pa. 287 (2018), *cert. denied*, *Turzai v. Brandt*, 139 S. Ct. 445 (2018).

47. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

48. *Ibid*. at 387.

49. Ariz. Const. art. II, § 21.

50. Ark. Const. art. 3, § 2.

51. Del. Const. art. I, § 3.

52. Ill. Const. art. III, § 3.

53. Ind. Const. art. 2, § 1.

54. Ky. Const. § 6.

55. Okla. Const. art. III, § 5.

56. Or. Const. art. II, § 1.

57. Pa. Const. art. I, § 5.

58. S.D. Const. art. VII, § 1.

59. Tenn. Const. art. I, § 5.

60. Wash. Const. art. I, § 19.

61. Wyo. Const. art. I, § 27.

62. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018).

63. *League of Women Voters of Pa. v. Commonwealth* (also *Turzai v. Brandt*), *cert. denied*, 139 S. Ct. 445 (2018).

64. *Rucho v. Common Cause*, No. 18–422, slip op. at 30.

65. *Colegrove v. Green*, 328 U.S. 549(1946).

66. *Ibid*. at 556.

67. *Baker v. Carr*, 369 U.S. 186 (1962).

68. *Colegrove v. Green*, 328 U.S. 549 (1946).

69. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

70. *Ibid*. at 439.

71. *Karcher v. Daggett*, 462 U.S. 725 (1983).

72. *Ibid*. at 728.

73. *Ibid*. at 744.

74. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

75. *Ibid*. at 738.

76. *Davis v. Bandemer*, 478 U.S. 109 (1986).

77. *Ibid*. at 113.

78. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

79. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

80. *Cox v. Larios*, 542 U.S. 947 (2004).

81. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

82. *Rucho v. Common Cause*, 204 L. Ed. 2d 931 (2019).

83. *Ibid.* at 949.

84. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018).

85. *Benisek v. Lamone*, 348 F. Supp. 3d 493, 498 (D. Md. 2018).

86. *Rucho v. Common Cause*, 204 L. Ed. 2d 931, 949 (2019).

87. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015).

88. *League of Women Voters of Pa. v. Commonwealth* (also *Turzai v. Brandt*), 644 Pa. 287 (2018), *cert. denied*, *Turzai v. Brandt*, 139 S. Ct. 445 (2018).

89. *League of Women Voters of Pa. v. Commonwealth*, 644 Pa. 287, 289 (2018).

90. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 816 (Pa. 2018).

7 | Legislative Privilege in Redistricting Cases

INTRODUCTION

During the past decade, litigation involving state legislative redistricting plans has increased significantly. In these lawsuits, the courts have increasingly granted litigants during the discovery phase greater access to the files of state legislators. Historically, there were few discovery disputes about whether plaintiffs were entitled to legislators' files and other records. With the increase in the amount of redistricting litigation, however, courts have a greater willingness to allow plaintiffs to dig a little deeper.

The fundamental issue is the degree to which the judicial branch can disregard state legislators' constitutional privilege to be free from compelled discovery in regard to their legislative work. Historically, that privilege has been known as the "legislative privilege," which extends from the Speech and Debate Clause of the U.S. Constitution and generally shields legislative deliberations from compelled judicial testimony and other evidence-gathering processes.

States have, with varying degrees of success, tried to invoke legislative privilege to limit such evidence from being obtained in discovery. Courts have found that state legislators, unlike members of Congress, do not have an absolute right to legislative privilege.

Because this is an emerging and increasingly significant topic, this is the first edition of the NCSL redistricting law book to include a chapter dedicated to legislative privilege. Specifically, this chapter discusses the following concepts:

- The legal origins of the Speech and Debate Clause
- The scope of the Speech and Debate Clause
- Legislative privilege in federal redistricting litigation
- Legislative privilege in state redistricting litigation

It is important to note that the scope of legislative privilege for state legislators involved in federal court redistricting litigation has been reviewed only by lower federal courts and not by the U.S. Supreme Court. Thus, it is not settled law. Until there is greater certainty on this issue, this chapter should serve only as guidance for legislators and staff involved in the post-2020 and future redistricting cycles, and not as prescriptive.

THE LEGAL ORIGINS OF THE SPEECH AND DEBATE CLAUSE

Relative to their legislative work, only members of Congress—not state legislators—have been granted separate constitutional privileges of a) immunity from suit and b) free speech and debate. These foundational privileges find their roots in the Speech and Debate Clause of the U.S. Constitution, which states:

> *The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.*[1]

The Speech and Debate Clause was "a product of the English experience."[2] The first U.S. Constitutional Convention adopted the clause in response to convention members' fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament.[3] Its purpose was to prevent "intimidation by the executive and accountability before a possibly hostile judiciary."[4] Recognizing the importance of this purpose, the Constitutional Convention approved the Speech and Debate Clause "without discussion and without opposition."[5] At such time when there was fear of legislative excess in the United States, "[i]t is significant that legislative freedom was so carefully protected by constitutional framers...."[6]

Ultimately, the Speech and Debate Clause "is a limitation on the Federal Executive"[7] that seeks to protect "the integrity of the legislative process by insuring the independence of individual legislators."[8] In doing so, it provides legislators "wide freedom of speech, debate, and deliberation."[9]

Although Maryland, Massachusetts and New Hampshire adopted similar provisions in their respective state constitutions before the Speech and Debate Clause was incorporated into the U.S. Constitution,[10] almost all the remaining states adopted similar language shortly thereafter.[11]

THE SCOPE OF THE SPEECH AND DEBATE CLAUSE

Legislative Immunity from Liability

The first privilege granted by the Speech and Debate Clause is that legislators are free from arrest or civil process for what they do or say in legislative proceedings.[12] Although it speaks only to legislators, courts have interpreted the Speech and Debate Clause to also include staff/aides "insofar as the conduct of the [staff] would be a protected legislative act if performed by the Member himself."[13] Further, while only congressional immunity from suit is set forth in the Speech and Debate Clause, in the interest of comity, federal courts have extended the clause's absolute legislative immunity from liability to state legislators as well.[14]

Ultimately, the concept of legislative immunity is rooted in two fundamental principles: 1) the separation of powers, and 2) the protection of the legislative process.[15] The privilege ensures that legislators can represent their constituents without fear that they later will be called to task in the courts for that representation.[16] It does so in civil as well as criminal actions, "and against actions brought by private individuals as well as those initiated by the Executive Branch."[17] Legislative immunity does not, however, bar all judicial review of legislative acts.[18]

Legislative Privilege from Testimony

The Speech and Debate Clause not only expressly grants absolute immunity from liability to members of Congress, but also provides them and their staff with an absolute privilege from testimony with respect to their legislative activities. This would include the production of documents pertaining to their legislative activities,[19] the production of committee reports, the passage of resolutions, and voting.[20] "In short…things generally done in a session of the House by one of its members in relation to the business before it."[21] Such activities are "protected not only from the consequences of litigation's results but also from the burden of defending themselves."[22]

Although federal courts have extended the legislative privilege to state legislators, that privilege is not absolute; unlike members of Congress, state legislators are entitled to only a qualified legislative privilege for legislative acts.[23] The Supreme Court concluded this when it declined to extend the evidentiary legislative privilege to a state legislator—who was indicted on various federal criminal charges—because "where important federal interests are at stake, as in the enforcement of federal criminal statutes, [the principles of] comity yield."[24]

Federal courts have provided little protection to state legislators who assert the legislative privilege in redistricting litigation.

LEGISLATIVE PRIVILEGE IN FEDERAL REDISTRICTING LITIGATION

As discussed above, the Speech and Debate Clause and most state constitutions provide absolute immunity to state legislators for their legislative acts. However, neither source provides an absolute privilege to state legislators from testifying in federal court. With redistricting cases, federal courts take an even narrower position on the privilege because "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege...."[25] When looking at the most recent cases that analyze the legislative privilege in redistricting cases, it is important to first review a particular case to which federal courts have recently turned for guidance.

The *Rodriguez* Balancing Test

In 2003, several voters in New York filed a lawsuit in the Southern District of New York against the governor of New York and legislative leaders, challenging New York's state Senate and congressional redistricting plans enacted by the New York Legislature in 2002.[26] During discovery, plaintiffs moved to compel the legislators to produce all documents used by legislators in developing the 2002 state Senate and congressional redistricting plans.[27] After the legislators objected on the grounds that such documents were protected by the doctrine of legislative privilege, the court granted in part and denied in part the plaintiffs' motion to compel.[28] Specifically, the legislative privilege was applicable only to documents that "intrude on deliberations or discussions which took place after the proposed 2002 redistricting plan reached the Legislature's floor."[29]

Since *Rodriguez* was decided, various courts have adopted that court's approach when reviewing the issue of legislative privilege in redistricting cases. What has evolved from these cases is what has become known as the "*Rodriguez* test." The test has been applied by a number of federal courts in cases challenging redistricting plans to determine if the privilege shields state legislators from producing certain documents. Factors the courts consider are:

- Relevance of the evidence sought to be protected;
- Availability of other evidence;
- "Seriousness" of the litigation and the issues involved;
- Role of government in the litigation; and
- Possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Post–*Rodriguez* Cases

In a case challenging Illinois' 2011 congressional redistricting map, a group of plaintiffs argued that the map violated the Voting Rights Act, the 14th Amendment, the 15th Amendment, and the First Amendment.[30] Plaintiffs served dozens of subpoenas on numerous non-parties, including the Illinois House and Senate, and individual state legislators and staff.[31] The non-parties refused to comply with the subpoenas, arguing legislative immunity, among other privileges. The legal issue for the court

was "whether common law legislative immunity absolutely shields non-party state lawmakers from providing evidence in a civil lawsuit related to their legislative activities."[32] The federal district court first concluded that the legislative immunity doctrine does not protect non-party state lawmakers from producing documents in federal redistricting cases.[33] The court then applied the *Rodriguez* test to determine the extent to which a state lawmaker may invoke legislative privilege to protect himself or herself from producing documents related to their legislative activities.

The court held that, unless a member affirmatively waives the legislative privilege doctrine in writing, state lawmakers are not required to disclose documents containing:[34]

- Motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the congressional map prior to its passage; and
- Identities of those who participated in decisions related to the map.

The court therefore concluded that the legislative privilege shields from disclosure pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation. It does not protect facts or information available to lawmakers at the time of their decision.

However, the court held that state lawmakers were required to disclose documents that:[35]

- Contain objective facts that state lawmakers relied upon in drawing the map;
- Were available to state legislators at the time the map was passed;
- Contain the identities of experts and/or consultants retained by state legislators to assist in drafting the map, and any related contracts; or
- Waive legislative privilege.

A few months later, in 2011, a number of individual plaintiffs challenged the 2011 Wisconsin legislative and congressional redistricting plans on the grounds that they violated the Voting Rights Act and the 14th Amendment.[36] During discovery, plaintiffs served subpoenas on certain non-parties, ordering them to turn over documents used in drawing the redistricting plans.[37] The Wisconsin House and Senate moved to quash the subpoenas, but the district court denied their request on the grounds that legislative privilege did not prevent disclosure.[38]

Although the federal district court did not expressly apply the *Rodriguez* test, the court relied upon *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections* in which Rodriguez had been "cited extensively."[39] In relying upon that case, the court concluded that the plaintiff's showing of need outweighed the non-party Wisconsin Legislature's asserted qualified legislative privilege.[40] "[T]he highly relevant and potentially unique nature" of the evidence outweighed any "future 'chilling effect' on the Legislature."[41]

The following year, a case was filed in a New York federal court challenging the newly enacted New York state Senate and Assembly redistricting plans on the grounds that the maps violated the Voting Rights Act and the 14th Amendment.[42] During discovery, various legislative defendants were served with subpoenas to produce documents about how they determined the size of the New York state Senate following the 2010 census redistricting cycle.[43] The legislative defendants objected on various grounds, including that the information was protected by legislative privilege.[44] After the federal district court initially deferred ruling on the question so that it could complete an in camera (when the court looks at documents confidentially) review of the withheld documents,[45] the court subsequently proceeded to apply the *Rodriguez* test and determined that the following were "non-legislative" documents not subject to protection under the legislative privilege:[46]

- Documents or communications prepared in connection with litigation, including documents reflecting communications with or activities conducted by a redistricting expert;
- Inquiries from, and any responses to, the public or media;
- Public remarks or statements, and public speeches made outside the Legislature;
- Public testimony;
- Negotiations with contractors or service providers;
- Administrative tasks;
- Correspondence with or about national political organizations; and
- Any correspondence serving as a "means of informing those outside the legislative forum."

At the same time, the court did presume that the qualified legislative privilege prevents the disclosure of legitimate legislative acts, especially when the line between what is "legislative" and "non-legislative" is blurred. The type of documents it held were presumed to be subject to protection from the legislative privilege doctrine include:

- Materials prepared for floor speeches, floor debate, committee meetings and reports, the casting of votes, or formal information-gathering; and
- Documents and communications reflecting the drafting of remarks to be made on the floor of the Legislature in support of:
    - proposed legislation,
    - proposed changes to statutory language,
    - decision making over placement of district lines,
    - exchanges between legislators or their aides and experts about possible changes to their districts,
    - consideration of public proposals, and
    - emails forwarding newspaper stories or other information to legislators or their staff during legislative deliberations.

Subsequently, in 2015, a Virginia federal court dealt with a discovery dispute in a case filed by a group of plaintiffs who asserted that 12 Virginia House of Delegates districts were unlawful racial gerrymanders in violation of the 14th Amendment.[47] During discovery, plaintiffs sought all documents of non-party legislators related to the 2011 Virginia redistricting process from the Virginia House.[48] On behalf of a number of legislators who asserted legislative privilege, the Virginia House refused to turn over those specific legislators' requested documents.[49]

The Virginia court first recognized that "[s]everal federal courts have … [found] that the [state legislative] privilege is a qualified one in redistricting cases" because "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege…."[50] Like the other courts above, the Virginia court applied the *Rodriguez* test and found that "the totality of circumstances warrant the selective disclosure of the assertedly privileged documents in the House's possession."[51] Thus, the following categories of documents were required to be disclosed:[52]

- Any documents or communications created after the redistricting legislation's date of enactment;
- Any documents or communications shared with, or received from, any individual or organization outside the employ of the General Assembly, unless a chamber specifically retained an individual or organization in accordance with Virginia law; and
- Any internal house documents or communications generated before the redistricting legislation's date of enactment that:
    - reflect strictly factual information, regardless of source, and
    - were produced by committee, technical or professional staff for the House (excluding personal staff of legislators) that reflect opinions, recommendations or advice.

The court did recognize, however, that the following could be withheld or redacted:[53]

- Comments, requests or opinions expressed by legislators or their aides in communication with such staff may be redacted; and
- Documents or communications produced by legislators or their immediate aides before the redistricting legislation was enacted, "except to the extent any such document pertains to, or 'reveals an awareness' of: racial considerations employed in the districting process, sorting of voters according to race, or the impact of redistricting upon the ability of minority voters to elect a candidate of choice."

Most recently, in 2018, a three-judge federal panel in Michigan squarely addressed the issue of legislative privilege in the context of a redistricting case. In *League of Women Voters v. Johnson,*[54] plaintiffs challenged

the state of Michigan's legislative and congressional maps on the grounds that they violated the First and 14th amendments of the U.S. Constitution. During discovery, plaintiffs served document subpoenas on various non-party Michigan state legislators and legislative offices in the state for the purpose of seeking documents related to the state of Michigan's redistricting process in 2012.[55] Those non-parties filed motions to quash the subpoenas, arguing that they enjoy absolute legislative privilege.[56]

After going through an exhaustive review of case law from various circuit courts, the panel concluded that state legislators are afforded a "legislative privilege against being required to provide records or testimony concerning legislative activity." Notably, however, the privilege for state legislators in federal court "is not absolute," especially "where important federal interests are at stake," including "cases involving constitutional challenges to state legislation."[57] In determining the extent of this qualified privilege in this particular case, the panel turned to the *Rodriguez* test and held that "Plaintiffs' need for the documents…is sufficient to overcome the legislative privilege,"[58] and the non-parties were required to produce the following categories of documents:[59]

- Documents and communications related to non-legislative tasks.
- Fact-based documents and communications.
- Documents and communications that legislators or their staff:
  - created after the redistricting legislation's date of enactment,
  - shared with third parties consulted during the redistricting process, or
  - produced for the legislators that reflect opinions, recommendations or advice; however, any comments, requests or opinions expressed by legislators or their aides in communication with committee staff may be redacted.
- Redistricting plans on record, or proposed, during the 2012 redistricting process.
- Any relevant documents or information that were shared with third parties, which would otherwise have been protected by the legislative privilege.

The panel did, however, recognize that the following categories of documents are subject to the legislative privilege and are not required to be turned over in discovery:[60]

- Any documents or information that contains, involves or reveals opinions, motives, recommendations or advice about legislative decisions between legislators or between legislators and their staff.
- Documents or communications produced by legislators or their aides before the redistricting legislation date of enactment, unless any such document pertains to, or reveals an intent to or awareness of: discrimination against voters on the basis of their known or estimated political party affiliation, or the impact of redistricting upon the ability of voters to elect a candidate of their choice.

- Any privileged information that is unrelated to the introduction, consideration or passage of Michigan's 2012 redistricting legislation.

LEGISLATIVE PRIVILEGE IN STATE REDISTRICTING LITIGATION

Not surprisingly, states address the legislative privilege question in their respective constitutions in different ways. While many state constitutions expressly include the privilege, some state constitutions do not mention it at all. Thus, because of the varying approaches to the privilege in each state constitution, including how state courts interpret their own constitutional provisions, little reliance can be placed on any particular state's privilege outside the specific state. Nevertheless, the following briefly summarize recent cases handling the legislative privilege question in redistricting litigation in state courts.

In 2013, the Florida Supreme Court was asked whether Florida legislators and their staff had an absolute privilege from testifying about the intent in drawing the state's congressional redistricting plan.[61] Florida's Constitution lacks a speech and debate clause; however, the Florida Supreme Court concluded that a legislative privilege exists in Florida based on the separation of powers in the Florida Constitution.[62] Given that, and in conjunction with the state's broad open meetings requirement, the Florida Supreme Court recognized that "legislators and legislative staff members may assert a claim of legislative privilege … only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process."[63]

In 2013, the North Carolina Supreme Court was asked whether state legislators were required to disclose documents related to the enactment of the state's legislative and congressional district plans.[64] Plaintiffs sought to compel production based on a state law that made such documents public after the districting plans became law. The state legislators objected, asserting legislative privilege, among others. The North Carolina Supreme Court held that, since the General Assembly had not clearly and unambiguously waived the attorney-client privilege and work-product doctrine, the court would not conclude it had intended to do so; as for the scope of the legislative privilege, the court "defer[red] to the General Assembly's judgment regarding the scope of its legislative confidentiality."[65]

In 2016, the Virginia Supreme Court considered an appeal of a trial court's order that found state legislators, staff and consultants in contempt for not testifying about their role in the drawing of state legislative districts.[66] On appeal of the contempt order, the Virginia Supreme Court concluded that Virginia's Constitution provided a legislative privilege to legislators and staff acting within the sphere of legitimate legislative activity.[67]

CONCLUSION

From the recent cases decided during the past decade, federal courts hearing constitutional challenges to newly drawn maps for congressional and state districts are clearing the way for plaintiffs to obtain documents from state legislators that were produced during a state's redistricting process. Although the legislative privilege doctrine protects state legislators from disclosing certain documents, federal courts continue to narrow the scope of the privilege and typically require state legislators to turn over most of their records for redistricting, including legislative or personal email. Consequently, attorneys advising state legislators and their staff must be well-versed on the scope of the legislative privilege in redistricting cases, their state's constitutional privilege provisions (if any) and court interpretations of these, and the consequences of unintended waiver of any applicable protections.

CASES RELATING TO LEGISLATIVE PRIVILEGE (IN CHRONOLOGICAL ORDER)

Rodriguez v. Pataki[68]

In 2003, voters in New York filed a lawsuit against the governor of New York and state legislative leaders, challenging New York's state Senate and congressional redistricting plans enacted in 2002. In developing the plan, the legislators were assisted by an advisory Task Force on Demographic Research and Reapportionment (LATFOR). During discovery, plaintiffs moved to compel the legislators to produce all documents employed by the legislators in developing the 2002 state Senate and congressional redistricting plans. The plaintiffs focused on LATFOR's activities, which involved participation of non-legislators. The court stated that, in deciding whether and to what extent the privilege should be honored, a court must balance the extent to which production of the information sought would chill the Legislature's deliberations concerning important matters against any other factors favoring disclosure. The factors a court should consider in arriving at such a determination are: 1) the relevance of the evidence sought to be protected; 2) the availability of other evidence; 3) the "seriousness" of the litigation and the issues involved; 4) the role of the government in the litigation; and 5) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. The district court granted the voters' motion to compel only as to the discovery requests that concerned LATFOR.

Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections[69]

The Illinois House of Representatives and Senate held a series of public hearings at locations around the state where members of the public were allowed to comment on the redistricting process. Both the Illinois House of Representatives and Senate passed the Redistricting Act, and the governor signed it into law. A group of plaintiffs alleged that the 2011 map discriminated against Latino and Republican voters. Plaintiffs served subpoenas on numerous non-parties, including the Illinois House and Senate, and individual state legislators and staff. The non-parties refused to comply with the subpoenas,

arguing legislative immunity, among other privileges. The court did not find in the common law an absolute immunity for non-party state lawmakers that protects them from producing documents in federal redistricting cases. Instead, non-parties' privilege claims are best analyzed under the doctrine of legislative privilege. The court then applied the *Rodriguez* test to determine the extent to which state lawmakers may invoke legislative privilege to protect them from producing documents related to their legislative activities. The court held that state lawmakers were not required to disclose documents containing the 1) motives, objectives, plans, reports and/or procedures created, formulated or used by lawmakers to draw the 2011 map prior to the passage of the Redistricting Act; or 2) identities of persons who participated in decisions regarding the 2011 map. However, it did not protect facts or information available to lawmakers at the time of their decision.

Baldus v. Members of the Wis. Gov't Accountability Bd.[70]

Plaintiffs alleged that the Wisconsin legislative and congressional plans violated the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act in various ways. Specifically, the plaintiffs alleged the plans were unconstitutional because they violated traditional redistricting principles and failed to protect communities of interest; constituted an impermissible partisan gerrymander; and disenfranchised nearly 300,000 voters. During discovery, plaintiffs served subpoenas on certain non-parties, ordering them to turn over documents used in drawing the redistricting plans. The Wisconsin House and Senate moved to quash the subpoenas, but the district court denied their request on the grounds that legislative privilege did not prevent disclosure. The court concluded that the plaintiff's showing of need outweighed the non-party Wisconsin Legislature's asserted qualified legislative privilege.

Favors v. Cuomo[71]

Plaintiffs challenged the New York Senate and Assembly plans for various violations of Section 2 of the Voting Rights Act and the Equal Protection Clause of the 14th Amendment. Both the Senate majority (Republicans) and Senate minority (Democrats) intervened as defendants. The Senate minority defendants sought discovery from the Senate majority defendants of all documents determining the size of the Senate following the 2010 census. The Senate majority, Assembly majority (Democrats), and Assembly minority (Republicans) defendants moved for an order denying discovery of documents and information protected by the legislative privilege. The court found that certain documents and communications were not "legislative" and not entitled to the privilege: 1) those categorized as public statements or concerning the preparation of public statements; 2) those prepared in anticipation of litigation; 3) inquiries from members of the public or media and responses thereto; 4) public remarks, statements crafted for public relations purposes, and public speeches made outside the Legislature by legislators or their representatives; 5) public testimony; 6) efforts made in connection with negotiation for or securing of government contracts, and remuneration of contractors or service providers; 7) those concerning administrative tasks; 8) correspondence with or about national political organizations; 9) submissions to the Department of Justice related to compliance with Section 5 of the VRA; and 10) any other means of informing those outside the legislative forum.

Bethune-Hill v. Va. State Bd. of Elections[72]

Voters in Virginia filed suit in federal district court alleging that the Virginia General Assembly violated the Equal Protection Clause when it drew state House districts in 2011. During discovery, plaintiffs sought all documents of non-party legislators related to the 2011 Virginia redistricting process from the Virginia House. On behalf of a number of legislators who asserted legislative privilege, the Virginia House refused to turn over those specific legislators' requested documents. Balancing the competing, substantial interests at stake, the court found that the totality of circumstances warranted the selective disclosure of the assertedly privileged documents in the House's possession. In this context, where plaintiffs allege racial gerrymandering and seek an injunctive remedy from the General Assembly itself, and the intent of the General Assembly is the dispositive issue in the case, the balance of interests called for the legislative privilege to yield. The court held first that the House must produce all documents or communications that were created after the redistricting legislation's date of enactment. Second, the House must produce all documents or communications shared with, or received from, any individual or organization outside the employ of the General Assembly. Third, all "internal" documents or communications to the House that were generated before the legislation's date of enactment and that reflected strictly factual information were to be produced.

League of Women Voters v. Johnson[73]

The League of Women Voters of Michigan, numerous league members and several Democratic voters challenged the 2011 congressional, Senate and House redistricting plans as violating their 14th Amendment right to equal protection of the laws and their First Amendment rights to freedom of speech and association by deliberately discriminating against Democratic voters. The Michigan Senate, Republican members of Congress, and members of the Michigan Senate and House intervened to defend the plans. During discovery, plaintiffs served document subpoenas on various non-party Michigan state legislators and legislative offices in the state, for the purpose of seeking documents related to the state of Michigan's redistricting process in 2012. Those non-parties filed motions to quash the subpoenas, arguing that they enjoy absolute legislative privilege. The panel found that the privilege for state legislators in federal court "is not absolute," especially "where important federal interests are at stake," including "cases involving constitutional challenges to state legislation." In determining the extent of this qualified privilege in this particular case, the panel turned to the five-factor *Rodriguez* test and held that "Plaintiffs' need for the documents…is sufficient to overturn the legislative privilege;" and the non-parties were required to produce: 1) documents and communications related to non-legislative tasks; 2) fact-based documents and communications; 3) documents and communications that legislators or their staff created after the redistricting legislation's date of enactment, shared with third parties consulted during the redistricting process, produced for the legislators that reflect opinions, recommendations or advice (excluding any comments, requests or opinions expressed by legislators or their aides in communication with committee staff which may be redacted); 4) redistricting plans on record, or proposed, during the 2012 redistricting process; and 5) any relevant documents or information that were shared with third parties, which otherwise would have been protected by the legislative privilege.

CHAPTER NOTES

1. U.S. Const., Art. I, § 6, cl. 1.

2. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975).

3. *United States v. Johnson*, 383 U.S. 169, 181-183 (1966).

4. *Ibid*. at 181.

5. *Ibid*. *at* 177.

6. *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951).

7. *United States v. Gillock*, 445 U.S. 360, 374 (1980).

8. *United States v. Brewster*, 408 U.S. 501, 507 (1972).

9. *Gravel v. United States*, 408 U.S. 606, 616 (1972).

10. *Tenney*, 341 U.S. at 373.

11. *Ibid*. at 375.

12. *Ibid*. at 372.

13. *Gravel*, 408 U.S at 618.

14. *Tenney*, 341 U.S. at 372; see also *Gillock*, 445 U.S. at 372 n. 10.

15. See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975).

16. *Powell v. McCormack*, 395 U.S. 486, 505 (1969).

17. *Eastland*, 421 U.S. at 502-503 (citations omitted).

18. *Powell*, 395 U.S. at 504 (finding that judicial review of the constitutionality of an underlying legislative decision was not barred even though House employees were acting pursuant to express orders of the House); citing *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (finding a sergeant at arms liable for false imprisonment by simply executing a House-passed resolution that arrested and imprisoned an individual).

19. See *Gravel*, 408 U.S. at 620-21; see also *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660, cert, denied, 552 U.S. 1295 (2008).

20. *Gravel,* 408 U.S. at 617.

21. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880).

22. *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

23. *Gillock*, 445 U.S. 360 (holding that the evidentiary privilege for legislative acts of Fed. R. Evid. 501 did not apply to the federal prosecution of a state legislator).

24. *Ibid.* at 373.

25. *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337 (E.D. Va. May 26, 2015).

26. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (2003).

27. *Ibid.* at 92.

28. *Ibid.*

29. *Ibid*. at 104.

30. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 U.S. Dist. LEXIS 117656, at *5 (N.D. Ill. Oct. 12, 2011).

31. *Ibid*. at *5-6.

32. *Ibid.* at *22.

33. *Ibid*. at *24.

34. *Ibid*. at *37.

35. *Ibid*. at *37-38.

36. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW-RMD, 2011 U.S. Dist. LEXIS 142338 (E.D. Wis. Dec. 8, 2011).

37. *Ibid*. at *4-5.

38. *Ibid*. at *5.

39. *Ibid*. at *10.

40. *Ibid*. at *8.

41. *Ibid*.

42. *Favors v. Cuomo*, 285 F.R.D. 187, 195 (E.D.N.Y. Aug. 10, 2012).

43. *Ibid*. at 195-196.

44. *Ibid*. at 197.

45. *Ibid*. at 202.

46. *Favors v. Cuomo*, No. 11-CV-5632, 2013 U.S. Dist. LEXIS 189355, at *26-30 (E.D.N.Y. Feb. 8, 2013).

47. *Bethune-Hill*, 114 F. Supp. 3d 323.

48. *Ibid*. at 329-330.

49. *Ibid*. at 330.

50. *Ibid*. at 336-37.

51. *Ibid*. at 342-343.

52. *Ibid*. at 343.

53. *Ibid*. at 343-345.

54. *League of Women Voters v. Johnson*, No. 17-14148, 2018 U.S. Dist. LEXIS 86398 (E.D. Mich. May 23, 2018).

55. *Ibid*. at *4.

56. *Ibid*.

57. *Ibid*. at *7-8.

58. *Ibid.* at *13-14.

59. *Ibid*. at *14-15.

60. *Ibid*.

61. *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So.3d 135 (Fla. 2013).

62. *Ibid*. at 138.

63. *Ibid*. at 154.

64. *Dickson v. Rucho*, 366 N.C. 332 (2013).

65. *Ibid*. at 345.

66. *Edwards v. Vesilind*, 292 Va. 510 (2016).

67. *Ibid*. at 528-29.

68. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89 (S.D.N.Y. 2003).

69. *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, No. 11 C 5065, 2011 U.S. Dist. LEXIS 117656 (N.D. Ill. Oct. 12, 2011).

70. *Baldus v. Members of the Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW-RMD, 2011 U.S. Dist. LEXIS 142338 (E.D. Wis. Dec. 8, 2011).

71. *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012).

72. *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323 (E.D. Va. 2015).

73. *League of Women Voters v. Johnson*, No. 17-14148, 2018 U.S. Dist. LEXIS 86398 (E.D. Mich. May 23, 2018).

8 | Federalism and Redistricting

INTRODUCTION

In earlier editions of this publication, federalism was discussed extensively, almost entirely by analyzing the 1993 U.S. Supreme Court decision in *Growe v. Emison*.[1] In *Growe*, the Court made clear that state courts had a role to play in redistricting litigation. Following this decision, state court litigation proliferated as many redistricting plaintiffs chose to avail themselves of a state forum to litigate their claims, rather than choosing federal courts. The use of state forums for redistricting litigation continues. For example, plaintiffs in *League of Women Voters of Pennsylvania, et al. v. Commonwealth of Pa.* successfully challenged the state's 2011 congressional map as a partisan gerrymander under the Pennsylvania state constitution.[2]

Since the 2010 edition, federalism considerations have been prominent in two significant cases decided by the U.S. Supreme Court:

- *Shelby County v. Holder*[3]
- *Arizona State Legislature v. Arizona Independent Redistricting Commission*[4]

SHELBY COUNTY V. HOLDER: FEDERALISM AND THE VOTING RIGHTS ACT

Of the U.S. Supreme Court's recent federalism cases, perhaps none has received as much comment and analysis as the 2013 *Shelby County v. Holder* case, where the Court invalidated the Section 4 coverage formula found in the Voting Rights Act of 1965 (VRA), rendering the preclearance provisions of Section 5 of the VRA essentially inoperative. These two sections had made it mandatory for specified states and other "covered jurisdictions" to submit all changes in electoral practices to the U.S. Department of Justice or to a special U.S. District Court for the District of Columbia for preclearance before the changes could become effective.

Alabama's Shelby County sought declaratory and injunctive relief against the enforcement of sections 4 and 5 of the VRA. The VRA required that Shelby County (and all Alabama jurisdictions) submit all local changes in electoral practices for preclearance prior to going into effect. After Shelby County lost in the District Court and the Court of Appeals for the District of Columbia, the Supreme Court reversed, finding the Section 4 coverage formula unconstitutional because it had been based on data from the 1960s that at the time showed evidence of widespread voting discrimination in certain states and jurisdictions.

When the Court initially upheld the coverage formula in the 1966 case *South Carolina v. Katzenbach*,[5] it acknowledged that the preclearance requirement was "stringent" and "potent," but it nonetheless upheld the provision, concluding that such an "uncommon exercise of congressional power" could be justified by "exceptional conditions."[6]

As decades passed and the formula for requiring preclearance was not changed or updated, the Court concluded that this could no longer justify the "Federalism costs" that are inherent in a statutory scheme that treats some states differently than others. The 10th Amendment grants states "residual sovereignty" or, put differently, powers not specifically granted to the federal government are reserved to the states or citizens.[7] Because some states were under preclearance and others were not, Section 4 did not provide "equal sovereignty among the states."[8]

The Court noted it had previously voiced concern about the continuing justification for Section 4 in *Northwest Austin Municipal Util. Dist. No. One v. Holder:* [9]

> *"In Northwest Austin, we stated that 'the Act imposes current burdens and must be justified by current needs.' And we concluded that 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.' These basic principles guide our review of the question before us."*[10]

Specifically, the Court was troubled because the law resulted in disparate treatment of states 50 years after original adoption of the VRA. The 2006 reauthorization of the VRA, including sections 4 and 5, was enacted without consideration of the considerable changes in African-American political participation in the covered jurisdictions.[11] In consideration of the changes in the opportunities for African-American political participation in the covered jurisdictions, the Court stated:

> *"Regardless of how to look at the record, however, no one can fairly say that it shows anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that … clearly distinguished the covered jurisdictions from the rest of the Nation* [*in 1965*].

> *But a more fundamental problem remains: Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. It instead reenacted a formula based on 40-year-old facts having no logical relation to the present day."*[12]

Shelby County v. Holder also is discussed in detail in Chapter 3, Racial and Language Minorities.

ARIZONA STATE LEGISLATURE V. ARIZONA INDEPENDENT REDISTRICTING COMMISSION: FEDERALISM, THE ELECTIONS CLAUSE AND WHO MAY REDISTRICT

The Elections Clause of the U.S. Constitution (Article I, Section 4) was the focus of one of the decade's most important redistricting cases involving federalism. While this constitutional provision is seldom applied by the courts outside of the one-person, one-vote cases addressing congressional redistricting, that was the case in *Arizona State Legislature v. Arizona Independent Redistricting Commission et al.*[13] In this case, the Arizona Legislature challenged the constitutional authority of the state's redistricting commission to develop and implement a congressional redistricting plan for the state, based on the Elections Clause.

In 2000, Arizona voters approved a citizens' initiative for an amendment to Arizona's Constitution that removed redistricting authority from the Arizona Legislature and vested that authority in a newly created Arizona Independent Redistricting Commission (AIRC). After the 2000 and 2010 censuses, the AIRC adopted redistricting maps for congressional and state legislative districts. The Arizona Legislature argued that the constitutional amendment from 2000 completely divested the Legislature of any authority to participate in redistricting and by doing so contravened the Elections Clause. In so arguing, the Arizona Legislature relied heavily on the text and history of the Elections Clause, which states as follows:

> *"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."*[14]

A three-judge federal district court panel held that the Arizona Legislature had standing to sue, but dismissed its complaint on the merits.[15] Upon direct review of that decision, the U.S. Supreme Court affirmed the district court's standing decision and the dismissal of the Arizona Legislature's complaint.

In supporting the AIRC's authority to redistrict, the Supreme Court interpreted basic federalism principles as allowing states considerable latitude to establish a process for redistricting without a legislature's involvement. Specifically, it acknowledged that redistricting is a legislative process that

must follow the state's prescribed methods for lawmaking, but these processes can include the use of the citizens' initiative process in the states that have such provisions, despite this method being unknown to the framers of the U.S. Constitution.[16]

In response to the Arizona Legislature's argument that the Elections Clause specifically grants "legislatures" the authority to conduct redistricting, the Court explained that the Elections Clause provides Congress with a means of overriding state election rules with respect to congressional redistricting, but does not restrict the way states adopt laws. While the clause uses the word "legislature," the term must be understood in the context of a federal system in which states establish their own political processes, free from intrusions of the federal government.[17]

Of specific significance was the following from the opinion:

> " '*Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.' Arizona engaged in definition of that kind when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority.*"[18]

The Court concluded that, although the framers may not have had the remotest thought of a direct initiative, the invention of the initiative was:

> "*in full harmony with the Constitution's conception of the people as the font of governmental power … it would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people, particularly where such lawmaking is intended to check legislators' ability to choose the district lines they run in, thereby advancing the prospect that Members of Congress will in fact be 'chosen … by the People of the several States'… .*"[19]

This case is noteworthy for federalism purposes because it demonstrates the wide latitude states have in how they structure and define their sovereignty in the context of the Elections Clause. In its embrace of a broad definition of the term "Legislature," the Court has allowed states to separately determine, whether it is through a citizens' initiative or the legislative process, if its legislature or some other entity should be responsible for redistricting in their respective state.

CONCLUSION

The federalism principles embedded in the U.S. Constitution are integral to the legal context of redistricting. As a result, the Supreme Court extends to states considerable latitude when drawing congressional, state and local electoral boundaries. This derives directly from Article 1, Section 4, which leaves the times, places and manner of (federal) elections to the states. In the last decade, the

Court employed federalism principles in decisive holdings that reaffirm the delicate interplay between the power of a state versus the federal government to control the redistricting process.

First, the Court reiterated that federalism requires current justifications for current harms to justify the burden on a state that a remedial measure such as preclearance presents. Second, the Court confirmed that federalism principles apply to states not only in the context of a state legislature's lawmaking authority, but also when a legislature assigns its lawmaking power through petition—in this case to establish a redistricting commission, despite the fact that petitions were not contemplated at the time of the constitutional convention.

CHAPTER NOTES

1. *Growe v. Emison*, 507 U.S. 25 (1993).
2. *League of Women Voters of Pa. v. Commonwealth*, 179 A.3d 1080 (Pa. 2018).
3. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).
4. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).
5. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).
6. *Ibid*. at 308, 334, 337.
7. *Shelby Cty.*, 570 U.S. at 543 (quoting *Bond v. United States*, 564 U.S. 211 (2011)).
8. *Ibid*. at 544 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).
9. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).
10. *Shelby Cty.*, 570 U.S. at 542 (quoting *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203).
11. *Ibid*. at 547-50.
12. *Ibid*. at 554 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 315, 331 (1966)).
13. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).
14. U.S. Const., Art. I, § 4, cl. 1.
15. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2659.
16. *Ibid*. at 2674.
17. *Ibid*. at 2657.
18. *Ibid*. at 2673 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).
19. *Ibid*. at 2674-75 (citations omitted).

9 | Redistricting for Local Jurisdictions, Courts and Other State Entities

INTRODUCTION

This book focuses on state legislative and congressional redistricting. While an in-depth discussion of local and judicial redistricting is outside the scope of the book, this chapter provides a summary of the redistricting process for other electoral bodies, including local jurisdictions (counties, cities and school districts), state courts, and other electoral districts that are geographically determined. The process for redrawing these boundaries varies greatly from jurisdiction to jurisdiction. Consequently, this chapter is not intended to be comprehensive, and NCSL suggests that, for redistricting questions relating to any entities other than Congress and state legislatures, readers seek advice in their own state.

In general, the same concepts that pertain to state and congressional redistricting pertain to redistricting for other entities as well. For instance, redistricting is likely to be required to reflect one person, one vote (although as mentioned in the judicial redistricting section below, this is not always the case); to not be discriminatory based on race in intent or effect; and to follow state-established criteria.
This chapter covers:

- Redistricting for local jurisdictions
- Redistricting for courts
- Redistricting for other state entities

REDISTRICTING FOR LOCAL JURISDICTIONS

The Equal Protection guarantee of one person, one vote applies to the tens of thousands of counties, cities, school boards and other local jurisdictions that elect members from districts. These districts must be redistricted in ways that are similar to congressional and legislative redistricting.

In *Avery v. Midland County*, the U.S. Supreme Court found:

> *"If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when members of a city council, school board, or county governing board are elected from districts of substantially unequal population...."*[1]

The Court went on to say, "We therefore see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power though legislatures and its exercise by elected officials in the cities, towns and counties."[2]

The opinion also recognized that local jurisdictions should have flexibility in their governance procedures, asserting that neither the Court nor the U.S. Constitution should throw up "roadblocks in the path of innovation, experiment, and development among units of local government."[3]

Even with that flexibility, local jurisdictions that have gone well past 10 years since redistricting their electoral districts are potentially in violation of federal and/or state law—particularly regarding one person, one vote, although there is greater latitude for local jurisdictions in regard to equal population than in state or federal electoral bodies. In 1971, in *Abate v. Mundt,* the Court said:

> *"[T]he facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lends support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes..."*[4]

With that said, local governments such as counties and cities generally are subject to the same redistricting criteria—such as compliance with the Voting Rights Act—as the states. See Chapter 4, Redistricting Principles and Criteria, for more information.

Racial Requirements Applied to Local Redistricting

Voting Rights Act (VRA) provisions aimed at protecting racial and language minority groups from vote dilution apply not only to states, but also to local jurisdictions. Thus, many VRA cases have involved local jurisdictions. These cases often involve the election of city council members from at-large districts as opposed to single-member districts. In many instances, minorities struggle to elect representatives in at-large election schemes but can successfully elect a preferred candidate from a single district. See Chapter 3, Racial and Language Minorities, for more information.

In a recent example, in the 2017 Texas case *Patino v. City of Pasadena*,[5] a federal judge ruled that Pasadena's move from single-member districts to a combination of single-member and at-large districts for municipal elections was unconstitutional under Section 2 of the VRA because it had the intent and effect of reducing electoral power for Latino voters.

Some courts have given local governments more freedom in how populations living in group quarters—such as prisons, dormitories and military installations—are counted for purposes of redistricting.[6]

REDISTRICTING FOR COURTS

Several states have an elected judiciary. When these states change their electoral districts or other practices addressing the election of judges, such changes must be made in conformity with state and federal legal requirements related to the redistricting and election of the judiciary. However, the requirements are not the same—in fact, as explained below, one person, one vote is not applicable.

The Inapplicability of the One-Person, One-Vote Requirement

Because judges do not represent people, the equal population requirement does not apply when establishing judicial districts. In *Wells v. Edwards*,[7] the Supreme Court, without opinion, affirmed the ruling of a three-judge district court in Louisiana that the 14th Amendment's one-person, one-vote requirement does not apply to the redistricting of judicial districts. The lower court reasoned:

> *"The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents. But as stated in Buchanan v. Rhodes, supra: "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary."*[8]

This position has been consistently applied by lower federal courts and state supreme courts when called upon to rule on plaintiff's one-person, one-vote claims.[9]

The Applicability of the Voting Rights Act of 1965

Courts have consistently held that provisions of the VRA do apply to judicial redistricting. Since *Chisom v. Roemer*[10] was decided in 1991, courts have applied Section 2 requirements to state and local redistricting plans for elected judges.[11]

One-Person, One-Vote Arguments Based on State Constitutional Provisions

More recently, in *Blankenship v. Bartlett*[12] the North Carolina Supreme Court held that the Equal Protection Clause of the North Carolina Constitution applies to challenges to state judicial districts. In this case, the court was faced with a judicial plan that contained electoral districts with as few as

32,199 residents per judge and as many as 158,812 residents per judge. While the court noted that this is not a violation of the federal one-person, one-vote rule per *Chisom*, the North Carolina Constitution's Equal Protection Clause requires that disparities in voter strength be subject to intermediate scrutiny. Under intermediate scrutiny:

> *"...Judicial districts will be sustained if the legislature's formulations advance important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary to further those interests."*[13]

In regard to what important governmental interests might be, the court set out a non-exhaustive list that included VRA compliance, geography, population density, convenience, number of persons in a district eligible to serve as judges, and types of legal proceedings in a given district.[14]

For more on the selection of judges, please consult the American Judicature Society.

REDISTRICTING FOR OTHER STATE ENTITIES

States can have other elected offices besides those of U.S. representatives, legislators and state judges that may be elected from geographically defined districts. Examples include the Utah State Board of Elections and the California State Board of Equalization.

Sometimes redistricting for these entities falls to the legislature or to a commission. How this is handled and what standards are applied are determined by the state in question.

CONCLUSION

While most of the focus on redistricting centers around state legislative and congressional seats, local elected bodies represent a far greater portion of the redistricting litigation since the 14th Amendment requires all representative bodies that elect members based on districts (except in the case of judicial districts) to redistrict. This includes counties, cities, towns, other municipalities, school boards, state courts, state and local boards of education, and utility districts.

The equal population requirement may be less stringent for local redistricting than it is for legislative redistricting. However, the Voting Rights Act applies locally as it does at the state level.

States that elect their judges based on districts must adhere to the same redistricting standards as for other elected officials with one major exception: Courts do not have to comply with the federal equal population requirement.

CASES RELATING TO REDISTRICTING FOR LOCAL JURISDICTIONS, COURTS AND OTHER STATE ENTITIES

Avery v. Midland County[15]

The Midland County, Texas, commissioners' court exercises broad governmental functions in the counties, including the setting of tax rates, equalization of assessments, issuance of bonds, and allocation of funds, and they have wide discretion over expenditures. A resident challenged that the selection of the commissioners' court from four single-member districts of substantially unequal population violated the Equal Protection Clause of the 14th Amendment. It held that the resident had a right to a vote for the commissioners' court of substantially equal weight to the vote of every other resident. In applying the Equal Protection Clause, there was little difference between the exercise of state power through legislatures and its exercise by elected officials in cities, towns and counties. The Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

Abate v. Mundt[16]

The Rockland County, New York, board of supervisors consisted of the supervisors of the county's five towns. Due to population growth and a court-ordered redistricting, a proposed plan provided for a county legislature of 18 members to be distributed among five districts, corresponding with the towns, and each district being assigned legislators in the proportion of its population to that of the smallest town. The plan produced a total deviation from equality of 11.9%. The Court held that a desire to preserve the integrity of political subdivisions may justify a plan that departs from numerical equality. With regard to the long tradition of overlapping functions and dual personnel in the Rockland County government and the fact that the plan did not contain any built-in bias tending to favor particular political interests or geographic areas, the plan's deviations in population did not violate the Equal Protection Clause.

Wells v. Edwards[17]

The Louisiana Constitution provides for the election of the seven justices of the state Supreme Court from districts that are established without regard to population. The voters in five districts, composed of varying numbers of parishes, elect one justice each, and the sixth district elects two justices. There was considerable deviation between the populations among the districts. The court reasoned that the primary purpose of one-person, one-vote is to make sure that each official member of an elected body speaks for approximately the same number of constituents. Apportionment cases have always dealt with elected officials who performed legislative or executive type duties, and in no case has the one-person, one-vote principle been extended to the judiciary. The court held that the one-person, one-vote rule does not apply to the judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district is not sufficient to state a claim upon which relief can be granted.

Thornburg v. Gingles[18]

In 1982, a legislative redistricting plan for the North Carolina General Assembly was enacted that created seven new districts. It was argued that the state had diluted black voting strength in violation of Section 2 of the Voting Rights Act of 1965 by enacting a redistricting plan with one single-member and six multi-member districts. The Supreme Court interpreted the new language of Section 2 concerning discriminatory effects. The Court enunciated that Section 2 requires the breakup of multi-member districts into minority single-member districts when three preconditions are met: 1) That the minority group is sufficiently large and compact that it can be drawn as a majority of a single-member district; 2) That the minority group is politically cohesive; and 3) That the majority usually votes as a bloc so as to defeat the minority's choices for representative. When the three preconditions are met, the Court's task then is to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters.

Chisom v. Roemer[19]

The Louisiana Supreme Court consists of seven members, two of whom are elected at large from one multi-member district, with the remainder elected from single-member districts. The Orleans Parish, which was the largest of the four parishes in the multi-member district, contains about half of the district's registered voters, and the majority of its registered voters were black. However, more than 75% of the other three parishes' registered voters were white. The state's justice election procedure was challenged because it weakened the minority's voting power. The issue in this case was whether the 1982 amendment to Section 2 of the Voting Rights Act applied to judicial elections. The Court argued that Congress did not intend for the 1982 amendment to exclude judicial elections because, if they did, Congress would have explicitly indicated the exclusion. Therefore, the Court held that vote dilution claims for state judicial elections were included within the ambit of the Voting Rights Act, as amended. The Court held that the voters could prevail by demonstrating that the challenged system or practice resulted in minorities being denied equal access to the political process.

Blankenship v. Bartlett[20]

Voters in Wake County, N.C., were divided into four districts for purposes of electing superior court judges. The North Carolina General Assembly gave residents in District 10C one-fifth, or 20%, of the voting power of residents in District 10A. Residents of Districts 10B and 10D had one-fourth, or 25%, of the voting power of residents in District 10A. Therefore, the residents of District 10A had a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D. The issue was whether the Equal Protection Clause of the North Carolina Constitution applies to the General Assembly's creation of an additional judgeship in Superior Court District 10A. The North Carolina Supreme Court held that the state's constitution requires that judicial redistricting is subject to intermediate scrutiny respecting the allocation of judges to the state's judicial districts. Therefore, the state bears

the burden of demonstrating significant interests that justified the General Assembly's subdivisions within District 10 and to show that the disparity in voter strength was not substantially greater than necessary to accommodate those interests.

Patino v. City of Pasadena[21]

The city changed its method for electing city council members from eight single-member districts to six single-member and two at-large districts. This plan for electing its council was challenged because it allegedly diluted the votes of Latino citizens in violation of Section 2 of the Voting Rights Act. The court applied the *Gingles* three-part test and discussed the totality of the circumstances, based on an evaluation of the past and present reality and on a functional view of the political process. The court ruled that Pasadena's move from single-member districts to a mix of single-member and at-large districts for municipal elections was unconstitutional under Section 2 of the VRA because it had the intent and effect of reducing electoral power for Latino voters.

CHAPTER NOTES

1. *Avery v. Midland Cty.*, 390 U.S. 474, 480 (1968).

2. *Ibid*. at 481.

3. *Ibid*. at 485.

4. *Abate v. Mundt*, 403 U.S. 182, 185 (1971).

5. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

6. See *Calvin v. Jefferson Cnty. Bd. of Commrs*, 172 F. Supp. 3d 1292 (N.D. Fla. 2016), relating to whether to include state prisoners when redistricting a county; and *Fairley v. Hattiesburg*, 584 F.3d 660 (5th Cir. 2009), relating to excluding residents of college dormitories.

7. *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd* 409 U.S. 1095 (1973).

8. *Ibid.* at 455 (citations omitted).

9. See *Johnson v. State*, 965 So. 2d 866 (La. Ct. App. 2007); *Blankenship v. Bartlett*, 363 N.C. 518 (2009); and *Field v. Michigan*, 255 F. Supp. 2d 708 (E.D. Mich. 2003).

10. *Chisom v. Roemer*, 501 U.S. 380 (1991).

11. See *Harding v. Cty. of Dallas*, 2018 U.S. Dist. LEXIS 35138 (No. 3:15-CV-0131-D, N.D. Tex., Mar. 5, 2018) and *Hall v. Louisiana*, 108 F. Supp. 3d 419 (M.D. La. 2015) as recent examples of Section 2 actions against governmental entities responsible for drawing judicial districts.

12. *Blankenship v. Bartlett*, 363 N.C. 518 (2009).

13. *Ibid*. at 527.

14. *Ibid*., but see *Johnson v. State*, 965 So. 2d 866 (La. Ct. App. 2007), where a Louisiana court found no state equal protection grounds for scrutinizing population disparities in judicial districts.

15. *Avery v. Midland Cty.*, 390 U.S. 474 (1968).

16. *Abate v. Mundt*, 403 U.S. 182 (1971).

17. *Wells v. Edwards*, 409 U.S. 1095 (1973).

18. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

19. *Chisom v. Roemer*, 501 U.S. 380 (1991).

20. *Blankenship v. Bartlett*, 363 N.C. 518 (2009).

21. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017).

10 | Enacting a Redistricting Plan through the Legislative Process

INTRODUCTION

How redistricting plans are enacted varies from state to state. In fact, certain states have distinct differences in how they draw their congressional and state legislative redistricting plans. In most states, however, redistricting is the responsibility of the legislature. This chapter covers those states where legislatures are in charge. For states that have delegated responsibility to a commission, see Chapter 5, Redistricting Commissions.

Historically, a state's general lawmaking process is used to enact that state's redistricting plans. During recent years, however, states have begun to change how they enact redistricting plans. Regardless of how states differ in their procedures and self-imposed rules, all federal, state and local redistricting plans must meet federal constitutional standards and the requirements of the federal Voting Rights Act.[1] For more details about these requirements, see Chapter 4, Redistricting Principles and Criteria.

Besides federal law, a state's constitution and laws impose unique requirements or procedures for redistricting. This chapter addresses:

- Legislative or public hearing requirements
- The role of the governor
- The role, if any, that citizens' initiative processes may play
- Requirements for publication of maps
- The legal format used to describe districts
- Addressing technical errors in enacted maps
- Mid-decade redistricting
- The population data set
- Accounting for prisoners, military service members and college students
- Multi-member districts
- Legal challenges to plans

LEGISLATIVE OR PUBLIC HEARING REQUIREMENTS

Many states require the legislature to hold public hearings, sometimes explicitly requiring that they be held throughout the state. For instance:

- Oregon's Legislative Assembly must hold at least 10 public hearings at locations throughout the state, including those areas that have experienced the largest population shifts, prior to proposing a plan.[2]
- In Illinois, each committee or joint committee must conduct at least four public hearings statewide to receive testimony and inform the public on the applicable existing districts, with one hearing held in each of four distinct geographic regions of the state determined by the respective committee.[3]
- Iowa's legislative commission is required to schedule and conduct at least three public hearings, in different geographic regions of the state, on the plan embodied in the bill delivered by the Legislative Services Agency to the General Assembly.[4]

Whether legislatures or commissions are in charge of redistricting the boundary lines, states are addressing the need for transparency and public participation as part of the process. At the time of this publication, 20 states, through their state constitutions and statutes, require public hearings or meetings during their redistricting process. See NCSL's webpage, Public Input and Redistricting, www.ncsl.org/research/redistricting/public-input-and-redistricting.aspx.

THE ROLE OF THE GOVERNOR

Most states apply the state's general lawmaking process to redistricting bills (a bill is introduced, heard in committee, sent to the floor, etc.), with the bill sent to the governor for a signature or veto. Therefore, governors in most states have a role in the adoption of new redistricting maps.

Because the U.S. Constitution delegates responsibility for elections to state legislatures, a question arose decades ago about whether a governor could play a role in redistricting. The U.S. Supreme Court, in 1932, addressed this point in *Smiley v. Holm*.[5] In that case, the Minnesota Legislature passed a bill redistricting the state into nine congressional districts, and the governor returned it without his approval. Pursuant to a joint resolution, the bill was deposited with the secretary of state without further action by the Legislature. A citizen of Minnesota filed the complaint and argued that the redistricting legislation was null and void because it was vetoed by the governor.[6] The Court upheld the veto of the governor, declaring that the U.S. Constitution requires only that redistricting be done by the method each state chooses. The Court stated that nothing in the U.S. Constitution "precludes a [s]tate from

providing that legislative action in districting the [s]tate for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."[7]

Notably, in *Holm*, the Court recognized that a state's governor is not automatically empowered with veto authority over a congressional plan, unless that authority has been granted to the governor by the state's constitution or law: "Whether the [g]overnor of the [s]tate, through the veto power, shall have a part in the making of state laws is a matter of state polity. Article 1, section 4, of the Federal Constitution, neither requires nor excludes such participation."[8]

Though the U.S. Supreme Court has addressed the issue of veto authority only in the context of congressional redistricting (due to its nexus to federal law), the authority of any state's governor to veto a state legislative redistricting plan is also entirely dependent upon the state's law.[9]

Most states present legislatively enacted redistricting bills to the governor for approval or veto, as they would with any bill. In a few states—such as Florida, Maryland and Mississippi—legislative redistricting plans are adopted by joint resolution and are not subjected to the gubernatorial approval process.[10]

In North Carolina, both legislative and congressional redistricting are conducted by joint resolution.[11]

THE ROLE, IF ANY, THAT CITIZENS' INITIATIVE PROCESSES MAY PLAY

A total of 24 states have a citizens' initiative process, whereby citizens can gather signatures and place policy options on statewide ballots. Twice, courts have addressed the use of citizens' initiatives in regard to redistricting.

In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' referendum that was filed in response to the Ohio General Assembly's enactment of a plan for congressional districts.[12] In supporting a lower court's decision allowing the referendum to go forward, the Court noted that Congress had specifically authorized states to adopt plans for districts "in the manner provided by the laws [of each state]..."[13] Because a referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state.[14]

More recently, in 2015, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the U.S. Supreme Court upheld Arizona's voter-approved ballot initiative process that established an

PREPARING FOR REDISTRICTING

When preparing for the upcoming redistricting cycle, legislators and staff should plan to have on hand:

- The state's constitutional provisions, statutes and guidelines that relate to redistricting.
- A chart or spreadsheet summarizing important data (the ideal population of a district, where is population growth or loss happening, etc.).
- Court precedents under state and federal law for the state, including legislative privilege.
- A history of the state's procedures and action for at least the last two decades.
- A planning timeline starting perhaps with the release of census data (no later than April 30, 2021) and continuing through the first election in which the new districts will be used.
- The status of any legislative or congressional redistricting commissions in the state, and what the legislature's role is in terms of appointments to the commissions or review of their work.
- Information on whether the state reallocates prisoners from their prison address to their last known address and, if so, any guidelines for the prisoner reallocation process, which probably need to be developed in conjunction with state prison officials.
- Guidelines for how to treat college students and military personnel if the state has special rules for these transient populations.
- Contact information for those who can provide legal guidance, authorize or approve portions of maps, talk to the media, etc.

independent redistricting commission, which supplanted the Arizona Legislature's historic authority to adopt congressional districts.[15] Specifically, the Court determined that the ballot initiative process in Arizona was a proper exercise of the state's lawmaking power, and that there is "no constitutional barrier to a State's empowerment of its people by embracing [the initiative process]."[16]

These principles do not apply universally in all circumstances, however. In at least one state, plans adopted by a commission are explicitly excluded from a referendum process by mandate of the state constitution.[17]

See Chapter 5, Redistricting Commissions, for more information.

REQUIREMENTS FOR PUBLICATION OF MAPS

Several states—such as Michigan, Missouri and Oklahoma—require a designated official to produce and publish an official map detailing a set of district boundaries.[18]

Whether explicitly required by state law or not, it is common practice to publish final maps. Draft maps may be published to provide an opportunity for public comment. Online publication considerations include:

- Permanence of the website used for publication
- Ease of finding and navigating the website
- Whether the maps and associated documents are accessible to people with disabilities (for example, someone who uses a screen reader to navigate online content)
- Maintaining links so documents remain live and accessible for a decade or more
- Whether to permanently post proposed plans as well as enacted plans to preserve a more fully developed legislative history

THE LEGAL FORMAT USED TO DESCRIBE DISTRICTS

To be adopted by the legislature, district plans must be described in law. District geography can be specified in at least four ways: metes and bounds; reference to electronic map files; census units, including reference to political subdivisions and other voting districts (counties, cities, towns, etc.); and block equivalency files. Each system has advantages and disadvantages.

Metes and Bounds

The phrase "metes and bounds" is a centuries-old legal term that refers to marking a parcel of land through a narrative description of its physical features. The narrative uses compass directional points; distances; and landmarks, monuments and other visible features on the ground to fully describe the territory. Metes and bounds should enable a person who is on site to drive, walk or follow the boundaries.

Metes and bounds descriptions continue to be used by attorneys, surveyors and other real property specialists when required by law.

A representative sample of a metes and bounds description in an enacted redistricting plan is found in New York's state legislative plan enactment, codified at: New York State Law Title 8, Article 1 (Assembly); Article 2 (Senate).

Writing an accurate metes and bounds description is a highly skilled, technical task. Even though most redistricting software programs offer a "metes and bounds" feature to create a narrative description automatically, a state considering enacting its plans through this method should ensure that the legislative drafter has substantial experience and expertise in this area.

Reference to An Electronic Map File

In recent decades, a few states have moved away from fully codified redistricting plans and instead have enacted by law a reference to an electronic map that is officially filed with an appropriate state authority such as the secretary of state, a geographic information systems office or other responsible entity. This may be referred to as a "shapefile," which is a common data format used in geographic information systems (GIS) software. A shapefile is a combination of several files and data sets. One file (.shp) defines geography, such as legislative districts, congressional districts and census geographic units (block, block groups, tracts, etc.). Another file (.dbf) contains attributes for each geographic unit, such as the total number of people, the voting age population, and the racial composition of the population in each geographic unit (as per the census data).

A representative sample of a redistricting plan enacted by reference to an electronic map file is Utah's state legislative plan, codified at: Utah Code §§ 36-1-201.5 (House); 36-1-101.5 (Senate).

Census Units, Including Political Subdivisions and Other Voting Districts (Counties, Cities, Towns, Etc.)

A redistricting plan that uses census units to describe districts can take a number of forms. It may consist simply of a list of numbered census blocks within each district, or it could include a mix of numbered census units along with more readily understandable territories—often named counties, cities, towns and the like.

A representative sample of census units used in an enacted redistricting plan is found in Kentucky's state legislative plan, codified at: Kentucky Revised Statutes, secs. 5.101-5.138 (House); 5.201-5.300 (Senate).

Using a Block Equivalency File

A block equivalency file is a table that provides a one-to-one correspondence between census blocks and districts. Since a census block is the smallest unit of census geography, a listing of census blocks and the districts where they are assigned is a convenient way to produce an accurate, legal description of a redistricting map. In cases where census blocks are split between districts, this method must be modified.

ADDRESSING TECHNICAL ERRORS IN ENACTED MAPS

A number of states have codified the process for correcting technical errors in detailed statutory descriptions of districts. Most of these statutes deal with the most common error—geography that has been inadvertently omitted from a district description. In these cases, a smaller unit of geography within a district, such as a census block or voting precinct, is located within a congressional or legislative district on a map but is not listed in the statute's description of the district. States most likely require

the excluded geography to be deemed to have been assigned to the district within which it is located. Some states also have further provisions for how to treat unlisted or unassigned geography that is located between two districts. In these cases, states generally provide for the unassigned area to be appended to the nearest contiguous district with the lowest population.[19]

These procedures that allow for technical errors in previously enacted redistricting plans often allow the plans to be administratively corrected. Procedures that address technical errors vary by state. In some states, correction authority is assigned to a specific official—often the secretary of state. In Minnesota, for example, the secretary of state is authorized to make technical corrections and, if necessary, may recommend additional changes to the Legislature for possible enactment. Since 2012, Minnesota's secretary of state has issued at least 19 correction orders to Minnesota's redistricting plans; 18 of these were issued shortly after the plans were ordered, and one was issued as recently as 2017.[20]

In addition to these technical correction orders, the Minnesota Legislature has separately enacted two boundary adjustments that, while not substantive enough to qualify as mid-decade redistricting, were beyond the scope of the secretary of state's administrative correction authority.[21]

In Maine, the secretary of state is authorized to "resolve ambiguities concerning the location of election district lines" consistent with a set of standards included in the state law.[22] This authorization has been in place since 1993.

In Rhode Island, the secretary of state may "undertake measures to ensure compliance with" specific standards for assigning territory provided in law.[23]

In Utah, the local county clerk is authorized to assign territory that has been omitted from a plan to an appropriate district.[24] Utah law also permits "affected parties" to petition the state's lieutenant governor for a clarification order to resolve uncertainty about a boundary line, or to determine in which district a person resides.[25]

In 1982, California law authorized the secretary of state and county clerks to use the official maps to help them interpret the law and conduct elections (Cal. Election Code sec. 30000 (1989)). In 1983, the Legislature and secretary of state used this authority to make corrections to the congressional redistricting plan to save it from constitutional attack.[26]

MID-DECADE REDISTRICTING

Generally, states enact a redistricting plan only once every 10 years. There are times, however—whether due to litigation or simple technical corrections—when a state alters its plan during a particular decade.

While the vast majority of states do not change their redistricting plans until the following decade's new census, a few states expressly prohibit mid-decade changes to district plans (other than technical adjustments or based on court order). For example:

- In Missouri, modification of district boundaries by its commission in the years between a full redistricting cycle is prohibited under its constitution.[27]
- In North Carolina, mid-decade redistricting is prohibited under its constitution.[28]
- In Tennessee, mid-decade adjustments to congressional district boundaries are specifically prohibited by statute.[29]

It is possible, though rare, for states where no prohibition on mid-decade redistricting exists for a state to undertake such redistricting. Texas did so in the 2000s, for instance.

THE POPULATION DATA SET

Occasionally, questions arise about the specific population data set to be used in redistricting. The U.S. Constitution requires congressional apportionment to be based on an "actual Enumeration" of the U.S. population, which means, in practice, with data from the federal decennial census. Most states use population data provided by the census for legislative redistricting as well, although some variation exists in whether this is required or just permitted.

Twenty-two states explicitly require the use of census data for legislative redistricting, with another 17 states implying the same. Six states permit either the use of census or other data sets. For instance, Alabama permits the state to conduct an "enumeration" in the event the federal census is not conducted,[30] and New York has a similar option for a state census.[31] Five states have special rules on how and when the census data is to be used in their redistricting. For more information, see Appendix B. In 2016, the U.S. Supreme Court addressed the issue of what population data is acceptable in a case arising from Texas, *Evenwel v Abbott*.[32] The case related to Texas' use of its total state population (by far the most common practice among states), rather than its population of eligible voters or registered voters, as the basis for drawing state senate districts of equal population. The Court did not direct the use of one particular population metric; instead, it affirmed the right of states to choose to use total population as the basis for upholding the constitutional principle of one-person, one-vote.[33] It did not address whether alternative data sets also would be permissible.

Although the *Evenwel* case did not fundamentally change any requirements for legislative drafters in developing a redistricting plan, it does highlight both the risk of confusion due to the complexity of

available population data sets and the need for consistency and clarity when proposing plans, especially if a legislature may consider multiple plans over the course of a redistricting cycle.

The *Evenwel* case is discussed in more detail in Chapter 1, The Census.

ACCOUNTING FOR PRISONERS, MILITARY SERVICE MEMBERS AND COLLEGE STUDENTS

The federal decennial census counts people where they live. This includes prisoners, military service members and college students, all of whom may be living in a state or jurisdiction other than their permanent home. In the 2010 cycle, New York and Maryland "reallocated" prisoners from the prison address to their last known address for congressional redistricting, legislative redistricting or both. Four additional states (California, Delaware, Nevada and Washington) intend to do so for the 2020 cycle.

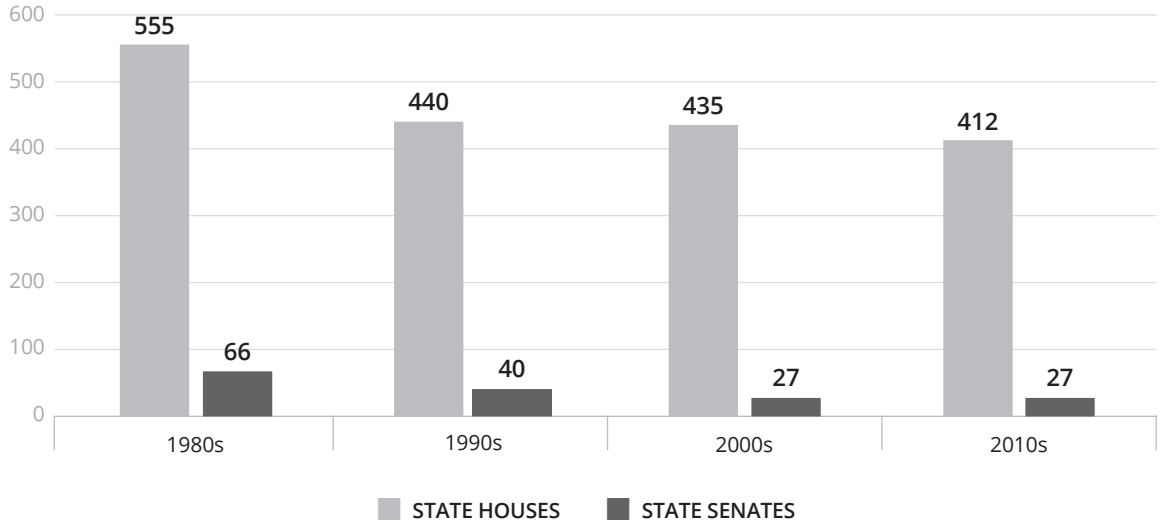
Reallocating specific populations requires guidelines on who will be reallocated (i.e., in the case of prisoners, those in federal and state prisons, or only those in state prisons) and where to reallocate them. Creating these guidelines may present challenges. For example, depending on the state's requirement, reallocating prison populations may involve engaging with local, state and federal corrections authorities. In 2010, Maryland and New York were denied access to federal prison data. Access to the complete set of data from state prisons necessary for redistricting purposes (for example, racial and ethnic data) may or may not be readily available. Rules for allocating individuals with a last known address that is out of state (prisoners, students, and the like) also will require careful thought and preparation.

Hawaii has excluded military service members from their legislative count, a practice upheld in *Burns v Richardson*.[34] Kansas has done the same in the past for military service members and students living away from home. In 2019, Kansas adopted a resolution to stop this practice.[35]

MULTI–MEMBER DISTRICTS

In most legislative chambers, a single representative or senator represents a specific district; these are known as single-member districts. In some cases, a district may be represented by two or more legislators in a given chamber. Chambers can have a mix of single-member and multi-member districts. Sometimes, a legislative district is represented by one senator and by two (or occasionally three, as is the case in Maryland) representatives, who are elected at large. In other cases, a single senate district could be composed of two distinct house districts. These are referred to as "nested" districts. In still other cases, a house district may be large enough to have two, three or more representatives.

EXHIBIT 10.1 Total Number of Multi-member Districts



Source: NCSL, 2019

Congress has prohibited multi-member districts for the purposes of redistricting seats in the U.S. House of Representatives since 1967.[36]

In contrast, the U.S. Supreme Court has held that the use of multi-member legislative districts is not unconstitutional per se. However, the Court has invalidated the use of multi-member legislative districts where their use impedes the ability of minority voters to elect representatives of their choice. Multi-member districts that discriminate against a racial group will most likely be challenged under Section 2 of the Voting Rights Act, which requires only showing that an election practice results in discrimination. The Court has made clear its preference for single-member legislative districts by discouraging the use of multi-member districts in court-drawn plans absent extraordinary circumstances.[37]

The use of multi-member districts for legislative districts has declined over the decades. In 1980, multi-member legislative districts were used in 17 states. In 2019, 10 states still had multi-member districts in at least one of their legislative bodies, as shown in Exhibit 10.1. To see the states that have used multi-member districts in 2000 and 2010, see Exhibit 10.2.

EXHIBIT 10.2 Multimember Districts in Each State

	STATE HOUSES					
	2000s			2010s		
	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District
Arizona	30	30	2	30	30	2
Idaho	35	35	2	35	35	2
Maryland	65	44	3	67	43	3
New Hampshire	103	92	13	204	99	11
New Jersey	40	40	2	40	40	2
North Dakota	47	47	2	47	47	2
South Dakota	37	33	2	35	3	2
Vermont	108	42	2	150	46	2
Washington	49	49	2	49	49	2
West Virginia	56	23	7	67	20	5

	STATE SENATES					
	2000s			2010s		
	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District	Number of Districts	Number of Multimember Districts	Largest Number of Seats in District
Vermont	13	10	6	13	10	6
West Virginia	17	17	2	17	17	2

Source: NCSL, 2019

LEGAL CHALLENGES TO THE PLANS

An important consideration for a legislature during the redistricting plan development process is determining who will be responsible for defending legal challenges to the plan. The resolution of this issue must be based upon a review of state laws, particularly those that empower the state's attorney general. A legislature's expectation that its attorney general will zealously defend an adopted plan may be affected by the degree of independence the attorney general has in declining representation or the office's power to settle a suit in the "best interests of the public." Likewise, a decision to provide that other parties will bear the responsibility of defending a plan can be affected by the state's allocation of powers and duties to its attorney general. A legislature must address, through careful examination, its constitutional, statutory and case law.[38]

Attorney general's authority to represent or defend a redistricting plan adopted by the legislature

In most states, the attorney general is the state's chief legal officer.[39] Each attorney general's office is unique in scope and sources of authority. In some states, the attorney general is empowered by provisions of the state's constitution as well as by statute. In many, the office is equipped with the same powers the position had at common law.[40]

Generally, state constitutions provide little detail as to the duties of the attorney general, leaving the matter to the legislature or to common law doctrine to define the responsibilities of the office.[41] In states where the office derives its powers from a statute or the common law, legislative enactments either amending statutes or abrogating the common law would appear to be possible means of placing the authority to defend redistricting plans in the hands of other officers.[42] In other states, constitutional language empowering the attorney general may place severe restrictions on the legislature's power to prohibit the attorney general from defending or taking other legal action.[43] In this latter group of states, the attorney general may be required to represent the state in any challenge to a plan.

The attorney general's choice to represent and defend

Forty-three state constitutions are silent on whether an attorney general has a duty to defend; the remaining seven contain language that is ambiguous on this point.[44] State statutes often set out a duty of the attorney general to enter appearances or defend the state, but often are silent as to whether the attorney general may choose *not* to defend, particularly when constitutional issues are raised in the case. Two states—Mississippi and Pennsylvania—specifically set out a duty of the attorney general to defend cases in which the constitutionality of a state law is challenged.[45] To the contrary, statutes in three states would empower their attorneys general to decline to defend their state statutes in constitutional cases.[46] Maryland courts have found that the attorney general may choose not to defend certain laws that are undeniably unconstitutional.[47] In recent years, attorneys general in several states have opted not to defend controversial statutes adopted on such subjects as same-sex marriage and abortion, giving rise to defenses from intervenors or other parties.[48] Thus, in some states, an attorney general who believes that a redistricting plan suffers from a legal infirmity, particularly a constitutional defect, may be able to refuse to defend such plans when they are challenged in court.

The clients' interests and settlements

A decision of an attorney general to decline representation in a redistricting case raises serious concerns about the legislature's ability to defend its adopted plan. As mentioned above, state approaches vary regarding the matter of who will be responsible for defending laws when the attorney general declines to do so. Some states clearly set out statutory guidelines allowing other public officers to make appearances to defend state laws under challenge. These statutes often allow the legislature to take action to defend a challenged statute or allow the governor to do so.[49] Outside intervenors or private counsel hired by affected agencies also may defend a challenged statute in some jurisdictions.[50] In

others, courts have devised tests for determining when state agencies may proceed or defend in cases in which the attorney general has taken a position adverse to the client's interests.[51] When attorneys general have defended challenges to a statute, some courts have made clear that an attorney general may not enter into settlements or make decisions regarding appeals if such actions are adverse to the interests of the clients.[52]

It also is possible that multiple parties or intervenors may appear in a case challenging a statute or a redistricting plan. The case of *Lawyer v. Department of Justice*[53] illustrates the complexities that arise when multiple parties with differing interests appear in a case involving the constitutionality of a redistricting plan.

During the 1990s, Florida Senate District 21 (Tampa Bay) had been challenged in federal court on the grounds that it violated the Equal Protection Clause of the U.S. Constitution. The district had been drawn by the Florida Legislature, but the U.S. Department of Justice had refused to preclear it because it failed to create a majority-minority district in the area. The governor and legislative leaders had refused to call a special session to revise the plan. The Florida Supreme Court, performing a review mandated by the Florida Constitution before the plan could be put into effect, had revised the plan to accommodate the Justice Department's objection, and the plan was used for the 1992 and 1994 elections. A suit was filed in April 1994, and a settlement agreement was presented for court approval in November 1995. The Florida attorney general appeared, representing the State of Florida, and lawyers for the president of the Senate and the speaker of the House appeared, representing their respective bodies. All parties but two supported the settlement agreement, and in March 1996, the district court approved it. Appellants argued that the district court had erred in not affording the Legislature a reasonable opportunity to adopt a substitute plan of its own. The Supreme Court did not agree and found that action by the Legislature was not necessary. The Court found that the state was properly represented in the litigation by the attorney general and that the attorney general had broad discretion to settle it without either a trial or the passage of legislation.[54]

In a 2019 decision, the U.S. Supreme Court held that the Virginia House of Delegates did not have standing to appeal a federal district court decision that created a new redistricting plan for the House after 11 districts were found to be racially gerrymandered.[55] The federal district court redrew the Virginia map after the House and Senate failed to develop their own remedial map during late 2018. The speaker of the House, on behalf of his chamber, appealed the district court decision creating the new map and sought to enjoin use of the court-drawn map in the 2019 elections.

The Court held that "(t)he House lacks standing, either to represent the State's interests or in its own right."[56] Justice Ruth Bader Ginsberg, writing for the majority, wrote that "(O)ne House of its bicameral legislature cannot alone continue the litigation against the will of its partners in the legislative process."[57] The opinion noted that the attorney general and governor did not seek to appeal the district

court decision, and the Senate also took no action. While the House was able to intervene in the lower court proceedings, it did not have standing on its own to appeal on behalf of the state.

Civil actions challenging statutes filed by the attorney general

Related to issues associated with the duty to defend is the power of an attorney general to bring a civil action against state agencies to enjoin them from implementing legislation. In several states, case law supports the proposition that an attorney general is under an affirmative duty to bring suits in cases challenging an allegedly unconstitutional law.[58] While states with an expansive view of the common law powers of an attorney general may support this position, several states have taken the position that such suits may not be brought by the attorney general against state agencies or entities absent specific statutory or constitutional authority.[59] In any state where an attorney general has taken the position that the office is legally obligated to take such action, it is possible that a redistricting plan could face a direct challenge from the state's own attorney general.

Legislatures will want to carefully examine the issue of representation before completing a redistricting plan. As this cursory overview reveals, each state's constitutional, statutory and common law is unique and must be carefully explored to help the legislature determine who can defend the adopted plans and whether there is a real possibility of opposition being directed against the plans from the state's attorney general.[60]

CONCLUSION

While the key tenets of redistricting are equal population, not abridging the right to vote based on race, and following state-specified criteria, procedurally based legal concerns can arise as well. Despite their procedural nature, these issues can be contentious. They include whether to count prisoners at their home address, use citizens as the population base, determine how public input is solicited and used, and conduct mid-decade redistricting.

Legal concerns also may arise around when and how states may undertake mid-decade redistricting, how plans are adopted and published, the role of the governor, the role (if any) that citizens' initiative process may play, and procedures for technical corrections and adjustments.

CASES RELATING TO ENACTING A PLAN

Ohio ex rel. Davis v. Hildebrant[61]

In 1916, the U.S. Supreme Court heard a challenge arising out of a petition for a citizens' initiative. The citizens filed in response to the Ohio General Assembly's enactment of a plan for 22 additional congressional districts. The voters disapproved the redistricting act by a referendum vote. In supporting a decision that the referendum should go forward, the Court noted that Congress had specifically

authorized states to adopt plans for districts in the manner provided by the laws of each state. The referendum law was part of the legislative power of the state, made so by the state constitution. Since the referendum procedure was part of the legislative power in Ohio, it did not violate the U.S. Constitution's direction that the "time, place, and manner" of conducting elections must be provided by the "legislature" in each state. For redistricting purposes, Hildebrant thus established, "the Legislature" did not mean the representative body alone. Rather, the word encompassed a veto power lodged in the people.[62]

Smiley v. Holm[63]

In 1931, the Minnesota Legislature passed a bill redistricting the state into nine congressional districts, and the governor returned it without his approval. Pursuant to a joint resolution, the bill was deposited with the secretary of state without further action. Since the bill had been vetoed by the governor and was not re-passed by the state Legislature, this case challenged the lawmaking authority and method needed to prescribe congressional districts. The Court held that nothing in the U.S. Constitution "precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power."

Arizona State Legislature. v. Arizona Independent Redistricting Commission[64]

In 2000, Arizona voters adopted an amendment to the Arizona Constitution via ballot initiative that removed the Legislature's authority to draw legislative and congressional districts. The amendment vested this power with the Independent Redistricting Commission (IRC). In 2012, the Arizona Legislature challenged the constitutionality of removing what they considered to be their constitutional powers and giving them to another entity. The argument was based on the Elections Clause of the U.S. Constitution, which gives this power to the legislatures to draw congressional districts.

Evenwel v. Abbott[65]

After the 2010 census, the Texas Legislature reapportioned its Senate districts. The 2011 redistricting plan was challenged on the grounds that the districts violated the one-person, one-vote principle. The districts were apportioned based on total population rather than on registered voter population or voter eligible population and, while the new districts were relatively equal in terms of total population, they varied in terms of voter population. It was argued that the Legislature's use of total population violated the Equal Protection Clause by discriminating against voters in districts with low immigrant populations by giving voters in districts with significant immigrant populations a disproportionately weighted vote. The Supreme Court held that its past opinions confirmed that states *may* use total population in order to comply with the one-person, one-vote principle of the Equal Protection Clause. Constitutional history, judicial precedent and consistent state practice all demonstrate that apportioning legislative districts based on total population is permissible under the Equal Protection Clause. The Court did not hold that other methods are impermissible.

CHAPTER NOTES

1. 89 Pub. L. No. 110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10101 et seq.).

2. Or. Rev. Stat. Ann. § 188.016.

3. 10 Ill. Comp. Stat. Ann. 125/10-5.

4. Iowa Code § 42.6.

5. *Smiley v. Holm*, 285 U.S. 355 (1932).

6. *Ibid*. at 361.

7. *Ibid*. at 372-73; see also *Carroll v. Becker*, 285 U.S. 380 (1932) (related to veto power of the Missouri governor in congressional redistricting), and *Koenig v. Flynn*, 285 U.S. 375 (1932) (related to veto power of the New York governor in congressional redistricting).

8. *Smiley*, 285 U.S. at 368.

9. See, for example, *Duxbury v. Donovan*, a 1965 Minnesota Supreme Court case holding that state legislative redistricting plans are part of the lawmaking function under Minnesota's constitution and, thus, subject to the governor's approval or veto. *Duxbury v. Donovan*, 138 N.W.2d 692 (1965).

10. Fla. Const. art. III, § 16; Miss. Const. Ann. art. 13, § 254; and Md. Const. art. III, § 5.

11. N.C. Const. art. II, § 22.

12. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

13. *Ibid.* at 568.

14. *Ibid*.; U.S. Const. Art. I, § 4. Interestingly, the Court cites the legislative history of Congress' addition, 1911, of the phrase "in the manner provided by the laws thereof" in the federal law authorizing states to establish procedures for redistricting, concluding that the phrase was inserted explicitly to ensure that redistricting plans could be subject to a state's initiative or referendum procedure. *Davis*, 241 U.S. at 568-69.

15. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

16. *Ibid*. at 2668.

17. See Mo. Const. art. III, §§ 2, 7.

18. See, among others, Mich. Comp. Laws § 3.53 (requiring the creation of a map); Mo. Rev. Stat., § 128.459 (requiring a map to be filed with the Revisor of Statutes); Okla. Stat. tit. 14, §§ 6.5 (congressional plan), 80.35.3 (State Senate), 136 (State House) (all requiring maps be published).

19. Minn. Stat. Ann. § 2.91, subd. 2 ("The legislature intends that a redistricting plan encompass all the territory of this state, that no territory be omitted or duplicated, that all districts consist of convenient contiguous territory substantially equal in population, and that political subdivisions not be divided more than necessary to meet constitutional requirements. Therefore, in implementing a redistricting plan for the legislature or for Congress, the secretary of state, after notifying the Legislative Coordinating Commission and the revisor of statutes, shall order the following corrections: (**a**) If a territory in this state is not named in the redistricting plan but lies within the boundaries of a district, it is a part of the district within which it lies. (**b**) If a territory in this state is not named in the redistricting plan but lies between the boundaries of two or more districts, it is a part of the contiguous district having the smallest population. (**c**) If a territory in this state is assigned in the redistricting plan to two or more districts, it is part of the district having the smallest population. (**d**) If a territory in this state is assigned to a district that consists of other territory containing a majority of the population of the district but with which it is not contiguous, the territory is a part of the contiguous district having the smallest population. (**e**) If the description of a district boundary line that divides a political subdivision is ambiguous because a highway, street, railroad track, power transmission line, river, creek, or other physical feature or census block boundary that forms part of the district boundary is omitted or is not properly named or has been changed, or because a compass direction for the boundary line is wrong, the secretary of state shall add or correct the name or compass direction and resolve the ambiguity in favor of creating districts of convenient, contiguous territory of substantially equal population that do not divide political subdivisions more than is necessary to meet constitutional requirements."); see also Nev. Rev. Stat. Ann. § 304.090; Ohio Rev. Code Ann. § 3521.01; 25 Pa. Cons. Stat. Ann. § 3596.303; and Tenn. Code Ann. § 2-16-103.

20. Minn. Stat. Ann. § 2.91, subds. 2-4. The 2017 order is available online, at https://officialdocuments.sos.state.mn.us/Document/Details/115134.

21. For an example of this style of drafting, see Minn. Stat. Ann. §§ 2.395 (modifying House boundaries within the 39th Senate District); 2.495 (modifying House boundaries within the 49th Senate District).

22. Me. Rev. Stat. tit. 21-A, § 1207.

23. R.I. Gen. Laws §§ 22-1-2 (Senate districts); 22-2-2 (House districts).

24. Utah Code Ann. §§ 20A-13-102 (Congressional districts); 36-1-104 (State Senate); 36-1-203 (State House).

25. Utah Code Ann. §§ 36-1-105 (state Senate boundaries); 36-1-204 (state House boundaries).

26. See *Badham v. United States Dist. Court for N. Dist*., 721 F.2d 1170, 1178-79 (9th Cir. 1983).

27. *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601 (Mo. 2012).

28. N.C. Const. art. II, §§ 3, 5.

29. Tenn. Code Ann. § 2-16-102.

30. Ala. Const. art. IX, § 201.

31. N.Y. Const. art. III, § 4.

32. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

33. *Ibid*. at 1132-33.

34. *Burns v. Richardson*, 384 U.S. 73 (1966).

35. Kansas S.C.R. 1605 (adopted Mar. 27, 2019) and H.C.R. 5005 (pending, will be carried over to the 2020 legislative session).

36. Seemingly conflicting mandates regarding multi-member districts for Congress were addressed by the U.S. Supreme Court when it reviewed a 2002 U.S. District Court-drawn congressional plan for Mississippi. Reviewing the conflicting language in light of the history of the 1967 amendment, the Court ruled that 2 U.S.C.S. § 2c applies to congressional plans whether drawn by the state redistricting authority or a court. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

37. See *Fortson v. Dorsey*, 379 U.S. 433 (1965) (the Supreme Court rejected the notion that the equal protection standard necessarily requires the formation of single-member districts.); *Burns v. Richardson*, 384 U.S. 73 (1966) (the Court stated that multi-member districts will constitute an invidious discrimination *only* if it can be shown that "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."); *White v. Regester*, 412 U.S. 755 (1973)("multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State."); *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1979) (the Supreme Court required that, to sustain an action under the Equal Protection Clause and Section 2 of the VRA, a showing of purposeful discrimination would be necessary.); *Rogers v. Lodge*, 458 U.S. 613 (1982) (the Supreme Court upheld, for the first time since *Register*, a lower court finding of a violation of the Equal Protection Clause in the use of multi-member districting.); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (the Supreme Court reaffirmed that multi-member legislative districts and at-large election schemes do not, per se, violate the rights of minority voters.); *Connor v. Johnson*, 402 U.S. 690 (1971) (the Court held that, as a general rule, single-member districts are preferable to large multi-member districts when district courts are required to fashion redistricting plans.); *Chapman v. Meier*, 420 U.S. 1 (1975) ("When the plan is court ordered, there often is no state policy of multimember districting which might deserve respect or deference. Indeed, if the court is imposing multimember districts upon a State which always has employed single-member districts, there is special reason to follow the Connor rule favoring the latter type of districting."); and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir., 1973) (the U.S. Court of Appeals held that the preference for single-member districts in court-drawn plans "is not an unyielding one," and a court-drawn plan can use multi-member districts.)

38. For a comprehensive examination of the issues discussed in this section, see Neal Devins and Saikrishna Bangalore Prakash, "Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend," *Yale Law Journal* 124 (2015): 2100-87.

39. See William P. Marshall, "Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive," *Yale Law Journal* 115, no. 19 (2006): 2446, 2452.

40. Devins, "Fifty States," at 2124-25.

41. *Ibid.* at 2128.

42. Examples of cases setting out the legislature's power to modify statutory and common law duties of the attorney general include *Commonwealth ex rel. Beshear v. Bevin*, 498 S.W.3d 355 (Ky. 2016); *Dunivan v. State*, 466 S.W.3d 514 (Mo. 2015); *State ex rel. Morrisey v. W. Va. Office of Disciplinary Counsel*, 764 S.E.2d 769 (W. Va. 2014); *State ex rel.Morrison v. Sebelius*, 179 P.3d 366 (Kan. 2008); *Botelho ex rel. Members of Alaskan Sports Bingo Joint Venture v. Griffin*, 25 P.3d 689 (Alaska 2001); *State v. City of Oak Creek*, 605 N.W.2d 526 (Wis. 2000); *State ex rel. Cartwright v. Georgia-Pacific Corp.*, 663 P.2d 718 (Okla. 1982).

43. See *Lyons v. Ryan*, 780 N.E.2d 1098(Ill. 2002) and *Hoffman v. Madigan,* 80 N.E.3d 105 (Ill. App. Ct. 2017), wherein Illinois courts ruled that the General Assembly may not diminish the common law prerogatives of the Illinois attorney general; see also *Barati v. State,* 198 So. 3d 69 (Fla. Dist. Ct. App. 2016) and *Murphy v. Yates*, 348 A.2d 837 (Md. 1975).

44. Devins, "Fifty States," 2128–29.

45. See Miss. Code Ann. § 7-5-1; 71 Pa. Cons. Stat. Ann. § 732-204(a)(3).

46. See Tenn. Code Ann. § 8-6-109(b)(9)-(10); Neb. Rev. Stat. Ann. § 84-215, cited in Devins,"Fifty States," at 2130.

47. *State v. Braverman*, 137 A.3d 377 (Md. Ct. Spec. App. 2016), wherein a Maryland court made clear that, while the attorney general is responsible for defending challenges to the constitutionality of a statute, the attorney general does not have to defend a law that is undeniably unconstitutional. *Ibid.* at 391.

48. Katherine Shaw, "Constitutional Nondefense in the States," *Columbia Law Review* 114, no. 13 (2014): 213, 219.

49. Devins, "Fifty States," at 2131.

50. Shaw, "Constitutional Nondefense," at 246–57.

51. *Frazier v. State*, 504 So. 2d 675 (Miss. 1987).

52. See *Tice v. Department of Transp.*, 312 S.E.2d 241 (N.C. Ct. App. 1984); *County of Cook v. Patka*, 405 N.E.2d 1376 (Ill. App. Ct. 1980); *Santa Rita Mining Co. v. Department of Property Valuation,* 530 P.2d 360 (Ariz. 1975). But see *Terrazas v. Ramirez,* 829 S.W.2d 712 (Tex. 1991), wherein respecting a settlement of litigation, the attorney general's broad authority to protect the state's interests superseded the Legislature's specific constitutional authority to redistrict.

53. *Lawyer v. Department of Justice*, 521 U.S. 567 (1997).

54. *Ibid.* at 577-78.

55. *Va. House of Delegates v. Bethune-Hill*, No. 18-281, 587 U.S. ___ (2019).

56. *Ibid*.

57. *Ibid*.

58. Devins, "Fifty States," at 2133; and specifically regarding a redistricting plan, see *State ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003).

59. See *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981), ruling that the California attorney general has no authority to bring suit against state agencies and setting out the several authorities that have ruled similarly, as well the authorities that have ruled otherwise.

60. Other articles pertinent to these issues include Gregory F. Zoeller, "Duty to Defend and the Rule of Law," *Indiana Law Journal* 90 (2015): 513; and Marshall, "*Break Up the Presidency?*"

61. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

62. See *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

63. *Smiley v. Holm*, 285 U.S. 355 (1932).

64. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).

65. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

APPENDIX A

Census Residence Concepts

The U.S. Census Bureau uses residence criteria to determine where people are counted during the 2020 Census. In general, the criteria follow these three principles:

- Count people at their usual residence, which is the place where they live and sleep most of the time.
- Count people in certain types of group facilities on Census Day at the group facility.
- Count people who do not have a usual residence, or who cannot determine a usual residence, where they are on Census Day.

The table below describes how the residence criteria apply to specific living situations for which people commonly request clarification. For additional details, see U.S. Census webpage, 2020 Census Residence Criteria and Residence Situations, www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.html.

LIVING SITUATION	DETAILS	WHERE COUNTED
People away from their usual residence on Census Day	People away from their usual residence on Census Day, such as on a vacation or a business trip, visiting, traveling outside the United States, or working elsewhere without a usual residence there (for example, as a truck driver or traveling salesperson).	Counted at the residence where they live and sleep most of the time.
Visitors on Census Day	Visitors on Census Day.	Counted at the residence where they live and sleep most of the time. If they do not have a usual residence to return to, they are counted where they are staying on Census Day.

LIVING SITUATION	DETAILS	WHERE COUNTED
Foreign citizens in the United States	Citizens of foreign countries living in the United States.	Counted at the U.S. residence where they live and sleep most of the time.
	Citizens of foreign countries living in the United States who are members of the diplomatic community.	Counted at the embassy, consulate, United Nations' facility or other residences where diplomats live.
	Citizens of foreign countries visiting the United States, such as on a vacation or business trip.	Not counted in the census.
People living outside the United States	People deployed outside the United States[1] on Census Day while stationed or assigned in the United States who are military or civilian employees of the U.S. government.	Counted at the U.S. residence where they live and sleep most of the time, using administrative data provided by federal agencies.[2]
	People stationed or assigned outside the United States on Census Day who are military or civilian employees of the U.S. government, as well as their dependents living with them outside the United States.	Counted as part of the U.S. federally affiliated overseas population, using administrative data provided by federal agencies.
	People living outside the United States on Census Day who are not military or civilian employees of the U.S. government and are not dependents living with military or civilian employees of the U.S. government.	Not counted in the census.
People who live or stay in more than one place	People living away most of the time while working, such as people who live at a residence close to where they work and return regularly to another residence.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
	People who live or stay at two or more residences (during the week, month or year), such as people who travel seasonally between residences (for example, snowbirds).	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
	Children in shared custody or other arrangements who live at more than one residence.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
People moving into or out of a residence around Census Day	People who move into a new residence on or before Census Day.	Counted at the new residence where they are living on Census Day.
	People who move out of a residence on Census Day and do not move into a new residence until after Census Day.	Counted at the old residence where they were living on Census Day.
	People who move out of a residence before Census Day and do not move into a new residence until after Census Day.	Counted at the residence where they are staying on Census Day.

LIVING SITUATION	DETAILS	WHERE COUNTED
People who are born or who die on Census Day	Babies born on or before Census Day.	Counted at the residence where they will live and sleep most of the time, even if they are still in a hospital on Census Day.
	Babies born after Census Day.	Not counted in the census.
	People who die before Census Day.	Not counted in the census.
	People who die on or after Census Day.	Counted at the residence where they were living and sleeping most of the time as of Census Day.
Relatives and nonrelatives	Babies and children of all ages, including biological, step, and adopted children, as well as grandchildren. Foster children. Spouses and close relatives, such as parents or siblings. Extended relatives, such as grandparents, nieces/nephews, aunts/uncles, cousins or in-laws. Unmarried partners. Housemates or roommates. Roomers or boarders. Live-in employees, such as caregivers or domestic workers. Other nonrelatives, such as friends.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.
People in health care facilities	People in general hospitals or Veterans Affairs hospitals (except psychiatric units) on Census Day, including newborn babies still in the hospital on Census Day.	Counted at the residence where they live and sleep most of the time. Newborn babies are counted at the residence where they will live and sleep most of the time. If patients or staff members do not have a usual home elsewhere, they are counted at the hospital.
	People in psychiatric hospitals and psychiatric units in other hospitals (where the primary function is for long-term non-acute care) on Census Day.	Patients are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in assisted living facilities[3] where care is provided for those who need help with the activities of daily living but do not need the skilled medical care that is provided in a nursing home on Census Day.	Residents and staff members are counted at the residence where they live and sleep most of the time.
	People in nursing facilities/skilled-nursing facilities (which provide long-term non-acute care) on Census Day.	Patients are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People staying at in-patient hospice facilities on Census Day.	Counted at the residence where they live and sleep most of the time. If patients or staff members do not have a usual home elsewhere, they are counted at the facility.

LIVING SITUATION	DETAILS	WHERE COUNTED
People in housing for older adults	People in housing intended for older adults, such as active adult communities, independent living, senior apartments or retirement communities on Census Day.	Residents and staff members are counted at the residence where they live and sleep most of the time.
U.S. military personnel	U.S. military personnel assigned to military barracks/dormitories in the United States on Census Day.	Counted at the military barracks/ dormitories.
	U.S. military personnel (and dependents living with them) living in the United States (living either on base or off base) who are not assigned to barracks/dormitories on Census Day.	Counted at the residence where they live and sleep most of the time.
	U.S. military personnel assigned to U.S. military vessels with a U.S. homeport on Census Day.	Counted at the onshore U.S. residence where they live and sleep most of the time. If they have no onshore U.S. residence, they are counted at their vessel's homeport.
	People who are active duty patients assigned to a military treatment facility in the United States on Census Day.	Patients are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in military disciplinary barracks and jails in the United States on Census Day.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	U.S. military personnel who are deployed outside the United States (while stationed in the United States) and are living on or off a military installation outside the United States on Census Day.	Counted at the U.S. residence where they live and sleep most of the time, using administrative data provided by the Department of Defense.
	U.S. military personnel who are stationed outside the United States and are living on or off a military installation outside the United States on Census Day, as well as their dependents living with them outside the United States.	Counted as part of the U.S. federally affiliated overseas population, using administrative data provided by the Department of Defense.
	U.S. military personnel assigned to U.S. military vessels with a homeport outside the United States on Census Day.	Counted as part of the U.S. federally affiliated overseas population, using administrative data provided by the Department of Defense.

LIVING SITUATION	DETAILS	WHERE COUNTED
Merchant Marine personnel on U.S.–flagged maritime/ merchant vessels	Crews of U.S.–flagged maritime/merchant vessels docked in a U.S. port, sailing from one U.S. port to another U.S. port, sailing from a U.S. port to a foreign port, or sailing from a foreign port to a U.S. port on Census Day.	Counted at the onshore U.S. residence where they live and sleep most of the time. If they have no onshore U.S. residence, they are counted at their vessel. If the vessel is docked in a U.S. port, sailing from a U.S. port to a foreign port, or sailing from a foreign port to a U.S. port, crewmembers with no onshore U.S. residence are counted at the U.S. port. If the vessel is sailing from one U.S. port to another U.S. port, crew-members with no onshore U.S. residence are counted at the port of departure.
	Crews of U.S.–flagged maritime/merchant vessels engaged in U.S. inland waterway transportation on Census Day.	Counted at the onshore U.S. residence where they live and sleep most of the time.
	Crews of U.S.–flagged maritime/merchant vessels docked in a foreign port or sailing from one foreign port to another foreign port on Census Day.	Not counted in the census.
People in correctional facilities for adults	People in federal and state prisons on Census Day.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in local jails and other municipal confinement facilities on Census Day.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in federal detention centers on Census Day, such as metropolitan correctional centers, metropolitan detention centers, Bureau of Indian Affairs (BIA) detention centers, Immigration and Customs Enforcement (ICE) service processing centers, and ICE contract detention facilities.	Prisoners are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in correctional residential facilities on Census Day, such as halfway houses, restitution centers, and prerelease, work release, and study centers.	Residents are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.

LIVING SITUATION	DETAILS	WHERE COUNTED
People in group homes and residential treatment centers for adults	People in non-correctional adult group homes on Census Day.	Residents are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in non-correctional adult residential treatment centers on Census Day.	Counted at the residence where they live and sleep most of the time. If residents or staff members do not have a usual home elsewhere, they are counted at the facility.
People in juvenile facilities	People in juvenile correctional facilities or non-correctional group homes on Census Day.	Juvenile residents are counted at the facility. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the facility.
	People in non-correctional juvenile residential treatment centers on Census Day.	Counted at the residence where they live and sleep most of the time. If juvenile residents or staff members do not have a usual home elsewhere, they are counted at the facility.
People in transitory locations	People at transitory locations such as recreational vehicle (RV) parks, campgrounds, hotels and motels, hostels, marinas, racetracks, circuses or carnivals.	Anyone, including staff members, staying at the transitory location is counted at the residence where they live and sleep most of the time. If they do not have a usual home elsewhere, or they cannot determine a place where they live most of the time, they are counted at the transitory location.
People in workers' residential facilities	People in workers' group living quarters and Job Corps centers on Census Day.	Counted at the residence where they live and sleep most of the time. If residents or staff members do not have a usual home elsewhere, they are counted at the facility.
People in religious-related residential facilities	People in religious group quarters, such as convents and monasteries, on Census Day.	Counted at the facility.

LIVING SITUATION	DETAILS	WHERE COUNTED
People in shelters and people experiencing homelessness	People in domestic violence shelters on Census Day.	People staying at the shelter (who are not staff) are counted at the shelter. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the shelter.
	People who are in temporary group living quarters established for victims of natural disasters on Census Day.	Anyone, including staff members, staying at the facility is counted at the residence where they live and sleep most of the time. If they do not have a usual home elsewhere, they are counted at the facility.
	People who are in emergency and transitional shelters with sleeping facilities for people experiencing homelessness on Census Day.	People staying at the shelter (who are not staff) are counted at the shelter. Staff members are counted at the residence where they live and sleep most of the time. If staff members do not have a usual home elsewhere, they are counted at the shelter.
	People who are at soup kitchens and regularly scheduled mobile food vans that provide food to people experiencing homelessness on Census Day.	Counted at the residence where they live and sleep most of the time. If they do not have a usual home elsewhere, they are counted at the soup kitchen or mobile food van location where they are on Census Day.
	People who, are at targeted non-sheltered outdoor locations where people experiencing homelessness stay without paying on Census Day.	Counted at the outdoor location where they are on Census Day.
	People who are temporarily displaced or experiencing homelessness and are staying in a residence for a short or indefinite period of time on Census Day.	Counted at the residence where they live and sleep most of the time. If they cannot determine a place where they live most of the time, they are counted where they are staying on Census Day.

1. "Outside the United States" and "foreign port" are defined for this purpose by the U.S. Census Bureau as being anywhere outside the geographic area of the 50 United States and the District of Columbia. Therefore, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, the Pacific Island Areas (American Samoa, Guam and the Commonwealth of the Northern Mariana Islands) and all foreign countries are considered to be "outside the United States." Conversely, "stateside," "U.S. homeport," and "U.S. port" are defined as being anywhere in the 50 United States and the District of Columbia

2. Military and civilian employees of the U.S. government who are deployed or stationed/assigned outside the United States (and their dependents living with them outside the United States) are counted using administrative data provided by the Department of Defense and the other federal agencies that employ them. If they are deployed outside the United States (while stationed/assigned in the United States), the administrative data are used to count them at their usual residence in the United States. Otherwise, if they are stationed/assigned outside the United States, the administrative data are used to count them (and their dependents living with them outside the United States) in their home state for apportionment purposes only

3. Nursing facilities/skilled-nursing facilities, in-patient hospice facilities, assisted living facilities and housing intended for older adults may coexist within the same entity or organization in some cases. For example, an assisted living facility may have a skilled nursing floor or wing that meets the nursing facility criteria, which means that specific floor or wing is counted according to the guidelines for nursing facilities/skilled nursing facilities, while the rest of the living quarters in that facility are counted according to the guidelines for assisted living facilities.

Source: NCSL, based on U.S. Census Bureau webpage, https://www.census.gov/programs-surveys/decennial-census/2020-census/about/residence-rule.htm

APPENDIX B

Redistricting and the Use of Census Data

The U.S. Constitution, Article I, Section 2, requires congressional apportionment to be based on an "actual Enumeration" of the U.S. population. However, the Constitution is silent on what data is to be used for redistricting.

This table notes whether each state's constitution or statutes explicitly requires the use of federal census data for congressional and legislative redistricting.

For constitutional and statutory citations and excerpts, see NCSL's webpage, Redistricting and the Use of Census Data, www.ncsl.org/research/redistricting/redistricting-and-use-of-census-data.aspx.

State	Use of Census Data
ALABAMA	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Alabama Const. Art. IX, Sec. 201: Should any decennial census of the United States not be taken, or if when taken, the same, as to this state, be not full and satisfactory, the legislature shall have the power at its first session after the time shall have elapsed for the taking of said census, to provide for an enumeration of all the inhabitants of this state, upon which it shall be the duty of the legislature to make the apportionment of representatives and senators
ALASKA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
ARIZONA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
ARKANSAS	**Legislative (House of Representatives):** Explicitly requires the use of federal census data for redistricting **Congressional and Legislative (Senate):** An implied or practiced use of federal census data for redistricting

State	Use of Census Data
CALIFORNIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
COLORADO	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
CONNECTICUT	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
DELAWARE	**Legislative:** Explicitly requires the use of federal census data for redistricting
FLORIDA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
GEORGIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
HAWAII	**Congressional:** Explicitly requires the use of federal census data for redistricting **Legislative:** An implied or practiced use of federal census data for redistricting
IDAHO	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
ILLINOIS	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
INDIANA	**Legislative:** Explicitly requires the use of federal census data for redistricting **Congressional:** An implied or practiced use of federal census data for redistricting
IOWA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
KANSAS	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
KENTUCKY	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
LOUISIANA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
MAINE	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Me. Const. Art. IV, Pt. 1, § 2: "The number of Representatives shall be divided into the number of inhabitants of the State exclusive of foreigners not naturalized according to the latest Federal Decennial Census or a State Census previously ordered by the Legislature to coincide with the Federal Decennial Census, to determine a mean population figure for each Representative District."
MARYLAND	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
MASSACHUSETTS	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
MICHIGAN	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting

State	Use of Census Data
MINNESOTA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
MISSISSIPPI	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
MISSOURI	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
MONTANA	**Legislative:** An implied or practiced use of federal census data for redistricting
NEBRASKA	**Legislative:** Explicitly requires the use of federal census data for redistricting
NEVADA	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Nev. Const. Art. 15, § 13: "The enumeration of the inhabitants of this State shall be taken under the direction of the Legislature if deemed necessary ... and these enumerations, together with the census that may be taken under the direction of the Congress of the United States in A.D. Eighteen hundred and Seventy, and every subsequent ten years shall serve as the basis of representation in both houses of the Legislature."
NEW HAMPSHIRE	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible N.H. Const. Pt. SECOND, Art. 9: "the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state."
NEW JERSEY	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
NEW MEXICO	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
NEW YORK	**Congressional and Legislative:** New York laws provide for census data to be used unless the federal census data is unavailable or delayed. In that case, New York can conduct its own census or use an alternative data source. NY CLS Const Art III, § 4: "the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor." **Legislative:** Does not require the use of federal census data; other options may be possible NY CLS Const Art III, § 4: "The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session."

State	Use of Census Data
NORTH CAROLINA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
NORTH DAKOTA	**Legislative:** An implied or practiced use of federal census data for redistricting
OHIO	**Congressional and Legislative:** Ohio laws provide for the census data to be used unless the federal census data is unavailable or delayed. In those circumstances, the Ohio General Assembly chooses how to proceed. Oh. Const. Art. XI, § 3 [Effective 1/1/2021]: "The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and by the number "thirty-three" and the quotients shall be the ratio of representation in the house of representatives and in the senate, respectively, for ten years next succeeding such redistricting."
OKLAHOMA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
OREGON	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible Ore. Const. Art. IV, § 6: "Apportionment of Senators and Representative (1) At the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population."
PENNSYLVANIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
RHODE ISLAND	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
SOUTH CAROLINA	**Congressional and Legislative:** Does not require the use of federal census data; other options may be possible S.C. Const. Ann. Art. III, § 3: "The General Assembly may at any time, in its discretion, adopt the immediately preceding United States Census as a true and correct enumeration of the inhabitants of the several Counties, and make the apportionment of Representatives among the several Counties"
SOUTH DAKOTA	**Legislative:** Explicitly requires the use of federal census data for redistricting
TENNESSEE	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
TEXAS	**Legislative (House of Representatives):** Explicitly requires the use of federal census data for redistricting **Congressional and Legislative (Senate):** An implied or practiced use of federal census data for redistricting
UTAH	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
VERMONT	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting

State	Use of Census Data
VIRGINIA	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
WASHINGTON	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting
WEST VIRGINIA	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
WISCONSIN	**Congressional and Legislative:** An implied or practiced use of federal census data for redistricting
WYOMING	**Congressional and Legislative:** Explicitly requires the use of federal census data for redistricting

Source: NCSL, 2019

APPENDIX C

Population Equality of Districts from 2010-Cycle Plans (aka Deviation)

This table provides 50-state information about congressional and legislative district maps, showing the ideal population for each seat or district, based on 2010 decennial census data, and the overall deviation range (from the smallest district to the largest) for each state's plans.

Unless otherwise noted, this information is from the plans adopted in 2011 or 2012. In a few cases, information is provided from remedial plans adopted later in the decade.

While most states relied upon the Public Law 94-171 block-level datasets as provided by the U.S. Census Bureau when creating their districts, Hawaii, Kansas, Maryland and New York modified these datasets to reassign or exclude individuals in certain population subgroups, such as servicemembers, students or prisoners. In these states the numbers listed below reflect this modification.

Block assignment files generated by the U.S. Census Bureau based on information supplied by the states assign each block to only one district. The overall range tabulated from whole blocks may differ from numbers in this table for some states.

Population Equality of 2010–Cycle

	CONGRESSIONAL PLAN			STATE HOUSE PLAN		STATE SENATE PLAN	
State	Ideal District Size	Percent Overall Range	Overall Range (# of people)	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range
ALABAMA	682,819	0.0%	1	45,521	1.98%	136,564	1.99%
ALASKA[*1]				17,756	4.25	35,512	2.97
ARIZONA[**]	710,224	0.0	0	213,067	8.78	213,067	8.78
ARKANSAS	728,980	.06	428	29,159	8.36	83,312	8.2
CALIFORNIA	702,905	0.0	1	465,674	1.98	931,349	1.99
COLORADO	718,457	0.0	1	77,372	4.98	143,691	4.99
CONNECTICUT[2]	714,819	0.0	1	23,670	5.99	99,280	9.79
DELAWARE[*]				21,901	9.93	42,759	10.73
FLORIDA[3]	696,345	0.0	1	156,678	3.98	470,033	1.92
GEORGIA[4]	691,975	0.0	2	53,820	1.98	172,994	1.84
HAWAII[5]	680,151	0.1	691	24,540	21.57	50,061	44.22
IDAHO[**]	783,791	0.1	682	44,788	9.7	44,788	9.7
ILLINOIS	712,813	0.0	1	108,734	0.0	217,468	0.0
INDIANA	720,422	0.0	1	64,838	1.74	129,676	2.88
IOWA	761,589	0.0	76	30,464	1.93	60,927	1.65
KANSAS	713,280	0.0	15	22,716	2.87	70,986	2.03
KENTUCKY[6]	723,228	0.0%	334	43,394	11.62	114,194	11.02
LOUISIANA	755,562	0.0	249	43,174	9.89	116,240	9.86
MAINE	664,181	0.0	1	8,797	9.9	37,953	9.51
MARYLAND[***7]	721,529	0.0	1	122,813	8.87	122,813	8.87
MASSACHUSETTS	727,514	0.0	1	40,923	9.74	163,691	9.77
MICHIGAN	705,974	0.0	1	89,851	9.96	260,096	9.79
MINNESOTA[**]	662,991	0.0	1	39,582	1.6	79,163	1.42
MISSISSIPPI	741,824	0.2	134	24,322	9.95	57,063	9.77
MISSOURI	748,616	0.0	1	36,742	7.8	176,145	8.5
MONTANA[*8]				9,894	5.44	19,788	5.26
NEBRASKA	608,780	0.0	1	N/A	N/A	37,272	7.39
NEVADA	675,138	0.0	1	64,299	1.33	128,598	0.8
NEW HAMPSHIRE[***]	658,235	0.0	4	3,291	9.9	54,853	8.83

Population Equality of 2010–Cycle

	CONGRESSIONAL PLAN			STATE HOUSE PLAN		STATE SENATE PLAN	
State	Ideal District Size	Percent Overall Range	Overall Range (# of people)	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range
NEW JERSEY**	732,658	0.0	1	219,797	5.20%	219,797	5.20%
NEW MEXICO	686,393	0.0	0	29,417	6.68	49,028	8.70
NEW YORK	717,707	0.0	1	129,089	7.94	307,356	8.8
NORTH CAROLINA[9]	733,499	0.0	1	79,462	9.97	190,710	9.49
NORTH DAKOTA*				14,310	8.86	14,310	8.86
OHIO[10]	721,032	0.0	1	116,530	16.44	349,591	9.2
OKLAHOMA	750,270	0.0	1	37,142	1.81	78,153	2.03
OREGON	766,215	0.0	2	63,851	3.1	127,702	2.99
PENNSYLVANIA[11]	705,688	0.0	1	62,573	7.88	254,048	7.96
RHODE ISLAND	526,284	0.0	1	14,034	4.99	27,699	5.01
SOUTH CAROLINA	660,766	0.0	1	37,301	4.99	100,551	9.55
SOUTH DAKOTA* [12]				23,262**	9.64	23,262	9.47
TENNESSEE	705,123	0.0	86	64,102	9.74	192,306	9.17
TEXAS	698,488	0.0	32	167,637	9.85	811,147	8.04
UTAH[13]	690,971	0.0	1	36,852	0.0	95,306	.01
VERMONT*,*** [14]				4,172	18.8	20,858	18.01
VIRGINIA	727,366	0.0	1	80,010	2.0	200,026	4.0
WASHINGTON**	672,454	0.0	19	137,236	.07	137,236	.07
WEST VIRGINIA***	617,665	.79	4,871	18,530	9.99	109,000	10.00
WISCONSIN	710,873	0.0	1	57,444	.76	172,333	.62
WYOMING*	536,626	0.0	0	9,394	9.84	18,788	9.37

Source: NCSL, 2019

* State has only one congressional seat.

**These states use multi-members districts, with two House seats elected in each Senate district.

***These states use multi-member districts with varying numbers of senators (Vermont) or representatives (Maryland, New Hampshire, Vermont and West Virginia) in each district.

1. Alaska: Data from the unified plan adopted for elections in 2014.

2. Connecticut: An error in the census count affects the overall range for the House: it would be 6.86% using the uncorrected data.

3. Florida: Data for the Senate from the plan adopted for elections in 2016.

4. Georgia: Data from the plans adopted for elections in 2016 (House) and 2014 (Senate).

Continues on page 188

Continues from page 187

5. Hawaii modifies the census counts for legislative plans; the modified numbers are used to apportion seats to the four basic island units (BIUs). Each unit has a separate target population for each chamber. The deviation numbers in the table reflect the range of all districts for that chamber.

6. Kentucky: Data from legislative plans adopted for elections in 2014.

7. Maryland has three House of Delegates districts nested within each Senate district; these three may be either a three-member district or any combination of single-member or two-member districts. The ideal district size for the two-member district is 81,875, with an overall deviation of 9.39%. The ideal district size for the single-member district is 40,938 with an overall deviation of 8.92%.

8. Montana: Data from the legislative plans adopted for elections in 2014.

9. North Carolina: Data from legislative plans finalized for elections in 2018.

10. Ohio used a customized dataset for the legislative plans with numerous split blocks; this does not affect the ranges.

11. Pennsylvania: Data from plans adopted for elections in 2014.

12. South Dakota: Thirty-three of the state's 35 districts elect one senator and two House members, but the state also maintains two Senate districts split into four single-member House districts. These four districts have an ideal population of 11,631, with an overall deviation of 4.68%.

13. Utah: These numbers reflect the legislative plans as enacted in 2011 using the census counts. Subsequent review by the state found several instances where local political boundaries were incorrect in the geography files. Deviations based upon updated block assignment files from the Census Bureau are 1.55% for the House and .39% for the Senate.

14. Vermont split a census block, which affects the overall range for the House; it would be 19.07% using whole blocks.

APPENDIX D

Redistricting Principles and Criteria (in addition to population equality)

This table provides a summary of the districting principles, or criteria, used by each state as it redrew legislative and congressional districts following the 2010 Census. It also includes new principles adopted by Colorado, Michigan, Missouri, New York, Ohio and Utah for the 2020 cycle. (Note that New York's and Utah's principles are to be used by their newly established advisory commissions and may or may not be required to be used if the legislature does not accept the maps offered by these commissions.)

Citations are shown in Appendix E, and full text is shown on NCSL's webpage, Districting Principles for 2010 and Beyond, www.ncsl.org/research/redistricting/districting-principles-for-2010-and-beyond.aspx.

C = Required in congressional plans **L** = Required in legislative plans

	Contiguous	Compact	Preserve Political Subdivisions	Preserve Communities of Interest	
TOTAL STATES Totals include either congressional plans or legislative plans, or both.	**50**	**40**	**44**	**26**	
ALABAMA	C, L	C, L	L	C, L	
ALASKA	L	L	L	L	
ARKANSAS	L	L	L	L	
ARIZONA	C, L	C, L	C, L	C, L	
CALIFORNIA	C, L	C, L	C, L	C, L	
COLORADO	C, L	C, L	C, L	C, L	
CONNECTICUT	L		L		
DELAWARE	L				
FLORIDA	C, L	C, L	C, L		
GEORGIA	C, L	C, L	C, L	C, L	
HAWAII	C, L	C, L		C, L	
IDAHO	C, L	C, L	C, L	C, L	
ILLINOIS	L	L			
INDIANA	L				
IOWA	C, L	C, L	C, L		
KANSAS	C, L	C, L	C, L	C, L	
KENTUCKY	C, L		C	C	
LOUISIANA	C, L		C, L		
MAINE	C, L	C, L	C, L		
MARYLAND	L	L	L		
MASSACHUSETTS	L		L		
MICHIGAN	C, L	C,	C, L	C, L	
MINNESOTA	C, L	C,	C, L	C, L	
MISSISSIPPI	C, L	C, L	C, L	C	
MISSOURI	C, L	C, L	L		
MONTANA	L	L	L		
NEBRASKA	C, L	C, L	C, L		

	Preserve Cores of Prior Districts	Avoid Pairing Incumbents	Not Favor Incumbent	Not Favor Party	Competitive	House Nested in Senate or Congress
	11	**12**	**16**	**16**	**5**	**19**
		C, L				
						L
	L	L				
			C, L		C, L	L
			C, L	C, L		L
			C, L	C, L	C, L	
			L	L		
			C, L	C, L		
		C, L				
			C, L	C, L		L
			C, L	C, L		L
						L
			C, L	C, L		C, L
	C	L				
	C					
	C, L					
						L
	L		C, L	C, L		
		C, L	C, L			L
		C				
				L	L	
			L	L		L
	C, L		C, L	C, L		

C = Required in congressional plans **L** = Required in legislative plans

	Contiguous	Compact	Preserve Political Subdivisions	Preserve Communities of Interest	
NEVADA	C, L	C, L	C, L	C, L	
NEW HAMPSHIRE	L		L		
NEW JERSEY	L	L	L		
NEW MEXICO	C, L	C, L	C, L	C, L	
NEW YORK	C, L	C, L	C, L	C, L	
NORTH CAROLINA	C, L	C, L	C, L		
NORTH DAKOTA	L	L			
OHIO	C, L	C, L	C, L		
OKLAHOMA	C, L	C, L	C, L	C, L	
OREGON	C, L		C, L	C, L	
PENNSYLVANIA	C, L	C, L	C, L		
RHODE ISLAND	C, L	C, L	C, L		
SOUTH CAROLINA	C, L	C, L	C, L	C, L	
SOUTH DAKOTA	L	L	L	L	
TENNESSEE	L		L		
TEXAS	L		L		
UTAH	C, L	C, L	C, L	C, L	
VERMONT	L	L	L	L	
VIRGINIA	C, L	C, L		C, L	
WASHINGTON	C, L	C, L	C, L	C, L	
WEST VIRGINIA	C, L	C, L	C, L		
WISCONSIN	L	L	L		
WYOMING	C, L	C, L	C, L	L	

Note: A few states use additional districting principles, such as "understandability to the voter" (Kansas and Nebraska) and "convenient" (Minnesota, New York and Washington).

Missouri's Constitution, as amended Nov. 6, 2018, requires for legislative plans that the difference between the total "wasted votes" cast for candidates of each of the two major parties, divided by the total votes cast for candidates of the two parties, be as close to zero as practicable.

The Ohio Constitution, effective in 2021, requires that, for legislative districts, "The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio."

Utah's Election Code, as adopted by initiative on Nov. 6, 2018, requires the use of "partisan symmetry" to assess whether legislative and congressional plans favor or disfavor an incumbent, candidate or party.

Source: NCSL, 2019

	Preserve Cores of Prior Districts	Avoid Pairing Incumbents	Not Favor Incumbent	Not Favor Party	Competitive	House Nested in Senate or Congress
		C, L				L
						L
	C, L	C, L				
	C, L		C, L	C, L	C, L	
		C, L				
						L
	L		C	C, L		L
	C, L	C, L				
			C, L	C, L		L
	C, L	L				
						L
			C, L	C, L		
		L				
				C, L	C, L	L
						L
						L

APPENDIX E

Citations for Redistricting Principles and Criteria

This appendix provides citations for each state's principles and criteria for redistricting. For the full text, see NCSL's Redistricting Principles webpage, www.ncsl.org/research/redistricting/districting-principles-for-2010-and-beyond.aspx. Another approach to criteria and redistricting principles can be found at NCSL's Redistricting Criteria webpage, www.ncsl.org/research/redistricting/redistricting-criteria.aspx.

ALABAMA	Ala Const. Art. IX, §198 Ala Const. Art. IX, §199 Ala Const. Art. IX, §200
ALASKA	Alaska Const. Art. VI, §6
ARIZONA	A.R.S. Const. Art. IV, Pt. 2, §1
ARKANSAS	Ark. Const. Art. 8, §3 *Arkansas Board of Apportionment,* Redistricting Criteria Approved By the Courts (last visited Mar. 19, 2018)
CALIFORNIA	Cal Const. Art. XXI §2
COLORADO	Colo. Const. Art. V, §44 Colo. Const. Art. V, §44.3 Colo. Const. Art. V, §46 Colo. Const. Art. V, §48.1
CONNECTICUT	Conn. Const. Art. III., §3, *as amended by Article II, §1, and Article XV, §1, of the Amendments to the Constitution of the State of Connecticut* Conn. Const. Art. III., Sec. 4*, as amended by Article II, §2, and Article XV, §2, of the Amendments to the Constitution of the State of Connecticut* *Conn. Const. Art. III., §5, as amended by Article XVI, §1, of the Amendments to the Constitution of the State of Connecticut*

DELAWARE	Del. Code Ann. tit. 29, §804
FLORIDA	Fla. Const. Art. III, §16 Fla. Const. Art. III, §20 Fla. Const. Art. III, §21
GEORGIA	Ga. Const. Art. III, §II, Para. II *2011-2012 Guidelines, adopted by the Senate Committee on Reapportionment and Redistricting* *2011-2012 Guidelines, adopted by the House Legislative and Congressional Reapportionment Committee*
HAWAII	Hawaii Const. Art. IV, §6 Hawaii Rev. Stat. Ann. §25-2
IDAHO	Idaho Const. Art. III, §2 Idaho Const. Art. III, §4 Idaho Const. Art. III, §5 Idaho Code §72-1506
ILLINOIS	Ill. Const. Art. IV, §2 Ill. Const. Art. IV, §3
INDIANA	Ind. Const. Art. 4, § 5
IOWA	Iowa Const. Art. III §34 Iowa Const. Art. III §37 Iowa Code §42.4
KANSAS	Kan. Const. Art. 10, §1 *Guidelines and Criteria for 2012 Congressional and Legislative Redistricting, adopted by House Select Committee on Redistricting and Senate Committee on Reapportionment, Jan. 9, 2012*
KENTUCKY	Ky. Const. §33
LOUISIANA	La. Const. Art. III, §6 *Committee Rules for Redistricting, Louisiana House of Representatives, Committee on House and Governmental Affairs, adopted Jan. 19, 2011* *Committee Rules for Redistricting, Louisiana Senate, Committee on Senate and Governmental Affairs, adopted Feb. 16, 2011*
MAINE	Me. Const. Art. IV, Pt. 1, §2 Me. Rev. Stat. tit. 21-A, §1206 Me. Rev. Stat. tit. 21-A, §1206-A
MARYLAND	Md. Const. art. III, §3 Md. Const. art. III, §4
MASSACHUSETTS	ALM Constitution Amend. Art. CI (§§1 and 2)*, as amended by Article CIX*

MICHIGAN	MCLS Const. Art. IV, §6*, as amended Nov. 6, 2018* Mich. Comp. Laws Serv. §.63 Mich. Comp. Laws Serv. §4.261 Mich. Comp. Laws Serv. §4.261a
MINNESOTA	Minn. Const. Art. IV, §2 Minn. Const. Art. IV, §3 Minn. Stat. Ann. §2.91 (Subd. 2) *Order Stating Redistricting Principles and Requirements for Plan Submissions, Hippert v. Ritchie, No. A11-152 (Minn. Spec. Redis. Panel Nov. 4, 2011)*
MISSISSIPPI	Miss. Code Ann. §-3-101 *Criteria for Legislative and Congressional Redistricting, adopted by the Standing Joint Legislative Committee on Reapportionment and Standing Joint Congressional Redistricting Committee, April 5, 2012* *Analysis of Factors Considered, Smith v. Hosemann, No. 3:01-cv-855 (S.D. Miss., Dec. 19, 2011)*
MISSOURI	Mo. Const. Art. III, §3 Mo. Const. Art. III, §7 Mo. Const. Art. III, §45
MONTANA	Mont. Const., Art. V §14 Mont. Code Ann. §5-1-115 *Congressional and Legislative Redistricting Criteria, adopted by Districting and Apportionment Commission, May 28, 2010*
NEBRASKA	Neb. Const. Art. III, §5 *Legislative Resolution No. 102, adopted by the Nebraska Legislature, April 8, 2011*
NEVADA	Nev. Const. Art. 4, §5 *Order Re: Redistricting, Guy v. Miller, No. 11-OC-42-1B (1st Jud. Dist., Carson City Sept. 21, 2011)*
NEW HAMPSHIRE	*Constitution, Part Second, House of Representatives* N.H. Const. Pt. SECOND, Art. 9 N.H. Const. Pt. SECOND, Art. 11 N.H. Const. Pt. SECOND, Art. 11-a *Constitution, Part Second, Senate* N.H. Const. Pt. SECOND, Art. 26 N.H. Const. Pt. SECOND, Art. 26-a
NEW JERSEY	N.J. Const., Art. IV, §II
NEW MEXICO	N.M. Stat. Ann. §2-7C-3 N.M. Stat. Ann. §2-8D-2 *Guidelines for the Development of State and Congressional Redistricting Plans, adopted by the Legislative Council Jan. 17, 2011*

NEW YORK	N.Y. CLS Const. Art III, §4 (c) N.Y. CLS Const. Art III, §5
NORTH CAROLINA	N.Y. CLS Const. Art II, §3 N.Y. CLS Const. Art II, §5 *Redistricting Criteria for State House and Senate Districts, Stephenson v. Bartlett, No. 94PA02, 355 N.C. 354, 562 S.E.2d 377 (*April *30, 2002)* *2017 House and Senate Plans Criteria, adopted by North Carolina House and Senate Redistricting Committees, Aug. 10, 2017* *2016 Contingent Congressional Plan Committee Adopted Criteria, adopted by Joint Select Committee on Congressional Redistricting, Feb. 16, 2016*
NORTH DAKOTA	N.D. Const. Art. IV, §2 N.D. Cent. Code §54-03-01.5
OHIO	Ohio Const. Art. XI, §§3 - 11 Ohio Const. Art. XIX, §§1 - 2
OKLAHOMA	Okla. Const. Art. V, §9A *2011 Guidelines for Redistricting, adopted by the House of Representatives Redistricting Committee, Feb. 14, 2011*
OREGON	Ore. Const. Art. IV, §6 Ore. Const. Art. IV, §7 Ore. Rev. Stat. Ann. §188.010
PENNSYLVANIA	Pa. Const. Art. II, §16 *Order, League of Women Voters of Pa. v. Pa., No. 159 MM 2017 (Pa. Jan. 22, 2018)*
RHODE ISLAND	R.I. Const. Art. VII, §1 R.I. Const. Art. VIII, §1 *Laws 2011, chapter 106*, §2
SOUTH CAROLINA	*2011 Redistricting Guidelines, adopted by Senate Judiciary Committee, April 13, 2011* *2011 Guidelines and Criteria for Congressional and Legislative Redistricting, adopted by House of Representatives Judiciary Committee, Election Laws Subcommittee*
SOUTH DAKOTA	S.D. Const. Article III, §5 S.D. Codified Laws §2-2-41
TENNESSEE	Tenn. Code Ann. §3-1-102 Tenn. Code Ann. §3-1-103
TEXAS	Tex. Const. Art. III, §25 Tex. Const. Art. III, §26
UTAH	Utah Const. Art. IX, §1 Utah Code, Title 20A §20A-19-103, Election Code, as amended Nov. 6, 2018 *2011 Redistricting Principles, adopted by the Legislative Redistricting Committee, May 4, 2011*

VERMONT	V.S.A. Const. §13 V.S.A. Const. §18 Vt. Stat. Ann. tit. 17, §1903 Vt. Stat. Ann. tit. 17, §1906b Vt. Stat. Ann. tit. 17, §1906c
VIRGINIA	Va. Const. Art. II, §6 Va. Code Ann. §24.2-305 *Committee Resolution No. 1, adopted by the House Committee on Privileges and Elections, March 25, 2011* *Committee Resolution No. 1, adopted by the Senate Committees on Privileges and Elections, March 25, 2011* *Committee Resolution No. 2, adopted by the Senate Committees on Privileges and Elections, March 25, 2011* *Third Congressional District Criteria, adopted by the Joint Reapportionment Committee, August 17, 2015*
WASHINGTON	Wash. Const. Art. II, §6 Wash. Const. Art. II, §43 Wash. Rev. Code Ann. §44.05.090
WEST VIRGINIA	W. Va. Const. Art. I, §4 W. Va. Const. Art. VI, §4
WISCONSIN	Wis. Const. Art. IV, §3 Wis. Const. Art. IV, §4 Wis. Const. Art. IV, §5
WYOMING	Wyo. Const. Art. 3, §3 Wyo. Const. Art. 3, §49 *Redistricting Principles, adopted by Joint Corporations, Elections and Political Subdivisions Interim Committee, April 12, 2011*

Source: NCSL, 2019

APPENDIX F

State Redistricting Authorities

The legislature typically is the primary redistricting authority, but a number of states have shifted responsibility from the legislature to a redistricting commission. Many states also have commissions that serve in an advisory capacity or as a backup in cases where the legislature does not meet its redistricting deadline.

	Congressional Districts	Legislative Districts
ALABAMA	Legislature has primary responsibility	Legislature has primary responsibility
ALASKA	Legislature has primary responsibility; state has only one congressional district	Commission has primary responsibility
ARIZONA	Commission has primary responsibility	Commission has primary responsibility
ARKANSAS	General Assembly has primary responsibility	Commission has primary responsibility
CALIFORNIA	Commission has primary responsibility	Commission has primary responsibility
COLORADO	Commission has primary responsibility	Commission has primary responsibility
CONNECTICUT	General Assembly has responsibility; backup commission	General Assembly has responsibility; backup commission
DELAWARE	General Assembly has primary responsibility; state has only one congressional district	General Assembly has primary responsibility
FLORIDA	Legislature has primary responsibility	Legislature has primary responsibility
GEORGIA	General Assembly has primary responsibility	General Assembly has primary responsibility
HAWAII	Commission has primary responsibility	Commission has primary responsibility
IDAHO	Commission has primary responsibility	Commission has primary responsibility

	Congressional Districts	Legislative Districts
ILLINOIS	General Assembly has primary responsibility	General Assembly has responsibility; backup commission
INDIANA	General Assembly has responsibility; backup commission	General Assembly has primary responsibility
IOWA	General Assembly has primary responsibility	General Assembly has primary responsibility
KANSAS	Legislature has primary responsibility	Legislature has primary responsibility
KENTUCKY	General Assembly has primary responsibility	General Assembly has primary responsibility
LOUISIANA	Legislature has primary responsibility	Legislature has primary responsibility
MAINE	Legislature has responsibility; advisory commission	Legislature has responsibility; advisory commission
MARYLAND	General Assembly has primary responsibility	General Assembly has primary responsibility[1]
MASSACHUSETTS	General Court has primary responsibility	General Court has primary responsibility
MICHIGAN	Commission has primary responsibility	Commission has primary responsibility
MINNESOTA	Legislature has primary responsibility	Legislature has primary responsibility
MISSISSIPPI	Legislature has primary responsibility	Legislature has responsibility; backup commission
MISSOURI	General Assembly has primary responsibility	Commissions have primary responsibility[2]
MONTANA	Commission has primary responsibility; to date, state has only one congressional district	Commission has primary responsibility
NEBRASKA	Legislature has primary responsibility	Legislature has primary responsibility
NEVADA	Legislature has primary responsibility	Legislature has primary responsibility
NEW HAMPSHIRE	General Court has primary responsibility	General Court has primary responsibility
NEW JERSEY	Commission has primary responsibility	Commission has primary responsibility
NEW MEXICO	Legislature has primary responsibility	Legislature has primary responsibility
NEW YORK	Legislature has responsibility; advisory commission	Legislature has responsibility; advisory commission
NORTH CAROLINA	General Assembly has primary responsibility	General Assembly has primary responsibility
NORTH DAKOTA	Legislative Assembly has primary responsibility; state has only one congressional district	Legislative Assembly has primary responsibility
OHIO	General Assembly has primary responsibility; backup commission	Commission has primary responsibility

	Congressional Districts	Legislative Districts
OKLAHOMA	Legislature has primary responsibility	Legislature has responsibility; backup commission
OREGON	Legislative Assembly has primary responsibility	Legislative Assembly has primary responsibility
PENNSYLVANIA	General Assembly has primary responsibility	Commission has primary responsibility
RHODE ISLAND	General Assembly has primary responsibility	General Assembly has primary responsibility
SOUTH CAROLINA	General Assembly has primary responsibility	General Assembly has primary responsibility
SOUTH DAKOTA	Legislature has primary responsibility; state has only one congressional district	Legislature has primary responsibility
TENNESSEE	General Assembly has primary responsibility	General Assembly has primary responsibility
TEXAS	Legislature has primary responsibility	Legislature has primary responsibility; backup commission
UTAH	Legislature has responsibility; advisory commission	Legislature has responsibility; advisory commission
VERMONT	General Assembly has primary responsibility; state has only one congressional district	General Assembly has primary responsibility; advisory commission
VIRGINIA	General Assembly has primary responsibility	General Assembly has primary responsibility
WASHINGTON	Commission has primary responsibility	Commission has primary responsibility
WEST VIRGINIA	Legislature has primary responsibility	Legislature has primary responsibility
WISCONSIN	Legislature has primary responsibility	Legislature has primary responsibility
WYOMING	Legislature has primary responsibility; state has only one congressional district	Legislature has primary responsibility

1. Maryland's governor has an advisory commission that provides information to the General Assembly.

2. Missouri will have a state demographer produce maps for the two legislative commissions (one for House districts and one for Senate districts) to consider for the 2020 cycle.

Source: NCSL, 2019

APPENDIX G

Redistricting Commissions

Redistricting commissions may have primary responsibility for drawing district plans, serve as an advisory capacity with the legislature having final authority, or come into play only if the legislature is unable to agree on a plan on time. These three kinds of commissions are represented in the following tables.

- Commissions with Primary Responsibility for Redistricting Plans
- Advisory Commissions
- Backup Commissions

For the purpose of this document, the phrase "deeply engaged in partisan politics," is used to generically describe restrictions on a commissioner's prior political activity, including being appointed or elected to public office, serving as an officer of a political party, serving as a registered paid lobbyist, or being on a candidate or issue campaign committee. Exact requirements and exceptions vary by state.

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
ALASKA **Alaska Const. art. 6, § 8**	**Redistricting Board:** Legislative districts only	Governor appoints two; then president of the Senate appoints one; then speaker of the House appoints one; then chief justice of the state supreme court appoints one. Appointments must be made without regard to political affiliation.	A commissioner must have been a resident of the state for at least one year and at least one commissioner must be a resident of each judicial district. No commissioner may be a public employee or official.	
ARIZONA **Ariz. Const. art. 4, pt. 2, § 1**	**Independent Redistricting Commission:** Legislative and congressional districts	The commission on appellate court appointees creates a pool of 25 nominees, 10 from each of the two largest parties and five not from either of the two largest parties. The highest-ranking officer of the House appoints one from the pool, then the minority leader of the House appoints one, then the highest-ranking officer of the Senate appoints one, then the minority leader of the Senate appoints one. These four appoint as chair a fifth from the pool who is not a member of any party already represented on the commission. If the four deadlock on the selection of the chair, the commission on appellate court appointments appoints.	No more than two commissioners may be of the same political party. Of the first four appointed, no more than two may reside in the same county. A commissioner must be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment. During the three years before appointment, a commissioner must not have been deeply engaged in partisan politics.	
ARKANSAS **Ark. Const. 1874, art. 8**	**Board of Apportionment:** Legislative districts only	The commission consists of the governor, the secretary of state and the attorney general.	n/a	
CALIFORNIA **Cal. Const. Article XXI** **Cal. Gov. Code §§ 8251-8253.6**	**Citizens Redistricting Commission:** Legislative and congressional districts	The commission must include five Democrats, five Republicans, and four members from neither party. Government auditors select 60 registered voters from each of the three political applicant pools. Legislative leaders can reduce the pool; the auditors then pick eight commission members by lot, and those commissioners pick six additional members for 14 total members.	During the five years before appointment, a commissioner must have been continuously registered to vote in California with the same political party or unaffiliated with a political party and not have changed political party affiliation. A commissioner must have voted in two of the last three statewide general elections before applying for appointment. During the 10 years before appointment, a commissioner must not have been deeply engaged in partisan politics.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	A commissioner may not be a candidate for the Legislature in the general election following adoption of the final redistricting plan.	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Sept. 1, 2020 **First plan:** 30 days after census officially reported **Final plan:** 90 days after census officially reported	Created by legislative referral, 1998 L.R. No. 74/H.J.R. No. 44
	During the term of office and for three years after, commissioners may not serve in Arizona public office or register as a paid lobbyist.	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Feb. 28, 2021 **First plan:** None **Final plan:** None	Created by citizens' initiative, 2000 Proposition 106
	n/a	**Members:** Three **Adopt a Plan:** simple majority: Two votes	**Commission formation:** None **First plan:** Feb. 1, 2021, or sometime after census data is received **Final plan:** Plan is official 30 days after it is filed	Created by citizens' initiative, 1956 Proposed Amend. 48
	For five years after appointment, a commissioner is ineligible to hold appointive federal, state, or local public office, to serve as paid staff for, or as a paid consultant to, the Board of Equalization, the Congress, the Legislature, or any individual legislator, or to register as a federal, state or local lobbyist in California. For 10 years after appointment, a commissioner is ineligible to hold elective public office at the federal, state, county or city level in California.	**Members:** 14 **Adopt a Plan:** Nine votes, including votes from at least three Democratic commissioners, three Republican commissioners, and three commissioners from neither party	**Commission formation:** Dec. 31, 2020 **First plan:** None **Final plan:** Sept. 15, 2021	Legislative commission created by citizens' initiative, 2008 Proposition 11 Congressional commission created by citizens' Initiative, 2010 Proposition 20

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
COLORADO (Colorado has two commissions, one for legislative redistricting and one for congressional redistricting. **Colo. Const. art. V, §§ 46-48.3** **Colo. Const. art. V, §§ 44-44.6**	**Independent Legislative Redistricting Commission:** Legislative districts **Independent Congressional Redistricting Commission:** Congressional districts	The same procedure is used for each of Colorado's two commissions. A panel of three retired judges of different parties will randomly select 300 applications from each of the largest political parties and 450 who are not affiliated with any party. The panel then selects 50 from each pool based on merit. From those, the panel chooses by lot two commissioners from each of the largest two parties and two who are unaffiliated. The majority and minority leaders in the House and Senate each select from all qualified applicants a pool of 10 candidates who are associated with the two largest parties. The panel of judges then selects one commissioner from each legislative leader's pool and two commissioners from the pool of unaffiliated applicants created earlier.	The same procedure is used for each of Colorado's two commissions. Commissioners must be registered electors who voted in both of the previous two general elections in Colorado, be either unaffiliated with any political party or have been affiliated with the same political party for no less than five years at the time of the application. A legislative commissioner may not be a congressional commissioner, and vice versa. During the five years before appointment, a commissioner must not have been a candidate for the General Assembly. During the three years before appointment, a commissioner must not have been deeply engaged in partisan politics. Appointments to the commission must represent the geographic diversity of the state and, to the extent possible, its demographic diversity.	
HAWAII **Hawaii Const. art. IV**	**Reapportionment Commission:** Legislative and congressional districts	The president of the Senate selects two, and the speaker of the House selects two. The minority leader in both the House and Senate each select one of their number. Those two each select one. These eight select the ninth member, who is the chair.	n/a	
IDAHO **Idaho Const. art. III, § 2** **Idaho Stat. Tit. 72, Chapter 15**	**Commission for Reapportionment:** Legislative and congressional districts	Leaders of the two largest political parties in each house of the Legislature each designate one member; chairs of the two parties whose candidates for governor received the most votes in the last election each designate one member.	A commissioner must be a registered voter in Idaho and must not have been deeply engaged in partisan politics within the last two years (except for precinct committee person).	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** 12 Both commissions have the same number of members and vote requirement to adopt a plan. **Adopt a Plan:** 2/3 majority: Eight votes, including votes from at least two commissioners who are unaffiliated with any political party	**Legislative commission formation:** May 15, 2021 **First plan:** 113 days after commission convened or necessary census data is available, whichever is later **Final plan:** Legislative. Sept. 15, 2021 **Congressional commission formation**. March 15, 2021 **First plan:** 45 days after commission convened or necessary census data is available, whichever is later **Final plan:** Sept. 1, 2021	**Legislative commission:** created by citizens' initiative, 1974 Ballot Measure 9 and replaced by legislative referral, 2018 Amendment Z **Congressional commission:** created by legislative referral, 2018 Amendment Y
	A commissioner may not run for the Legislature or Congress in the two elections following redistricting.	**Members:** Nine **Adopt a Plan:** Simple majority: Five votes	**Commission Formation:** March 1, 2021 **First plan:** 80 days after commission forms **Final plan:** 150 days after commission forms	Created by legislative referral, 1992 HB 2322
	For five years following service as a commissioner, a commissioner may not serve in either house of the Legislature.	**Members:** Six **Adopt a Plan:** 2/3 majority: Four votes	**Commission formation:** 15 days after secretary of state orders formation of commission **First plan:** None **Final plan:** 90 days after commission is organized, or after census data is received, whichever is later	Created by legislative referral, 1994 S.J.R. No. 105

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
MICHIGAN **Mich. Const. Art. IV, § 6**	**Independent Citizens Redistricting Commission:** Legislative and congressional districts	The secretary of state makes applications to become a commissioner available to the public, including mailing to 10,000 Michigan residents at random. The secretary then randomly selects 60 applicants from each pool affiliated with the two major parties and 80 from the pool of those who are unaffiliated. The Senate majority leader, Senate minority leader, the speaker of the House and the House minority leader each can strike five applicants from any pool or pools. The secretary then randomly draws the names of four applicants from the pools affiliated with the two major parties, and five from the unaffiliated pool.	A commissioner must be registered and eligible to vote in Michigan. During the six years before appointment, a commissioner must not have been deeply engaged in partisan politics or otherwise disqualified for appointed or elected office by the constitution, and must remain so while serving as a commissioner.	
MISSOURI **Mo. Const. art. III, § 3**	**House Apportionment Commission:** Legislative districts (house)	The governor picks one person from each list of two submitted by the two main political parties in each congressional district.	n/a	
Mo. Const. art. III, § 7	**Senatorial Apportionment Commission:** Legislative districts (senate)	The governor picks five people from each of two lists of 10 submitted by the state's two major political parties.	n/a	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	For five years after appointment, a commissioner is ineligible to hold a partisan elective office at the state, county, city, village or township level in Michigan.	**Members:** 13 **Adopt a plan:** Simple majority: Seven votes, including at least two commissioners who affiliate with each major party, and at least two commissioners who do not affiliate with either major party	**Commission formation:** Oct. 15, 2020 **First plan:** 45 days before Nov. 1, 2021 **Final plan:** Nov. 1, 2021	Created by citizens' initiative, 2018 Ballot Measure 18-2
	For four years after the plan is adopted, a commissioner is disqualified from holding office as a member of the General Assembly.	**Members:** 18 **Adopt a plan:** State demographer submits a plan to the commission. A 70% majority (13 votes) may amend the plan. Otherwise, the plan becomes final.	**Commission formation:** Within 60 days after census data becomes available **First plan:** Five months after commission forms **Final plan:** Six months after commission forms	Created by legislative referral in 1966 Amendment 3 Amended by citizens' initiative in 2018 Amendment 1
	For four years after the plan is adopted, a commissioner is disqualified from holding office as a member of the General Assembly.	**Members:** 10 **Adopt a plan:** State demographer submits a plan to the commission. A 70% majority (seven votes) may amend the plan. Otherwise, the plan becomes final.	**Commission formation:** Within 60 days after census data becomes available **First plan:** Five months after commission forms **Final plan:** Six months after commission forms	Created by legislative referral in 1966 Amendment 3 Amended by citizens' initiative in 2018 Amendment 1

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
MONTANA **Mont. Const. art. V, § 14** **Mont. Code Ann. Tit. 5, Part 1**	**Commission:** Legislative and congressional districts**	Majority and minority leaders of both houses of the Legislature each select one member. Those four select a fifth, who is the chair.	Commissioners cannot be public officials and must be appointed from different districts in the state.	
NEW JERSEY **N.J. Const. art. IV, § 3**	**Apportionment Commission:** Legislative districts	The two parties getting the most votes in the last gubernatorial election each select five members. If the 10-member commission cannot agree, an 11th member will be chosen by the chief justice of the state Supreme Court.	Due consideration must be given to the representation of the various geographical areas of the state.	
N.J. Const. art. II, § II	**New Jersey Redistricting Commission:** Congressional districts	The majority and minority leaders in each legislative chamber and the chairs of the state's two major political parties each choose two commissioners. These 12 commissioners then choose a 13th, who has not held any public or party office in New Jersey within the last five years. If the 12 commissioners are not able to select a 13th member to serve as chair, they will present two names to the state Supreme Court, which will choose the chair.	A commissioner may not be a member or employee of Congress and must be appointed with due consideration to geographic, ethnic and racial diversity.	

**Montana had a single representative to the U.S. House of Representatives in recent decades, so a commission has not yet been used for congressional districts. Depending on federal apportionment after the 2020 census, this may change.

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	For two years after the plan becomes effective, a commissioner may not run for a seat in the Legislature.	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** The legislative session before the census data is available **First plan:** The commission must give its plan for legislative districts to the Legislature at the first regular session after its appointment **Final plan:** The final plan for legislative districts is due 30 days after the Legislature returns recommendations to the plan The final plan for congressional districts is due 90 days after official census figures are available	Created by Constitutional Convention in 1972 Amended by legislative referral in 1984 Measure C-14
	n/a	**Members:** 10 **Adopt a plan:** simple majority: Six votes	**Commission formation:** Dec.1, 2020 **First Plan:** Feb. 1, 2021, or one month after census data becomes available, whichever is later **Final plan:** The initial deadline, or one month after the 11th member is picked	Created by legislative referral, 1966 Public Question #1
	n/a	**Members:** 13 **Adopt a plan:** Simple majority: Seven votes	**Commission formation:** Sept. 8, 2021 **First Plan:** None **Final Plan:** Jan. 18, 2022	Created by legislative referral, 1995 Public Question #1

Commissions with Primary Responsibility for Redistricting Plans

State	Name and Type of Districts	Selection	Qualifications	
OHIO **Ohio Const. art. XI, § 1**	**Ohio Redistricting Commission:** Legislative districts only	The commission consists of the governor, auditor, secretary of state and four people appointed by the majority and minority leaders of the General Assembly.	An appointed commissioner may not be a current member of Congress.	
PENNSYLVANIA **Pa. Const. art. II, § 17**	**Reapportionment Commission:** Legislative districts only	The majority and minority leaders of the legislative houses each select one member. These four select a fifth to chair. If they fail to do so within 45 days, a majority of the state Supreme Court will select the fifth member.	The chair, selected by the other commissioners, must be a citizen of the Commonwealth and may not be a local, state or federal official holding an office to which compensation is attached.	
WASHINGTON **Wash. Const. art. II, § 43** **RCW chap. 44.05**	**Commission:** Legislative and congressional districts	The majority and minority party leaders in each legislative chamber each select one registered voter to serve as commissioner, and these four commissioners choose a nonvoting fifth commissioner to serve as chair.	A commissioner may not be an elected official or a person elected to a legislative district, county or state political party office. During the two years before appointment, a commissioner may not have been an elected official and may not have been elected as a legislator, county official or state political party officer, but may have been a precinct committee person.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes, including at least two members of the commission who represent each of the two largest political parties	**Commission formation:** None **First Plan:** None **Final Plan:** Sept. 1, 2021	Created by legislative referral, 2015 HJR 12 (2014)/Issue 1
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** None **First plan:** 90 days after the availability of the census data or after commission formation, whichever is later **Final plan:** 30 days after the last public exception is filed against the initial plan	Created by legislative referral, 1968 (last amended in 2001) Adopted as part of 1968 State Constitution
	A commissioner may not hold or campaign for a seat in the state Legislature or Congress for two years after the effective date of the plan.	**Members:** Five **Adopt a plan:** At least three of four voting members	**Commission formation:** Jan. 31, 2021 **First Plan:** None **Final Plan:** Nov. 15, 2021	Created by legislative referral, 1983 SJR 103

Advisory Commissions

State	Name and Type of Districts	Selection	Qualifications	
MAINE **Me. Const. art. IV, pt. 3, § 1-A** **Me. Rev. Stat. tit. 21-A, § 1206**	**Apportionment Commission:** Legislative and congressional districts	The speaker of the House appoints three. The House minority leader appoints three. The president of the Senate appoints two. The Senate minority leader appoints two. Chairs of the two major political parties each choose one. The members from the two parties represented on the commission each appoint a public member, and the two public members choose a third public member.	The 12 commissioners appointed by a legislative leader must be a member of the appointing house. There are no qualifications required for the three public members.	
NEW YORK **N.Y. Const. art. III, § 5-b**	**Independent Redistricting Commission:** Legislative and congressional districts	Each of the four legislative leaders appoints two commissioners; the original eight commissioners select two additional commissioners.	Commissioners must be registered voters in the state. To the extent practicable, the commissioners must reflect the diversity of the residents of the state. During the three years before appointment, the two commissioners selected by other commissioners must not have been enrolled in either of the two largest political parties. During the three years before appointment, a commissioner may not have been deeply engaged in partisan politics and must remain so while serving as a commissioner. Commissioners may not be a spouse of a statewide elected official, member of the state Legislature or member of Congress.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** 15 **Adopt a plan:** Simple majority: Eight votes The Legislature must enact the plan, or another, by 2/3 vote of both houses within 30 days after it receives the commission's plan. If the Legislature fails to meet the deadline, the state Supreme Court must adopt a plan within 60 days.	**Commission formation:** Within three calendar days of convening the Legislature in 2023 **First plan:** The commission must submit its plan to the Legislature within 120 days after the Legislature convenes in 2023. The Legislature must enact the plan, or another plan, by a 2/3 vote of both houses within 30 days after it receives the commission's plan. **Final plan:** Within 60 days after the Legislature fails to meet its deadline, the state Supreme Court must adopt a plan	Created by legislative referral in 1975 H-54
	n/a	**Members:** 10 **Adopt a plan:** Seven votes, including at least one member appointed by each of the legislative leaders, if the speaker of the House and the temporary president of the Senate are of the same party. If they are of different parties, one of those voting in favor must include an appointee of the speaker and one appointee of the temporary president of the Senate. If plans submitted by the commission are rejected by the Legislature twice, the Legislature can amend as necessary.	**Commission formation:** Feb. 1, 2020, or when court orders congressional or legislative districts be amended **First Plan:** None **Final plan:** Jan. 1, 2022	Created by legislative referral, 2014 AB 2086/Proposal 1

Advisory Commissions

State	Name and Type of Districts	Selection	Qualifications	
UTAH **Utah Code § 20A-19-201**	**Utah Independent Redistricting Commission:** Legislative and congressional districts	Commissioners are appointed, one each, by the governor, the president of the Utah Senate, the speaker of the Utah House, the leader of the largest minority political party in the Utah Senate, the leader of the largest minority political party in the Utah House, Utah Senate and House leadership of the political party that is the majority party in the Utah Senate, and Utah Senate and House leadership of the political party that is the largest minority party in the Utah Senate. *NOTE:* If the Legislature rejects a commission-recommended plan, the commission must review the Legislature's plan and publish a report on why the Legislature rejected the commission's plan and whether the Legislature's plan adheres to Utah-specific standards.	During the four years before appointment, commissioners must have been an active voter but must not have been deeply engaged in partisan politics. During the four years before appointment, nonpartisan commissioners may not have been affiliated with a political party, voted in any political party's primary election or been a delegate to a political party convention.	
VERMONT **Vt. Stat. Ann. tit. 34A, § 1904**	**Legislative Apportionment Board:** Legislative districts only	The chief justice appoints the chair; the governor appoints one member from each political party with at least three state legislators for six of the previous 10 years; those parties each select one. The secretary of state is secretary of the board but does not vote.	A commissioner may not be a member or employee of the General Assembly.	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	For four years after appointment, a commissioner must not be deeply engaged in partisan politics.	**Members:** Seven **Adopt a plan:** Five votes	**Commission formation:** 30 days after census data is received or the number of districts changes for a reason other than the census **First plan:** 120 days after census data is received or the number of districts changes for a reason other than the census **Final plan:** 30 days after the last public hearing on the plan	Created by citizens' initiative, 2018 Proposition 4
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes	**Commission formation:** July 1, 2020 **First plan:** April 1, 2021 **Final plan:** May 15, 2021. General Assembly must adopt the plan or a substitute at that biennial session	Created by legislation, 1965 No. 97, §4

Backup Commissions

State	Name and Type of Districts	Selection	Qualifications	
CONNECTICUT **Conn. Const. art. III, § 6 as amended by Amend. XXVI (b)-(c)**	**Commission:** Legislative and congressional districts	The president pro tem of the Senate, the Senate minority leader, the speaker of the House, and the House minority leader each select two; these eight must select the ninth within 30 days.	n/a	
ILLINOIS **Ill. Const. art. IV, § 3**	**Legislative Redistricting Commission:** Legislative districts only	The president of the Senate, the Senate minority leader, the speaker of the House, and the House minority leader each select two members, one of whom is a legislator and the other who is not. No more than four may be from the same party. If the commission fails to develop a plan by August 10 in the year ending in one, the state Supreme Court selects two people not of the same political party, one of whom is chosen by lot to be the ninth member.	n/a	
INDIANA **Ind. Code § 3-3-2-2**	**Redistricting Commission:** Congressional districts only	The commission is made up of the speaker of the House, president pro tem of the Senate, the chair of the redistricting committee from each legislative chamber, and a state legislator nominated by the governor.	n/a	
MISSISSIPPI **Miss. Const. art. 13, § 254**	**Commission:** Legislative districts only	The chief justice of the state Supreme Court is chair; the attorney general, secretary of state, speaker of the House, and president pro tem of the Senate are the other members	n/a	

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** Eight **Adopt a plan:** Simple majority: Five votes	**Commission formation:** After General Assembly fails to meet deadline **First plan:** None **Final plan:** Nov. 20, 2021	Created in 1976
	n/a	**Members:** Eight **Adopt a plan:** Simple majority: Five votes	**Commission formation:** July 10, 2021 (if General Assembly fails to meet its June 30 deadline) **First plan:** None **Final plan:** Oct. 5, 2021	Created in 1980
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Adjournment of General Assembly session that failed to adopt required plan **First plan:** None **Final plan:** 30 days after adjournment of regular session	Created in 1969
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** After Legislature fails to meet deadline (60 days after end of second regular session following decennial census) **First plan:** None **Final plan:** 180 days after special apportionment session adjourns	Created by legislative referral, 1977, and ratified by voters, 1979

Backup Commissions

State	Name and Type of Districts	Selection	Qualifications	
OHIO **Ohio Const. art. XI, § 1, art. XIX**	**Ohio Redistricting Commission:** Congressional districts only	The commission consists of the governor, auditor, secretary of state, and four people appointed by the majority and minority leaders of the General Assembly.	An appointed commissioner may not be a current member of Congress.	
OKLAHOMA **Okla. Const. § V-11A**	**Bipartisan Commission on Legislative Apportionment:** Legislative districts only	Lieutenant governor is the nonvoting chair; the governor, Senate majority leader, and House majority leader each choose two members, one Republican and one Democrat.	n/a	
TEXAS **Tex. Const. art. 3, § 28**	**Legislative Redistricting Board of Texas:** Legislative districts only	Lieutenant governor is the nonvoting chair; the governor, Senate majority leader, and House majority leader each choose two, one Republican and one Democrat.	n/a	

Source: NCSL, 2019

	Prohibitions on Later Service	Number of Members and Votes Needed to Adopt a Plan	Deadlines	History of Commission
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes, including at least two who represent each of the two largest political parties	**Commission formation:** None **First plan:** None **Final plan:** Oct. 31, 2021	Created by legislative referral, 2018 Issue 1
	n/a	**Members:** Seven **Adopt a plan:** Simple majority: Four votes	**Commission formation:** After Legislature fails to meet deadline (90 days after convening first regular session following decennial census) **First plan:** None **Final plan:** None	Created by legislative referral, 2010 State Question No. 748, Legislative Referendum No. 349
	n/a	**Members:** Five **Adopt a plan:** Simple majority: Three votes	**Commission formation:** Within 90 days after Legislature fails to meet deadline (adjournment of the first regular session following decennial census) **First plan:** None **Final Plan:** 60 days after commission formation	Created in 1948

APPENDIX H

Historic Supreme Court Redistricting Cases

CASES RELATING TO POPULATION

***Baker v. Carr*, 369 U.S. 186 (1962)**

SIGNIFICANCE: For the first time, the court held that the federal courts had jurisdiction to consider constitutional challenges to state legislative redistricting plans.

SUMMARY: Since the earliest days of the republic, redrawing the boundaries of legislative and congressional districts after each decennial census has been primarily the responsibility of state legislatures. Following World War I, as the nation's population began to shift from rural to urban areas, many legislatures lost their enthusiasm for the decennial task and failed to carry out their constitutional responsibility. For decades, the U.S. Supreme Court declined repeated invitations to enter the "political thicket" of redistricting—*Colegrove v. Green* (1946)—and refused to order the legislatures to carry out their duty.

In this case, the Tennessee General Assembly had failed to reapportion seats in the Senate and House of Representatives since 1901 (*Id.* at 191). By 1960, population shifts in Tennessee made a vote in a small rural county worth 19 votes in a large urban county. The court held that a federal district court had jurisdiction to hear a claim that this inequality of representation violated the Equal Protection Clause of the 14th Amendment.

***Wesberry v. Sanders*, 376 U.S. 1 (1964)**

SIGNIFICANCE: The court held that the constitutionality of congressional districts was a question that could be decided by the courts.

SUMMARY: Voters in Georgia's Congressional District 5, which had three times the population of Congressional District 9, alleged that this imbalance denied them the full benefit of their right to vote.

A three-judge federal district court held that drawing congressional districts was a task assigned by the Constitution to state legislatures, subject to guidance by Congress, and not assigned to the courts. The district court held that the complaint presented a "political question" the court had jurisdiction to decide, but should not (*Id.* at 2-3). The Supreme Court reversed, holding that congressional districts must be drawn so that "as nearly as is practicable one man's vote in a congressional election is worth as much as another's" (*Id.* at 7-8).

Reynolds v. Sims, 377 U.S. 533 (1964)

SIGNIFICANCE: Both houses of a bicameral state legislature must be apportioned substantially according to population. Legislative districts may deviate from strict population equality only as necessary to give representation to political subdivisions and provide for compact districts of contiguous territory. Legislative districts should be redrawn to reflect population shifts at least every 10 years. Once a constitutional violation has been shown, a court should take equitable action to correct it, bearing in mind the practical requirements of running an election.

SUMMARY: Alabama Senate and House seats had not been reapportioned among the counties since 1903. Each county had one or more senators and one or more representatives, regardless of population. According to the 1960 census, the largest Senate district had about 41 times the population of the smallest Senate district, and the largest House district had about 16 times the population of the smallest House district.

Alabama attempted to justify the disparity in the Senate by analogy to the federal system, but the Supreme Court found that comparison to not be pertinent. Justice Earl Warren declared, "Legislators represent people, not trees or acres" (*Id.* at 562).

The court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis" (*Id.* at 568). More flexibility is allowed for legislative districts than for congressional districts. "[M]mathematical nicety is not a constitutional requisite" when drawing legislative plans. All that is necessary is that the maps achieve "substantial equality of population among the various districts" (*Id.* at 579). Deviations from population equality in legislative plans may be justified if they are "based on legitimate considerations incident to the effectuation of a rational state policy," such as maintaining the integrity of political subdivisions and providing for compact districts of contiguous territory (*Id. at 578*).

Redrawing legislative districts at least every 10 years to reflect population shifts is not constitutionally required, but to redraw them less often "would assuredly be constitutionally suspect" (*Id. at 583-84*).

Once a constitutional violation has been shown, a court should take equitable action to correct it, bearing in mind the practical requirements of running an election (*Id. at 585*).

Gaffney v. Cummings, 412 U.S. 735 (1973)

SIGNIFICANCE: The Court upheld a Connecticut legislative redistricting plan in which the total deviation was 1.81% for the Senate and 7.83% for the House. This indicates that legislative plans with a total deviation of 10% or less are presumptively constitutional, although 10% is not a safe harbor.

SUMMARY: Connecticut voters challenged the 1971 redrawing of Senate and House districts by the Apportionment Board. The Senate districts had a total population deviation of 1.81%. The House districts had a total deviation of 7.83% (*Id.* at 737). The complaint alleged that the population deviations were larger than required by the Equal Protection Clause of the 14th Amendment and split too many town boundaries (*Id.* at 738-39). The Supreme Court held that the board was not required to justify population deviations of this magnitude (*Id.* at 740-751). In dissent, Justice William J. Brennan surveyed the various legislative plans whose total deviations the court had approved or rejected and alleged it had established a 10% threshold: "deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever" (*Id.* at 777).

In later cases, the court majority has endorsed and followed the rule Brennan's dissent accused them of establishing. See, e.g., *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thomson*, 462 U.S. 835, -43 (1983); and *Voinovich v. Quilter*, 507 U.S. 146 (1993).) Based on this line of cases, plans with a total deviation of 10% or less are presumptively constitutional. But a total deviation of less than 10% is not a safe harbor; plaintiffs may rebut the presumption by providing other evidence of discrimination within the 10%. See *Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947, 2004.

Karcher v. Daggett, 462 U.S. 725 (1983)

SIGNIFICANCE: Congressional districts must be mathematically equal in population, unless necessary to achieve a legitimate state objective.

SUMMARY: The New Jersey Legislature drew a congressional plan that had a total deviation of 3,674 people, or 0.6984% (*Id.* at 728). The Supreme Court held that parties challenging a congressional plan bear the burden of proving that population differences among districts could have been reduced or eliminated by a good-faith effort to draw districts of equal population. If the plaintiffs carry their burden, the state must then bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate state objective. Brennan, now writing for the 5-4 majority, noted that complying with what we now call "traditional redistricting principles," such as compactness, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbents, could meet the state's burden (*Id.* at 740-41).

***Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)**

SIGNIFICANCE: Total population is a permissible metric for calculating compliance with "one person, one vote."

SUMMARY: Since *Reynolds* and *Wesberry*, states have almost universally used total population as the unit for calculating population equality for districting plans. Plaintiffs in *Evenwel* challenged Texas's 2011 redistricting scheme, arguing that its use of total population violated the Equal Protection Clause by discriminating against voters in districts with low immigrant populations by giving voters in districts with significant immigrant populations a disproportionately weighted vote. The Supreme Court held that its past opinions confirmed that states *may* use total population in order to comply with one person, one vote. The Court did not address the issue of whether other methods are impermissible.

CASES RELATING TO LEGISLATURES VS. COMMISSIONS

***Arizona State Legislature v. Arizona Independent Redistricting Commission*, No. 13-1314, 135 S. Ct. 2652 (2015)**

SIGNIFICANCE: The creation of a redistricting commission for congressional districts via citizens' initiative does not violate the Elections Clause of the U.S. Constitution.

SUMMARY: In 2000, Arizona voters created the Arizona Independent Redistricting Commission via citizens' initiative to redraw state legislative districts and congressional districts. In 2015, the Arizona Legislature challenged the right of the commission to draft congressional lines, arguing that the Elections Clause of the U.S. Constitution only grants two institutions the power to regulate the time, place or manner of electing congressional representatives: the legislatures in each of the states, or Congress. The Supreme Court held that the reference to the "Legislature" in the Elections Clause encompassed citizens' initiative in states like Arizona, where the state constitution explicitly includes the people's right to bypass the Legislature and make laws directly through such initiatives.

CASES RELATING TO RACE

***Thornburg v. Gingles*, 478 U.S. 30 (1986)**

SIGNIFICANCE: This case created the standard for determining whether Section 2 of the Voting Rights Act (VRA) requires that a majority-minority district be drawn.

SUMMARY: Following the 1982 amendments to the Voting Rights Act, it was unclear precisely *when* the VRA would require a majority-minority district be drawn to prevent vote dilution. Here, the Supreme Court held that, for a plaintiff to prevail on a Section 2 claim, he or she must show:

1. The racial or language minority group "is sufficiently numerous and compact to form a majority in a single-member district."
2. The minority group is "politically cohesive," meaning its members tend to vote similarly.
3. The "majority votes sufficiently as a bloc to enable it…usually to defeat the minority's preferred candidate."

A later case, *Bartlett v. Strickland* (556 U.S. 1 (2009)) added the requirement that a minority group be a numerical majority of the voting-age population in order for Section 2 of the Voting Rights Act to apply.

***Shaw v. Reno*, 509 U.S. 630 (1993)**

SIGNIFICANCE: Legislative and congressional districts will be struck down by courts for violating the Equal Protection Clause if they cannot be explained on grounds other than race. While not dispositive, "bizarrely shaped" districts are strongly indicative of racial intent.

SUMMARY: Plaintiffs brought a novel legal claim, arguing that a North Carolina congressional district was so bizarrely shaped that it amounted to a "racial gerrymander," which they claimed violated the Equal Protection Clause. The court rejected the state's defense that the district was justified as a so-called "majority-minority district," holding that the Voting Rights Act required no such district to be drawn where one did not previously exist. Claiming the North Carolina district resembled "the most egregious racial gerrymanders of the past," the Court struck down the district on the basis that it reflected the incorrect belief that members of minority groups in different geographic areas (e.g., *Durham v. Charlotte*) had the same interests and did not have independent local needs that would be better served by having a more locally oriented representative.

***Miller v. Johnson*, 515 U.S. 900 (1995)**

SIGNIFICANCE: A district becomes an unconstitutional racial gerrymander if race was the "predominant" factor in drawing its lines.

SUMMARY: Following *Shaw*, it remained unclear what the standard of review was under the new racial gerrymandering doctrine. In *Miller*, the U.S. Department of Justice in 1991 refused preclearance to Georgia's initial congressional redistricting plan under Section 5 of the Voting Rights Act, claiming the state needed to create an additional majority-minority district. Plaintiffs challenged the newly drawn districts as racial gerrymanders. The Supreme Court held for the plaintiffs and established the rule for racial gerrymandering claims: if a district is drawn predominantly on the basis of race, it violates the Equal Protection Clause.

***Bush v. Vera*, 517 U.S. 952 (1996)**

SIGNIFICANCE: Those who want to argue that partisan politics, not race, was the dominant motive in drawing district lines will want to beware of using race as a proxy for political affiliation. To survive

strict scrutiny under the Equal Protection Clause and avoid being struck down as a racial gerrymander, a district must be reasonably compact.

SUMMARY: Under the 1990 reapportionment of seats in Congress, Texas was entitled to three additional congressional districts. The Texas Legislature decided to draw one new Hispanic majority district in South Texas, one new African-American majority district in Dallas County, and one new Hispanic majority district in the Houston area. In addition, the Legislature reconfigured a district in the Houston area to increase its percentage of African Americans. The Legislature used sophisticated software that allowed it to redistrict with racial data at the census block level. Plaintiffs challenged 24 of the state's 30 congressional districts as racial gerrymanders. The Supreme Court struck down three districts, holding that race was the predominant factor in drawing the lines. In these districts, the Court concluded that districts drawn to satisfy Section 2 of the VRA must not subordinate traditional redistricting principles more than reasonably necessary. The districts in question were, in the Court's words, "bizarrely shaped and far from compact." These characteristics were predominantly attributable to racially motivated gerrymandering.

***Shelby County v. Holder*, No. 12-96, 570 U.S. 529 (2013)**

SIGNIFICANCE: Section 5 of the Voting Rights Act no longer applies to any jurisdictions in the United States. As a result, redistricting plans and any other changes in voting laws, need not be approved before they take effect.

SUMMARY: Section 5 of the Voting Rights Act of 1965 (codified as amended at 52 U.S.C. § 10304, prohibits certain states and political subdivisions from changing any voting law or practice without first obtaining from either the U.S. Attorney General or the U.S. District Court for the District of Columbia a determination that the change neither had the purpose nor would have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. (A "language minority group" is defined as "American Indian, Asian American, Alaskan Native or of Spanish heritage." 52 U.S.C. § 10310(c)(3)). This process is called "preclearance." A redistricting plan had to be precleared before it could take effect. Section 5 applies only to certain jurisdictions in the South and elsewhere that meet the requirements of Section 4(b): the jurisdiction had imposed a literacy test or similar requirement making it difficult to vote and less than 50% of its voting-age population had been registered to vote or had voted in the presidential election of 1964, 1968 or 1972 (depending on when the jurisdiction first became subject to Section 5).

In 2011, Shelby County, Alabama, challenged the constitutionality of both the formula that determined whether Section 5 applied to a jurisdiction—Section 4(b)—and Section 5 itself. It alleged that the coverage formula in Section 4(b) had not changed since the VRA was enacted in 1965, that conditions in Shelby County had changed drastically since then, and that standards based on old data should no longer apply.

The Supreme Court held that Section 4(b) was unconstitutional. It balanced the exceptional conditions surrounding implementation of the Voting Rights Act with the basic principles of the 10th Amendment. The 10th Amendment reserves to the states all powers not specifically granted to the federal government. This includes the power to regulate elections. In addition, the principle of equal sovereignty among the states frowns upon their disparate treatment. It also found that the exceptional conditions that gave rise to the Voting Rights Act no longer existed.

Post-*Shelby*, it is still possible that states or jurisdictions could be "bailed in" under Section 3 of the VRA for preclearance, if a pattern of current discrimination is found.

***Alabama Legislative Black Caucus v. Alabama*, No. 13-895, 135 S. Ct. 1257 (2015)**

SUMMARY: Racial gerrymandering claims proceed district-by-district, not against an entire plan. Further, equal population is not a "factor to be considered" when redistricting, but rather a constitutional mandate. Section 5 of the Voting Rights Act does not require a covered jurisdiction to maintain a specific numerical minority percentage when redistricting.

SIGNIFICANCE: The district court upheld an Alabama legislative redistricting plan that tried to make populations nearly equal in the districts, and attempted to maintain the same black population percentages in these districts as those in the plan from the previous decade. The Supreme Court reversed and remanded the case to the district court for several reasons.
These reasons are:

1. The district court's analysis of the racial gerrymandering claim erroneously referred to the state "as a whole," rather than district-by-district. Case law since *Shaw v. Reno* has made clear that racial gerrymandering claims are judged on a district-by-district basis.

2. The state could not use its equal-population goal as a factor to be weighed against other factors when redistricting. Rather, equal population is a constitutional mandate that undergirds the entire redistricting process and can neither give way to other mandatory factors nor justify deviating from them.

3. Respecting the state's compelling interest to consider race in drawing districts so as to comply with Section 5 of the Voting Rights Act, the district court, while understanding that a plan had to be narrowly tailored to meet the compelling interest test, asked the wrong question when it concluded that it must answer, "How can we maintain present minority percentages in majority-minority districts?" The proper inquiry would have focused on the extent to which present percentages of minority voters had to be maintained to preserve a minority's ability to elect a candidate of its choice. Asking the wrong question yielded the wrong answer.

***Cooper v. Harris*, No. 15-1262, 137 S. Ct. 1455 (2017)**

SIGNIFICANCE: Partisanship cannot be used to justify a racial gerrymander. Further, Section 2 of the Voting Rights Act requires that a racial minority have the opportunity to elect a "candidate of choice," not that a particular percentage of minority voters be present in a district. This case represents a synthesis of earlier cases on the requirements of Section 2 as set out in *Gingles*, and the now well-developed case law on racial gerrymandering that began with *Shaw v. Reno*.

SUMMARY: Voters in two North Carolina congressional districts challenged their districts as unconstitutional racial gerrymanders. The state argued the case on two primary grounds. First, the state argued the increase in the percentage of black voters in the district was required to avoid a potential vote dilution challenge under Section 2 of the Voting Rights Act. Second, the state argued that any gerrymandering that had transpired was strictly partisan. The Court rejected these arguments, holding that: 1) Section 2 of the Voting Rights Act does not require a numerical majority of voters in a particular district; rather, it requires only that a compact and politically cohesive minority have the opportunity to elect its candidate of choice; and 2) Even if the underlying intent of the legislature in drawing maps is for partisan advantage and not with racial intent, the predominant use of race as a proxy for partisanship nonetheless constitutes racial gerrymandering.

CASES RELATED TO PARTISANSHIP

***Gaffney v. Cummings*, 412 U.S. 735 (1973)**

SIGNIFICANCE: An otherwise acceptable reapportionment plan is not constitutionally vulnerable when its purpose is to provide districts that would achieve "political fairness" between the political parties.

SUMMARY: Connecticut voters challenged the 1971 redrawing of Senate and House districts by the Apportionment Board. The board followed a policy of "political fairness," using results from the preceding three statewide elections to create a number of Republican and Democratic legislative seats that would reflect as closely as possible the actual statewide plurality of votes for House and Senate candidates in a given election. The complaint alleged that the plan was a political gerrymander that favored the Republican party. The Supreme Court held that a state's attempt, within tolerable population limits, to fairly allocate political power to the parties in accordance with their voting strength is constitutional.

It should be noted that, in *Larios v. Cox* (300 F. Supp.2d 1320 (N.D. Ga. Feb. 10, 2004), the U.S. Supreme Court affirmed without opinion a three-judge federal court decision holding unconstitutional a legislative plan within tolerable statistical limits (overall range less than 10%) when the General Assembly had departed from traditional redistricting principles and had discriminated against Republican incumbents. In *Larios*, plaintiffs challenged the 2001 congressional and House plans and the 2001 and 2002 Senate plans enacted by the Georgia General Assembly on various grounds.

A three-judge federal district court upheld the congressional plan but struck down the legislative plans as a violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. The order regarding the 2001 Senate plan was stayed pending preclearance of the plan. The overall range of both the 2001 House plan and the 2002 Senate plan was 9.98%, but the court found that the General Assembly had systematically underpopulated districts in rural South Georgia and inner-city Atlanta and overpopulated districts in the suburban areas north, east and west of Atlanta in order to favor Democratic candidates and disfavor Republican candidates. The plans also systematically paired Republican incumbents, while reducing the number of Democratic incumbents who were paired. The plans tended to ignore the traditional districting principles used in Georgia in previous decades, such as keeping districts compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts.

Davis v. Bandemer, 478 U.S. 109 (1986)

SIGNIFICANCE: Partisan gerrymandering claims may be brought in federal courts under the Equal Protection Clause. While a standard for measuring partisan gerrymanders was established, over the next 18 years it proved so difficult to satisfy that no partisan gerrymander was struck down under the *Bandemer* discriminatory effects test, which was abandoned in *Vieth v. Jubelirer* discussed below (541 U.S. 267 (2004)).

SUMMARY: Democrats in Indiana challenged the 1981 legislative redistricting plan, claiming the district lines intentionally discriminated against them in violation of the Equal Protection Clause. The Supreme Court held that the claim was not a "political question," and instead posed questions of law. The fact that a bright-line rule such as one-person, one-vote does not exist for partisanship did not mean that such challenges were non-justiciable political questions. The court required that, in order to prove partisan discrimination, a plaintiff political group must prove that those drawing a plan had an intent to discriminate against them, and that the plan had a discriminatory effect on them.

The Court assumed that a discriminatory intent would not be hard to prove. As Justice Byron White said for the majority, "We think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win" (*Id.* at 128).

Merely showing that the minority is likely to lose elections held under the plan is not enough. As the Court pointed out, "the power to influence the political process is not limited to winning elections. . . . We cannot presume . . . without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters [who did not vote for him or her] (*Id.* at 128)."

***Vieth v. Jubelirer*, 541 U.S. 267 (2004)**

SIGNIFICANCE: While a plurality of justices in this case held that partisan gerrymandering claims were non-justiciable, Justice Anthony Kennedy left the door open for potential future claims under the First Amendment, rather than the 14th Amendment as had been cited in *Bandemer*.

SUMMARY: Between *Bandemer* and *Vieth*, nearly 20 years elapsed. During that time, no lower court successfully created a manageable legal standard under which to scrutinize partisan gerrymanders. The majority of justices in this case held that this particular challenge also failed to prove a violation of the Constitution. Four of the five justices in the majority went further, stating that they believed no such standard existed and that partisan gerrymandering claims should be excluded from federal courts under the political question doctrine. However, the fifth justice in the majority—Kennedy—would not go that far. In his view, partisan gerrymandering claims might be justiciable, possibly under the First Amendment. Nonetheless, he concluded that, "the failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper. If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief (*Id*. at 317)."

Because Kennedy did not join the other four justices in the majority on this point, aggrieved parties could continue to offer arguments for judicially manageable standards by which alleged political gerrymanders may be reviewed.

***Rucho v. Common Cause* (2019) Case No. 18–422, 588.U.S. ___ (2019)**

SIGNIFICANCE: Partisan gerrymandering represents a political question that is not justiciable by federal courts, because there is no credible way to define and measure fairness in the political context.

SUMMARY: Plaintiffs alleged that North Carolina's 2016 contingent congressional plan constituted a partisan gerrymander. The legislative defendants did not dispute that the North Carolina General Assembly intended for the 2016 plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates, nor that the plan had its intended effect. Rather, they argued that a partisan gerrymander was not against the law.

The federal district court held the challenged congressional plan to be an unconstitutional partisan gerrymander under both the First and 14th amendments. However, in a 5-4 opinion that included the consolidated case of *Benisek v. Lamone*, the Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court stated that constitutional history confirms that drawing congressional electoral boundaries was an issue assigned to state legislatures with ultimate authority reserved for Congress, with nothing to suggest the federal courts have a role to play. Secondly, the Court found a fundamental problem in attempting to determine what is "fair" in

a politically adversarial system of government. The Court stated that the U.S. Constitution does not guarantee proportional representation of political parties and without "proportionality" as a measure of fairness, and it was unable to fashion any rational framework for making objective determinations of political fairness in districting. As a result, the Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral" to measure fairness are not available.

Rucho does not preclude state courts from hearing cases based on partisanship.

Source: NCSL, 2019

APPENDIX I

Major Case Summaries, 2010 to 2019, on Legislative and Congressional Redistricting

Summaries of major redistricting cases relating to legislative and congressional redistricting plans from the 2010 cycle are presented below. NCSL has defined "major" as those cases that strike down an enacted plan or that refine and further develop redistricting law. Cases that simply apply the law as established prior to 2010 are not included. For additional information on major redistricting cases from the 2010s, please see NCSL's Redistricting Case Summaries 2010-Present webpage, www.ncsl.org/research/redistricting/redistricting-case-summaries-2010-present.aspx.

ALABAMA

Shelby County v. Holder, 570 U.S. 529 (2013)

TOPIC(S) ADDRESSED: Racial VRA

RELATES TO: Legislative Redistricting

Shelby County, Alabama, challenged sections 4(b) and 5 of the Voting Rights Act of 1965, claiming that the act was unconstitutional because it required some, but not all, states and counties to obtain preclearance from federal authorities in Washington, D.C.—either the U.S. Attorney General or a three-judge court—before they changed voting procedures. The U.S. Supreme Court found that Section 4(b) of the act was unconstitutional because it was based on a formula that used 40-year-old facts that had no logical relation to the present day, and it held that the formula could not be used as a basis for subjecting jurisdictions to preclearance by federal authorities.

Alabama Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015)

TOPIC(S) ADDRESSED: Partisanship, Equal Protection and Equal Population

RELATES TO: Legislative Redistricting

The Alabama Legislative Black Caucus and others filed suit claiming that the Alabama Legislature violated the Equal Protection Clause of the 14th Amendment by drawing the 2012 state legislative map

with race as their predominant motivation. When racial considerations predominate, the reason for this predominance must be narrowly tailored to a compelling governmental interest. The Supreme Court remanded the case to the three-judge federal district court to apply this standard. The Supreme Court also indicated that there may be solid evidence that race does predominate, citing testimony that legislators in charge of creating the plan told their technical advisers that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district.

ALASKA

***Alaska, In re 2011 Redistricting Cases*, 294 P.3d 1032 (Alaska 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

This case was a consolidation of multiple challenges to the post-2010 census maps drawn by Alaska's reapportionment board. The main issue faced by the Alaska Supreme Court was how to resolve the tension "between strictly complying with the Alaska Constitution . . . and the contrary requirements of the federal Voting Rights Act." The Alaska Supreme Court held the board must first draw a plan for all 40 House districts without regard to complying with the Voting Rights Act and then, "to the extent it is noncompliant, make revisions that deviate from the Alaska Constitution when deviation is 'the only means available to satisfy Voting Rights Act requirements.'" Op. at 6, 294 P.3d 1032, 1035 (Alaska Dec. 28, 2012) (quoting 274 P.3d at 467). Ultimately, the Alaska Supreme Court approved new maps prior to the 2012 elections.

ARKANSAS

***Jeffers v. Beebe*, 895 F. Supp. 2d 920 (E.D. Ark. 2012)**

TOPIC(S) ADDRESSED: Racial VRA, Racial Equal Protection

RELATES TO: Legislative Redistricting

Registered voters of Arkansas challenged the state Senate districts. Plaintiffs argued that the districts in question did not have a large enough black voting-age population (BVAP) to elect a member of their choosing. Although it was a majority-minority district with a BVAP of 53%, block voting by white voters usually defeated their preferred candidate of choice. Plaintiffs argued that a BVAP of 60% was necessary to defeat the white voting bloc in the district. The three-judge federal court denied the plaintiffs' challenge, stating that a BVAP of 53% was sufficient, and that they did not prove that the Arkansas Board of Apportionment drew districts with an intent to discriminate based on race. In addition, the court stated that creation of the redistricting plan was not the result of racial intent, but instead reflected political preferences.

ARIZONA

***Arizona State Legislature. v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Legislative Redistricting and Congressional Redistricting

In 2000, Arizona voters adopted an amendment to the Arizona Constitution via ballot initiative that removed the Legislature's authority to draw legislative and congressional districts. The amendment vested this power with the Independent Redistricting Commission. In 2012, the Arizona Legislature challenged the constitutionality of removing what they consider to be their constitutional powers and giving them to another entity. The argument is based on the Elections Clause of the U.S. Constitution, which gives this power to the legislatures to draw congressional districts. The Supreme Court held that redistricting is a legislative function, and that it is left to the laws of the state to determine the process. The Elections Clause does not restrict this particular power of the state. States retain autonomy to establish their own governmental process. If this includes enacting laws via a citizens' initiative process, as is true in Arizona and two dozen other states, then the state retains this power to establish an independent redistricting process through a ballot initiative.

***Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016)**

TOPIC(S) ADDRESSED: Equal Population, Partisanship and Racial VRA

RELATES TO: Legislative Redistricting

Voters in Arizona challenged the Independent Redistricting Commission's state legislative redistricting plan based on alleged equal population violations stemming from alleged partisan bias. A three-judge federal district court ruled in favor of the commission. The U.S. Supreme Court affirmed the district court's decision. The Court held that deviations are justified by "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). These legitimate factors include: compactness, contiguity, integrity of political subdivisions, competitive balance of political parties, and Section 5 of the Voting Rights Act. In addition, plaintiffs must show that it is "more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors." The district court concluded that the deviations were the result of a good-faith effort to comply with the Voting Rights Act. The plaintiffs did not show that it is more probable than not that the deviation reflects the predominance of illegitimate reapportionment factors. Therefore, plaintiffs failed to show that the revised plan violates the Equal Protection Clause, and the plans remain in place.

COLORADO

***In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108 (Colo. 2011)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

The main issue in this case was whether the Reapportionment Commission responsible for crafting

plans for the General Assembly to consider violated the hierarchy of considerations set forth in the 1982 reapportionment cases. *In re Reapportionment 1982* created a hierarchy of weight that must be given to all the mandatory criteria, prohibiting lower-ranked criteria from infringing on higher-ranked criteria if not absolutely necessary. The commission's plan that the General Assembly ultimately adopted split several counties around Denver into multiple districts, claiming this was necessary to comply with the Voting Rights Act. The challengers to the maps said there was no evidence indicating a need to create majority-minority districts in either of the contested counties. The Colorado Supreme Court held that the commission had not established a need to comply with the Voting Rights Act, and thus it improperly infringed on the commands of Section 47(2). The districts were remanded to the commission to be redrawn correctly.

FLORIDA

***Brown v. Secretary of State*, 668 F.3d 1271 (11th Cir. 2012)**

TOPIC(S) ADDRESSED: State Constitution Challenge

RELATES TO: Congressional Redistricting

Plaintiff members of Congress and the Florida House of Representatives challenged the Fair Districts Amendment relating to congressional districts (art. III, § 20) as violating the Elections Clause of the U.S. Constitution. They argued that, because the Elections Clause authorizes "the Legislature" of each state to prescribe the times, places and manner of holding congressional elections, a state constitutional amendment proposed by citizen initiative was invalid as applied to congressional elections. The 11th U.S. Circuit Court of Appeals upheld the amendment because, rather than dictating electoral outcomes, the amendment seeks to maximize electoral possibilities by leveling the playing field.

***Fla. House of Representatives v. League of Women Voters of Florida* (*Apportionment III*), 118 So. 3d 198 (Fla. 2013)**

TOPIC(S) ADDRESSED: State Constitutional Challenge and Legislative Privilege

RELATES TO: Legislative Redistricting

The Florida Supreme Court rejected the Legislature's argument, stating that it never interpreted art. III, § 16(d) of the Florida Constitution, which provides that the Florida Supreme Court's judgment determining an apportionment to be valid is "binding upon all the citizens of the state," as granting the supreme court exclusive jurisdiction over all claims relating to legislative apportionment. The court held that the lower court did have subject matter jurisdiction to hear the case. That litigation continued until the circuit court adopted the plaintiffs' Senate plan in *League of Women Voters of Florida v. Detzner*, No. 2012 CA 2842 (2nd Cir. Leon County Dec. 30, 2015), discussed below.

In re Senate Joint Resolution of Legislative Apportionment 1176 **(*Apportionment I*), 83 So. 3d 597 (Fla. 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

Senate, House and congressional redistricting plans passed the Legislature on Feb. 9, 2012. The state constitution provides for automatic review by the state supreme court to determine the validity of Senate and House apportionment plans. In *Apportionment I,* the Florida Supreme Court interpreted the Fair Districts Amendments for the first time. The court explained that, while the Fair Districts Amendments do not prohibit a partisan effect, an intent to favor or disfavor a political party or an incumbent can be inferred from objective indicators, such as a district's level of compliance with compactness and other second-tier requirements. The court found that the state Senate plan contained indicators of improper intent and ordered eight Senate districts to be redrawn. The state House plan was approved.

In re Senate Joint Resolution of Legislative Apportionment 2-B **(*Apportionment II*), 89 So.3d 872 (Fla. 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

On March 27, 2012, the Legislature adopted a revised Senate plan in accordance with the court's order. The Florida Supreme Court reviewed the revised plan as prescribed by the state constitution and declared the Senate plan valid.

Fla. House of Representatives v. League of Women Voters of Florida **(*Apportionment III*), 118 So.3d 198 (Fla. 2013)**

TOPIC(S) ADDRESSED: State Constitutional Challenge and Legislative Privilege

RELATES TO: Legislative Redistricting

The revised Senate plan was challenged again in *League of Women Voters of Florida v. Detzner*, Complaint, No. 2012 CA 2842 (2nd Cir. Leon County Sept. 5, 2012). Plaintiffs alleged that the Legislature continued to violate the state constitution by "drawing districts that will keep incumbent Senators in office, assist incumbent house members with election to the Senate, impact internal Senate leadership battles, and make gains for the controlling party." The Legislature moved to dismiss the complaint based on the view that, once the apportionment plan was validated through the supreme court's constitutionally mandated automatic review, no further challenges could be brought. The trial court denied the motion to dismiss, and the Legislature petitioned the state supreme court to review the trial court's ruling. The Florida Supreme Court rejected the Legislature's argument, stating that it never interpreted art. III, § 16(d) of the Florida Constitution, which provides that the supreme court's judgment determining an apportionment to be valid is "binding upon all the citizens of the state," as granting the supreme court exclusive jurisdiction over all claims relating to legislative apportionment. The court held that

the lower court did have subject matter jurisdiction to hear the case. That litigation continued until the circuit court adopted the plaintiffs' Senate plan in *League of Women Voters of Florida v. Detzner*, No. 2012 CA 2842 (2nd Cir. Leon County Dec. 30, 2015), discussed below.

***League of Women Voters of Florida v. Detzner*, No. 2012 CA 2842 (2nd Cir. Leon County Dec. 30, 2015)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

In light of the July 9, 2015, Florida Supreme Court opinion upholding the finding that the 2012 congressional plan was drawn with the intent to favor a party or incumbent, the Florida Senate stipulated that the 2012 Senate plan similarly violated the law and would not be enforced or used for the 2016 elections. The Legislature convened in special session on Oct. 19, 2015, to adopt new Senate districts and adjourned on Nov. 5, 2015, without adopting a plan. The Senate president submitted proposed plans to the trial court, as did the plaintiffs, and the court adopted one of the plaintiffs' plans that it found to be metrically superior. The legislative defendants did not appeal the trial court's final judgment.

***Romo v. Detzner*, No. 2012-CA-412 (2nd Cir. Leon County)**

TOPIC(S) ADDRESSED: State Constitution Challenge

RELATES TO: Congressional Redistricting

The congressional plan enacted under the new constitutional standards was challenged in state court. In *Romo v. Detzner*, plaintiffs challenged numerous congressional districts and the plan as a whole. They alleged that the Legislature intentionally favored the Republican Party and incumbents by drawing districts that preserved the cores of prior districts and avoided pairing incumbents, packed Democratic and African-American voters, created districts that were not compact, and did not utilize existing political and geographic boundaries where feasible. Before the final ruling on either the Senate or the congressional plan, a discovery battle ensued, resulting in three more decisions by the Florida Supreme Court (*Apportionment IV, V, and VI*).

***League of Women Voters of Fla. v. Fla. House of Representatives* (*Apportionment IV*), 132 So. 3d 135 (Fla. 2013)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

In the congressional case, the legislative defendants asserted "an absolute privilege against testifying as to issues directly relevant to whether the legislature drew the 2012 congressional apportionment plan with unconstitutional partisan or discriminatory 'intent.'" The Florida Supreme Court recognized a legislative privilege founded on the constitutional principle of separation of powers, even though there is no legislative privilege explicitly stated in the state constitution. However, the privilege is not absolute "where the purposes underlying the privilege are outweighed by the compelling, competing

interest of effectuating the *explicit* constitutional mandate [in the Fair Districts Amendment] that prohibits partisan political gerrymandering and improper discriminatory intent in redistricting." The court approved "the circuit court's order permitting the discovery of information and communications, including the testimony of legislators and the discovery of draft apportionment plans and supporting documents, pertaining to the constitutional validity of the challenged apportionment plan." It concluded that "legislators and legislative staff members may assert a claim of legislative privilege at this stage of the litigation only as to any questions or documents revealing their thoughts or impressions or the thoughts or impressions shared with legislators by staff or other legislators, but may not refuse to testify or produce documents concerning any other information or communications pertaining to the 2012 reapportionment process."

***League of Women Voters v. Data Targeting, Inc.* (*Apportionment V*), 140 So. 3d 510 (Fla. 2014)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

Again, in the congressional case, non-party political consultants asserted that the First Amendment privilege protected documents reflecting their communications. The plaintiffs contended that the documents would "demonstrate 'the surreptitious participation of partisan operatives in the apportionment process,'" by submitting "through 'public front persons' draft redistricting maps for the legislature's consideration." The trial court ruled that the privileged documents in possession of non-parties might be admitted as evidence under seal, but that court proceedings would remain open during any use of the documents at trial. The Florida Supreme Court, however, required the trial court to maintain the confidentiality of the documents by permitting disclosure or use only under seal, and in a courtroom closed to the public.

***Bainter v. League of Women Voters* (*Apportionment VI*), 150 So. 3d 1115 (Fla. 2014)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

On appeal from the trial court's order to produce documents, the Florida Supreme Court held that the political consultants had waived any objection to production of the documents based on a qualified First Amendment privilege by not raising it during more than six months of hearings and filings regarding document production. The court also rejected the consultants' claim of a trade secrets privilege against production. It ordered the sealed documents and sealed portions of the trial transcript unsealed.

***League of Women Voters of Florida v. Detzner* (*Apportionment VII*), 172 So. 3d 363 (Fla. 2015)**

TOPIC(S) ADDRESSED: State Constitution Challenge

RELATES TO: Congressional Redistricting

On July 10, 2014, the *Romo v. Detzner* trial court declared two congressional districts invalid. On Aug. 11, 2014, the Legislature in special session enacted a remedial plan, which the trial court approved. In *Apportionment VII*, the supreme court reviewed the trial court's final judgment and the Legislature's

remedial plan. The supreme court held that the trial court, in approving the remedial plan, failed to give proper legal effect to its determination that the congressional plan was enacted in 2012 with unconstitutional intent to favor a political party or incumbents. The supreme court held that, in light of the trial court's finding of improper intent, the trial court should have required the Legislature to justify any district that the plaintiffs showed to have a problematic configuration. The supreme court required eight districts to be redrawn: five districts where plaintiffs proved there was intent to favor or disfavor a political party or incumbent, and three that were not compact or did not utilize existing political and geographical boundaries.

***League of Women Voters v. Detzner* (*Apportionment VIII*), 179 So. 3d 258 (Fla. 2015)**
TOPIC(S) ADDRESSED: State Constitution Challenge
RELATES TO: Congressional Redistricting
A special session on Aug. 10-21, 2015, adjourned without enactment of a revised congressional plan. Thereafter, the Florida Supreme Court gave final approval to the congressional plan adopted by the trial court, which consisted of districts 1 to 19 (North and Central Florida) as passed by the House and incorporated into the plaintiffs' alternative map and districts 20 to 27 (South Florida) as proposed by plaintiffs.

GEORGIA

***Georgia State Conf. of NAACP v. Georgia*, No. 1:17-cv-1427 (N.D. Ga. Aug. 25, 2017)**
TOPIC(S) ADDRESSED: Racial VRA, Equal Protection and Partisan Gerrymander
RELATES TO: Legislative Redistricting
Plaintiff African-American voters and the NAACP alleged that Georgia's 2015 redistricting of Georgia House of Representatives districts 105 and 111 resulted from racial and partisan gerrymandering. The plaintiffs asked the district court to declare these two districts unconstitutional, order them redrawn, and impose preclearance requirements on Georgia for the next 10 years. A three-judge federal district court entered an order dismissing the plaintiffs' Section 2 and partisan gerrymandering claims. The order did not address the plaintiffs' racial gerrymandering claims. The court consolidated this case with *Thompson v. Kemp*. After the November 2018 election and the close of discovery, the case was dismissed by stipulation of the parties.

IDAHO

***Twin Falls County v. Idaho Comm'n on Redistricting*, 152 Idaho 346, 271 P.3d 1202 (2012)**
TOPIC(S) ADDRESSED: State Constitutional Challenge
RELATES TO: Legislative Redistricting
This case involves a state constitutional challenge to the legislative apportionment plan adopted by the Idaho Commission on Redistricting. Plaintiffs argued the plan adopted by the commission violated art.

III, § 5, of the Idaho Constitution, which states that "a county may be divided in creating districts only to the extent it is reasonably determined by statute that counties must be divided to create senatorial and representative districts which comply with the constitution of the United States." The Idaho Supreme Court interpreted the requirements of art. III, § 5, as being mandatory, thus holding that the only permissible reason to deviate from art. III, § 5, was to comply with the Equal Protection Clause, and only then to the smallest extent necessary. Because the commission had considered plans that split fewer counties and complied with the Equal Protection Clause, the plan the commission ultimately adopted did not split as few counties as was practicable. Thus, the commission's plan violated the Idaho Constitution. The court directed the commission to reconvene and adopt new maps.

KENTUCKY

***Legislative Research Commission v. Fischer*, No. 2012-SC-000091 (Ky. Apr. 26, 2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenge

RELATES TO: Legislative Redistricting

This case was a state constitutional challenge to the state House and Senate maps adopted by the Kentucky Legislature in 2011. Section 33 of the Kentucky Constitution requires that state legislative districts be drawn "as nearly equal in population as may be without dividing any county, except where a county may include more than one district." The plaintiffs in *Fischer v. Grimes*, Civil Action No. 12-Cl-109, requested a temporary injunction preventing the state from using the new plans until remedial plans could be drawn. The trial court granted plaintiffs' motion and enjoined the state from enforcing the maps. On appeal, the Kentucky Supreme Court held that the Legislative Research Commission had not carried its burden of proving the excessive population deviation was a result of a consistently applied rational state policy. Since plaintiffs had demonstrated that fewer county splits and population deviations of no more than 5% could be achieved in both the House and Senate, the new maps adopted by the General Assembly in 2011 were unconstitutional.

MAINE

***Desena v. Maine*, No. 1:11-cv-117 (D. Me. June 21, 2011)**

TOPIC(S) ADDRESSED: Equal population

RELATES TO: Congressional Redistricting

After the 2010 census data was completed, Maine's two congressional districts saw an increased population differential. Instead of having a gap of 23 residents between the two congressional districts, as was the case after the previous redistricting cycle, these two districts varied by 8,669 residents. Plaintiffs, who were residents of the larger district, sued the state on March 28, 2011, alleging that the plan from 2003, which was in effect for the 2012 election cycle, was unconstitutionally malapportioned and that the 2012 congressional election could not go forward under these current maps. The Maine federal district court ruled in favor of the plaintiffs, holding that the population deviation between the

two districts was significant and was greater than variances previously deemed unconstitutional by the U.S. Supreme Court. On June 21, 2011, the court ordered the Legislature to act quickly and redraw the districts before the 2012 congressional elections. On Sept. 27, 2011, at a special session called for this specific purpose, both houses of the Maine Legislature approved legislation adopting new congressional districts based on the 2010 federal decennial census. The governor signed the bill the next day, no challenges were filed against it, and the court ordered judgment for plaintiffs.

MARYLAND

***Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), 567 U.S. 930 (2012)**

TOPIC(S) ADDRESSED: Counting of Prisoners and Equal Population

RELATES TO: Congressional Redistricting

Maryland drew its congressional redistricting plan in accordance with the requirements of Maryland's "No Representation Without Population Act." This act requires that prisoners be counted at their last known residence before incarceration, not at the prison address. If prisoners were residents of an address outside of Maryland before incarceration, the prisoners must be excluded from data used for redistricting. Plaintiffs challenged the congressional districts, based on alleged racial and partisan gerrymandering, unequal population, violations of the Voting Rights Act, and two claims based on adjustments to account for the population in prison—including a claim based on omission of individuals in prison whose last known addresses are outside the state. The court rejected plaintiffs' claims of partisan and racial gerrymandering and of violations of the Voting Rights Act and found no constitutional deficiency in Maryland's decision to adjust census data to account for the incarcerated population. The decision was summarily affirmed by the U.S. Supreme Court.

***Shapiro v. McManus*, 136 S. Ct. 450 (2015)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Maryland voters challenged the state's congressional redistricting plan, saying it burdened their First Amendment rights of political association by drawing partisan-based lines. A single federal district court judge—not a three-judge panel—dismissed the claim, concluding that no relief could be granted. The 4th Circuit U.S. Court of Appeals affirmed this single judge's dismissal. The Supreme Court held that this standard was inconsistent with its precedents and clarified when U.S. district court judges must refer cases to three-judge panels. The court ruled that federal district courts are required to refer cases to a three-judge panel when plaintiffs challenge the constitutionality of the apportionment of congressional districts.

***Benisek v. Lamone*, No. 18–422, 588.U.S. ___ (2019). (The U.S. Supreme Court consolidated *Rucho v. Common Cause* and *Lamone v. Benisek*)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Six years after the Maryland General Assembly redrew the Sixth Congressional District, plaintiffs sued to enjoin Maryland's election officials from holding congressional elections under the 2011 map. They alleged lawmakers intentionally used information about voters' histories and party affiliations to replace large numbers of Republican voters with Democratic voters in the district, thus flipping the district from a reliable Republican seat into a safe Democratic one. They asserted that extending the alleged gerrymander into the 2018 election would be a manifest and irreparable injury. The three-judge panel hearing the case denied the state's motion to dismiss and held that a map could be an unconstitutional partisan gerrymander if the plaintiffs could satisfy a three-part test laid out by the court. The trial court denied the preliminary injunction and stayed further proceedings pending the outcome of *Gill v. Whitford*. The U.S. Supreme Court held that a district court did not abuse its discretion in denying a preliminary injunction in a gerrymandering case, but deferred its ruling in the face of the legal uncertainty surrounding any potential remedy was within its sound discretion. On remand, the district court found that the state specifically targeted voters who were registered as Republicans and who historically had voted for Republican candidates. That court held that Maryland's 2011 redistricting law "violates the First Amendment by burdening both the plaintiffs' representational rights and associational rights based on their party affiliation and voting history." It enjoined the use of the 2011 congressional plan in future elections and directed the state to submit to the court a remedial plan. It then stayed its decision pending an expedited appeal to the U.S. Supreme Court. In a 5-4 opinion consolidated with *Common Cause v. Rucho*, the Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral" to measure fairness are not available.

MICHIGAN

***League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Legislative Redistricting and Congressional Redistricting

The League of Women Voters of Michigan, numerous League members, and several Democratic voters challenged the 2011 congressional, Senate and House redistricting plans as violating their 14th Amendment right to equal protection of the laws and their First Amendment rights to freedom of speech and association by deliberately discriminating against Democratic voters. The Michigan Senate, Republican members of Congress and of the Michigan Senate and House intervened to defend the plans. The district court considered testimony and documents showing the motivations of the members, staff

and consultants who drew the plans and the process they followed. The court also considered expert evidence comparing the challenged plans to those drawn by the expert's computer using programs to create districts that complied with traditional districting principles. Based on this evidence, the court applied the standard used in *Common Cause v. Rucho* to establish a violation of the 14th Amendment's Equal Protection Clause: 1) a predominant intent to subordinate the adherents of one political party and entrench a rival party in power, 2) a discriminatory effect diluting a plaintiff's vote by cracking or packing, and 3) no legitimate state interest to justify the discrimination. It applied a three-part test—similar to that used in *Ohio A. Philip Randolph Inst. v. Householder*—to establish a violation of the First Amendment: 1) a specific intent to burden individuals or entities that support a disfavored candidate or political party, 2) an actual burden imposed on the political speech or associational rights of those individuals or entities, and 3) that the intent to burden actually caused the burden to be imposed. The court found that partisan considerations played a central role in every aspect of the redistricting process. The court found that the challenged districts had intentionally been drawn to disadvantage Democratic candidates and voters. The court gave the Michigan Legislature until Aug. 1, 2019, to draw remedial plans, but also set a schedule for the court to appoint a special master to draw a plan if the Legislature failed or if the court were to find the remedial plan invalid. The Michigan Senate and Michigan House and congressional intervenors applied to the U.S. Supreme Court for a stay of the judgment of the district court pending a direct appeal.

MISSISSIPPI

***Clemons v. U.S. Dep't of Commerce*, No. 3:09-cv-104 (N.D. Miss. July 8, 2010), 131 S. Ct. 821 (2010)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Congressional Redistricting

Registered voters across the country filed suit in a Mississippi federal district court in 2010 alleging that Section 2a of Title 2 of the U.S. Code, which freezes the number of U.S. representatives at 435, is unconstitutional under the principle of "one-person, one-vote." Freezing the number of U.S. representatives naturally leads to under-representation of some districts and over-representation of others. The three-judge federal district court granted the government's motion for summary judgment.

***Mississippi NAACP v. Barbour*, No. 3:11-cv-159 (S.D. Miss. May 16, 2011), 565 U.S. 972 (2011)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Legislative Redistricting

The Mississippi NAACP filed suit alleging that the legislative plans drawn for the 2010 cycle were unconstitutionally malapportioned and violated the Equal Protection Clause of the 14th Amendment. The federal district court ruled that the 2011 elections for the state House and Senate could go on absent a plan adopted by the Mississippi Legislature precleared before the June 1 qualifying deadline for the 2011 elections. The court ruled in favor of the Legislature on the premise that it was not required to

redistrict at this time. The U.S. Supreme Court had previously held that state legislatures are required to redistrict every 10 years. Here, only nine years had passed. In addition, the three-judge panel found that the Legislature did not violate the Mississippi Constitution pertaining to when the reapportionment process must begin. The U.S. Supreme Court affirmed the lower court's ruling.

***Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Congressional Redistricting

When the 2001 Mississippi Legislature failed to enact a congressional redistricting plan based on the 2000 census that reflected a reduction from five representatives to four, a three-judge federal district court adopted a four-district plan and retained jurisdiction "to implement, enforce, and amend [its] order as shall be necessary and just." When the 2011 Mississippi Legislature likewise failed to enact a plan based on the 2010 census that reflected population shifts within the state, the same panel amended its 2001 judgment to impose a new plan that met equal population requirements.

NEW HAMPSHIRE

***City of Manchester v. Gardner*, No. 2012-0338 (N.H. June 19, 2012)**

TOPIC(S) ADDRESSED: Racial, Process and State Constitutional Challenges

RELATES TO: Legislative Redistricting

Plaintiffs argued that by strictly adhering to a 10% overall deviation rule for the state House redistricting plan, the General Court violated the New Hampshire Constitution. The General Court failed to provide approximately 62 towns, wards and places with their own representatives, which the plaintiffs argued was excessive. The New Hampshire Supreme Court ruled in favor of the General Court, stating that plaintiffs did not show that the General Court lacked a rational or legitimate basis for adhering to the 10% rule. The court went on to say that it had not found a case in which a court has required a legislature to adopt a redistricting plan with an overall deviation range of more than 10% in order to enhance its compliance with a state constitutional mandate. The state supreme court remanded the case to the state trial court, which subsequently dismissed the case.

NEW YORK

***Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012)**

TOPIC(S) ADDRESSED: Legislative Privilege

RELATES TO: Congressional Redistricting

Plaintiffs challenged the state Senate and Assembly plans for various violations of Section 2 of the Voting Rights Act and the Equal Protection Clause of the 14th Amendment. Both the Senate majority (Republicans) and Senate minority (Democrats) intervened as defendants. The Senate minority defendants sought discovery from the Senate majority defendants of all documents determining the

size of the Senate following the 2010 census. The Senate majority, Assembly majority (Democrats), and Assembly minority (Republicans) defendants moved for an order denying discovery of documents and information protected by the legislative privilege. A U.S. magistrate judge applied a five-factor analysis and ordered the parties to submit for *in camera* inspection the documents for which they claimed a privilege. The magistrate judge found that certain documents and communications were not "legislative" and thus not entitled to the privilege: 1) those categorized as public statements or concerning the preparation of public statements; 2) those prepared in anticipation of litigation; 3) inquiries from members of the public or media and responses thereto; 4) public remarks, statements crafted for public relations purposes, and public speeches made outside the Legislature by legislators or their representatives; 5) public testimony; 6) efforts made in connection with negotiation for or securing of government contracts, and remuneration of contractors or service providers; 7) those concerning administrative tasks; 8) correspondence with or about national political organizations; 9) submissions to the Department of Justice related to compliance with Section 5 of the VRA; and 10) any other means of informing those outside the legislative forum.

***Leib v. Walsh*, 45 Misc. 3d 874, 992 N.Y.S.2d 637 (Sup. Ct. 2014)**

TOPIC(S) ADDRESSED: Process Challenge

RELATES TO: Legislative Redistricting

In 2013, the New York Legislature approved a concurrent resolution to amend the state Constitution to include the creation of an "independent" redistricting commission to draw legislative and congressional redistricting plans starting in 2020. One of the main issues in question was the use of the qualifier "independent" in the ballot language. Plaintiffs sued the State Board of Election in New York state trial court for approving this ballot initiative with "misleading, ambiguous, illegal, or inconsistent" language. The state trial court agreed with the plaintiff that the term "independent" was indeed misleading because the ultimate outcome was subject to control by others (the Legislature). The Legislature could reject any map drawn by the commission for unstated reasons and draw its own lines, therefore calling into question the true independence of the commission. Also, the court found that the standard of review was "misleading, ambiguous, illegal, or inconsistent," based on previous case law interpreting the challenge of specific ballot language or ballot abstracts. The court then held that, to remedy this matter, the word "independent" must be stricken from the ballot.

NORTH CAROLINA

***Covington v. North Carolina*, 137 S. Ct. 1624 (2017), 138 S. Ct. 2548 (2018)**

TOPIC(S) ADDRESSED: Racial Equal Protection

RELATES TO: Legislative Redistricting and Congressional Redistricting

In 2011, plaintiffs claimed that the General Assembly employed a race-based proportionality policy for state House and Senate plans. They argued that approximately 10 of the state's 50 Senate districts and approximately 24 of the state's 120 House districts should be black-majority districts. The three-judge

federal district court agreed with the plaintiffs and ordered a new map to be drawn for a 2017 special election. On direct appeal, the Supreme Court affirmed on liability, but vacated the order for a special election. The General Assembly drew new plans, but on Oct. 26, 2017, the trial court appointed a Special Master in light of concerns about the General Assembly's remedy. The court expressed concerns that the General Assembly had not sufficiently corrected the racial gerrymandering violation, and that the General Assembly had unnecessarily redrawn districts in Wake and Mecklenberg counties, contrary to state law prohibiting mid-decade redistricting. The Special Master drew new plans adopted by the court on Jan. 21, 2018. On June 28, 2018, the Supreme Court affirmed the trial court's decision to deploy the Special Master's plan with respect to the racially gerrymandered districts, but reversed the trial court's decision to correct the alleged state law violation in Wake and Mecklenberg counties. The court held that the district court's remedy should have been confined to violations of federal law, not the state law prohibition on mid-decade redistricting.

***North Carolina Conference of NAACP Branches v. Lewis*, No. 18CVS 002322 (N.C. Superior Ct, Wake County Nov. 2, 2018)**

TOPIC(S) ADDRESSED: Racial Equal Protection

RELATES TO: Legislative Redistricting

Following the Feb. 6, 2018, refusal of the U.S. Supreme Court to enjoin use of the General Assembly's Aug. 31, 2017, remedial plan for five House districts in Wake and Mecklenburg counties, plaintiffs challenged those districts as a mid-decade redistricting before a three-judge state panel in Wake County Superior Court. On April 13, 2018, the panel found that plaintiffs were reasonably likely to succeed on the merits, but that the election, in which absentee voting had begun four weeks earlier, was too far along to enjoin the use of the challenged districts for 2018. The court denied the plaintiffs' motion for preliminary injunction. On Nov. 2, 2018, the panel held that the alteration of the four districts was not necessary to remedy the racial gerrymander and thus violated the state constitution's ban on mid-decade redistricting. It directed the General Assembly to enact a new Wake County House District map for use in the 2020 general election no later than the earlier of: 1) the adjournment of the 2019 regular session of the General Assembly, or 2) July 1, 2019. On June 25, 2019, the General Assembly enacted the Special Master's plan for House districts in Wake County.

***Dickson v. Rucho*, No. 11-CVS-16896 (N.C. Super Ct., Wake County)**

TOPIC(S) ADDRESSED: Racial VRA

RELATES TO: Legislative Redistricting and Congressional Redistricting

An action in state court challenged North Carolina's legislative and congressional maps as violating federal and state law for relying too heavily on race to create its 2011 maps. According to the plaintiffs, the General Assembly used a racial proportionality target to determine the number of majority-minority districts that it drew and required that each such district meet a fixed 50% black voting-age population (BVAP) target. The North Carolina Supreme Court found that drawing districts to comply with the Voting Rights Act did not automatically amount to consideration of race warranting strict scrutiny, and

that the state had a strong evidentiary basis for concluding that the districts it drew were sufficiently tailored to satisfy the Voting Rights Act. Also, the districts met state constitutional requirements. On two separate occasions, the U.S. Supreme Court vacated and remanded in light of *Alabama Legislative Black Caucus v. Alabama* and *Cooper v. Harris*. The North Carolina Supreme Court remanded to the trial court. On Feb. 11, 2018, the Wake County Superior Court entered a judgment in the case, stating that challenged districts in the 2011 congressional and legislative plan were unconstitutional but holding that no further remedy could be offered by the court since the 2011 maps had already been redrawn. The court declared all the plaintiffs' remaining claims moot.

***Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016); aff'd *Cooper v. Harris*, 137 S. Ct. 1455 (2017)**

TOPIC(S) ADDRESSED: Racial Equal Protection

RELATES TO: Congressional Redistricting

Plaintiffs alleged that North Carolina's First and 12th congressional districts, as drawn by the General Assembly in 2011, violated the Equal Protection Clause of the 14th Amendment. They argued that race was the predominant motive in drawing the challenged districts. The federal district court ruled in favor of the plaintiffs on this claim. On Feb. 5, 2016, the trial court struck the two challenged congressional districts as districts drawn predominantly based on race, without adequate justification. That decision was affirmed on appeal by the Supreme Court. On Feb. 19, 2016, the General Assembly passed a remedial plan; plaintiffs challenged that remedial plan as a partisan gerrymander. On June 2, 2016, the three-judge panel denied the plaintiffs' objections, ruling that the court could not "resolve this question based on the record before it." The Supreme Court, on June 28, 2018, summarily affirmed that decision.

***Common Cause v. Rucho*, No. 18–422, 588.U.S. ___ (2019). (The U.S. Supreme Court consolidated *Rucho v. Common Cause* and *Lamone v. Benisek*)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Plaintiffs alleged that North Carolina's 2016 contingent congressional plan constituted a partisan gerrymander. They alleged that the plan violated the Equal Protection Clause of the 14th Amendment, the First Amendment, and Article I, Section 2 (Members chosen by the People) and Section 4 (the Elections Clause) of the U.S. Constitution. The three-judge district court found for the plaintiffs on all their constitutional claims. The legislative defendants did not dispute that the North Carolina General Assembly intended for the 2016 plan to favor supporters of Republican candidates and disfavor supporters of non-Republican candidates, nor that the plan had its intended effect. Rather, they argued that a partisan gerrymander was not against the law. The court also found that the plan's partisan favoritism excluded it from the class of "reasonable, politically neutral" electoral regulations that pass First Amendment muster and that the 2016 plan represented an impermissible effort to "dictate electoral outcomes" and "disfavor a class of candidates." The district court ordered the North Carolina General Assembly to draw new congressional districts. On remand, the three-judge district

court held that at least one of the plaintiffs residing in each of the state's 13 congressional districts had standing to assert a partisan vote dilution challenge under the Equal Protection Clause and that 12 of the 13 districts in the 2016 plan violated the Equal Protection Clause, the First Amendment and Article I of the U.S. Constitution. The court enjoined the use of the 2016 plan in any election after the 2018 election. In a 5-4 opinion that included the consolidated case of *Benisek v. Lamone*, the U.S. Supreme Court vacated the decision and remanded the case with instructions to dismiss for lack of jurisdiction. The Court held that this category of claims is not justiciable by federal courts, because there is no credible way to define fairness in the political context and "limited and precise standards that are clear, manageable, and politically neutral" to measure fairness are not available.

OHIO

***Ohio A. Philip Randolph Inst. v. Householder*, No. 1:18-cv-357 (S.D. Ohio May 3, 2019)**

TOPIC(S) ADDRESSED: Partisanship and Legislative Privilege

RELATES TO: Congressional Redistricting

Seventeen Ohio Democratic voters and five Ohio-based Democratic and nonpartisan organizations challenged the 2011 congressional plan as violating their 14th Amendment right to equal protection of the law, their First Amendment right to freedom of association, and the Elections Clause of Article I, sections 2 and 4, of the U.S. Constitution, by deliberately discriminating against Democratic voters. Members of the Ohio congressional delegation intervened to join the speaker of the Ohio House, the president of the Ohio Senate, and the secretary of state in defending the plan. Based on the evidence, the court applied the standard used in *Rucho v. Common Cause* (North Carolina) and *League of Women Voters of Mich. v. Benson* (Michigan) to establish a violation of the 14th Amendment's Equal Protection Clause: 1) a predominant intent to subordinate the adherents of one political party and entrench a rival party in power, 2) a discriminatory effect diluting a plaintiff's vote by cracking or packing, and 3) no legitimate state interest to justify the discrimination. The court applied a similar three-part test used in *Rucho* and *Benson* to establish vote dilution under the First Amendment: 1) a specific intent to burden individuals or entities that support a disfavored candidate or political party, 2) an actual burden imposed on the political speech or associational rights of those individuals or entities, and 3) that the intent to burden actually caused the burden to be imposed. The court found that partisan considerations played a central role in every aspect of the redistricting process. All 16 districts were struck down. The court gave the Ohio General Assembly until June 14, 2019, to draw a remedial plan, but also set a schedule for the court to appoint a special master to draw a plan if the General Assembly failed or if the court were to find the remedial plan invalid. At the time of publication, further motions are expected.

PENNSYLVANIA

***Holt v. 2011 Legislative Reapportionment Comm'n*, 614 Pa. 364, 38 A.3d 711 (2012)**

TOPIC(S) ADDRESSED: State Constitutional Challenges

RELATES TO: Legislative Redistricting

This is a consolidation of multiple challenges to the final plan adopted by the Pennsylvania Legislative Reapportionment Commission (LRC) following the 2010 census. While there were more than 10 individual challenges, there were two challenges to the entire legislative scheme that the Pennsylvania Supreme Court used when it struck down the plan as unconstitutional. Most of the legal dispute in this case centered around what kinds of evidence challengers could bring to the attention of the state supreme court to back up their arguments. The supreme court held that its precedents did not preclude it from seeing alternative plans from challengers, so long as those plans were being submitted as evidence of the unconstitutionality of the adopted maps, and not as proposed plans that should be enacted in place of the unconstitutional maps adopted by the LRC. The supreme court struck down the LRC's final plan, saying it violated Article II, Section 17(d), of the Pennsylvania Constitution, which requires the LRC to craft a plan with no more splits of townships, wards and counties than are "absolutely necessary." The court remanded the case to the LRC, directing them to adopt maps that had fewer splits as mandated by art. II, § 17(d).

***Holt v. 2011 Legislative Reapportionment Comm'n*, 620 Pa. 373, 67 A.3d 1211 (2013)**

TOPIC(S) ADDRESSED: State Constitutional Challenges

RELATES TO: Legislative Redistricting

On remand, the LRC adopted Senate and House plans with fewer political subdivision splits than in its 2011 final plan, but not as few as in plans submitted by challengers that also had lower population deviations and more compact districts. On appeal, the Pennsylvania Supreme Court held that "the LRC, in crafting the 2012 Final Plan, sufficiently heeded this court's admonition that it 'could have easily achieved a substantially greater fidelity to all of the mandates in Article II, § 16' than it did in its unconstitutional 2011 Final Plan, and as the court stated, "the appellants have not demonstrated that the 2012 Final Plan is contrary to law."

***League of Women Voters of Pa. v. Pennsylvania*, 644 Pa. 287 (2018), cert. denied, 139 S. Ct. 445 (2018)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

The League of Women Voters of Pennsylvania and a group of Democratic Pennsylvania voters challenged the state's 2011 congressional map in state court as an unconstitutional partisan gerrymander under the state constitution. The petitioners sought a declaration that the plan discriminates against Democratic voters in violation of the Pennsylvania Constitution's Free Expression and Association clauses, Equal Protection Guarantees, and Free and Equal Clause. The Pennsylvania Supreme Court found that "the Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the

Commonwealth of Pennsylvania" and enjoined its use in future elections, commencing with the state primary election May 15, 2018. The court gave the General Assembly and the governor until Feb. 15, 2018, to submit to the court a remedial plan. If they failed to do so, the court would adopt its own plan by Feb. 19, 2018. The court reviewed the historical development of Pennsylvania's constitutional limits on the drawing of legislative districts, such as requirements that they be compact, contiguous and maintain the boundaries of political subdivisions, and adopted them "as appropriate in determining whether a congressional redistricting plan violates the Free and Equal Elections Clause..." The court held that, when drawing congressional districts, if these neutral criteria are subordinated to gerrymandering for unfair partisan political advantage, whether intentional or not, the plan violates the Free and Equal Elections Clause. The Pennsylvania General Assembly failed to submit a congressional redistricting plan to the governor by the court's deadline of February 9. The court released its adopted remedial plan. On Feb. 27, 2018, the legislative defendants filed an Emergency Application for Stay with Justice Samuel Alito. The stay was denied.

***Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018)**

TOPIC(S) ADDRESSED: Partisanship

RELATES TO: Congressional Redistricting

Eight incumbent Pennsylvania congressmen and two members of the Pennsylvania Senate challenged the supreme court's new map in federal district court as a violation of the Elections Clause of the U.S. Constitution, alleging that the court had neither authority to strike down the 2011 plan nor authority to draw a new map in its place. The new congressional map was put in place by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*. A three-judge court dismissed the complaint for lack of standing. The two members of the Pennsylvania Senate were not a sufficient number to enact a law or override a governor's veto, so they were not entitled to defend the rights of the General Assembly. The eight members of Congress had no legally recognized interest in the composition of their congressional districts. Their complaint that the state court had adopted improper criteria and provided too little time for the General Assembly to draw a plan was not why their districts' boundaries had changed, so it was not the cause of their injury.

***Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. Nov. 16, 2017), 138 S. Ct. 2576 (2018)**

TOPIC(S) ADDRESSED: Partisanship and Legislative Privilege

RELATES TO: Congressional Redistricting

Four Pennsylvania citizens challenged the state's 2011 congressional map in federal court as a partisan gerrymander. The plaintiffs asserted that the 2011 plan unlawfully placed citizens into congressional districts based upon their likely voting preferences. The plaintiffs asked the court to redraw the districts before the 2018 congressional elections. The court dismissed the partisan gerrymandering claim under the Equal Protection Clause of the 14th Amendment for failure to articulate a standard for reviewing the claim. The speaker of the Pennsylvania House moved for a protective order that he not be deposed at all or, if deposed, that he not be questioned about his deliberative process or subjective

intent regarding the 2011 congressional map. The three-judge federal district court denied the motion, saying there was no legislative or deliberative process privilege as to documents and communications with third parties nor for questions about his own intent or motive, nor for communications with the public or outside of the members and staff of the General Assembly. The court dismissed the partisan gerrymandering claim under the First Amendment for failure to articulate a standard for reviewing the claim. The court dismissed the remaining claims on Jan. 10, 2018. The plaintiffs filed a notice of appeal to the Supreme Court. On May 29, 2018, the Supreme Court dismissed the appeal as moot, in light of *League of Women Voters of Pa. v. Pennsylvania*.

SOUTH CAROLINA

***Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012), 568 U.S. 801 (2012)**

TOPIC(S) ADDRESSED: Racial Equal Protection and Racial VRA

RELATES TO: Legislative Redistricting and Congressional Redistricting

Registered voters in South Carolina challenged the General Assembly's state and congressional redistricting plans in federal court. They argued that the maps as drawn in the 2010 cycle denied African-American voters equal protection under the law, violating the 14th Amendment to the U.S. Constitution and Section 2 of the Voting Rights Act. The plaintiffs argued that the new plans unnecessarily packed African-American voters into specific districts. The three-judge federal district court rejected the plaintiffs' challenge, stating that the plaintiffs had failed to prove that the General Assembly acted with a discriminatory purpose. In addition, the plaintiffs failed to prove a discriminatory effect. The plaintiffs appealed to the U.S. Supreme Court. The Court summarily affirmed the lower court's ruling. The plaintiffs moved the trial court for relief from the dismissal due to the holding in *Shelby County v. Holder*. Once again, the plaintiffs were denied by the three-judge federal district court and the U.S. Supreme Court.

TENNESSEE

***Moore v. State*, 436 S.W. 3d 775 (Tenn. Ct. App. 2014)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Legislative Redistricting

Article II, Section 6 of the Tennessee Constitution prohibits splitting counties to form senatorial districts. In 2012, the General Assembly adopted a Senate redistricting plan splitting eight counties with an overall population range of 9.17%. Plaintiffs challenged the constitutionality of the plan based on county splitting and offered a plan that split five counties with an overall population range of 10.05% as a plan more compliant with the Tennessee Constitution. No plan splitting fewer counties with an overall population range under either 9.17% or 10% was offered as an alternative. Affirming summary judgment in favor of the state, the Tennessee Court of Appeals found that the state demonstrated that crossing county lines was necessary to best achieve population equality on balance with the state constitutional interests.

TEXAS

***Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)**

TOPIC(S) ADDRESSED: Equal Population

RELATES TO: Legislative Redistricting and Congressional Redistricting

Voters in Texas sought an injunction barring the use of the 2011 state legislative maps. They argued that Texas should adopt a map measured by *voter population* numbers, not *total population* numbers. The U.S. Supreme Court rejected the plaintiffs' claim that the Texas plan based upon total population was in violation of the one-person, one-vote principle of the Equal Protection Clause. The Supreme Court held that centuries of practice and precedent establishes the principle of representation that serves all residents, not just those who are eligible to vote. Because non-voters have an important stake in many policy decisions and debates, they therefore are accorded their fair representation. The Court did not determine that a state must use total population numbers, and instead said that a state may use total population numbers.

***Perez v. Abbott*, No. 5:11-cv-360 (W.D. Tex.) (formerly Perez v. Perry)**

TOPIC(S) ADDRESSED: Process, Legislative Privilege, Racial Equal Protection and VRA

RELATES TO: Legislative Redistricting and Congressional Redistricting

Voters in Texas challenged the 2011 congressional, state House, and state Senate plans. Plaintiffs alleged that the Legislature intentionally diluted Latino and African-American voting strength based on alleged violations of the Voting Rights Act, racial and partisan gerrymandering, and excessive population deviations based on impermissible purposes and on counting the population of individuals in prison at the facilities where they are incarcerated rather than at their former addresses. The defendants asserted legislative privilege under federal common law and moved for a protective order. The motion was denied as premature. Twenty-three of Texas' members of Congress then asserted legislative privilege under the Speech and Debate Clause of the U.S. Constitution and moved to prevent disclosure of written communications between them, their staff and counsel and Texas legislators, staff and counsel relating to the Texas Legislature's redistricting. The communications had been submitted to the trial court under seal. The trial court denied the motion and unsealed the documents. When it appeared that the state's newly enacted plans would not be precleared under Section 5 of the Voting Rights Act before the 2012 election, the trial court drew interim plans. On appeal, the U.S. Supreme Court said that the trial court must follow the enacted plans, except for districts that violated the Constitution or the Voting Rights Act. In 2013, the Texas Legislature enacted those plans into law, with minor changes to the state House plan. Plaintiffs agreed that the enacted 2013 plan for the Senate remedied their complaint, and the complaint was dismissed. While the trial court continued its consideration of the challenges to the 2011 House and congressional plans on the merits, it ordered the House and congressional plans enacted in 2013 to be used for elections in 2014 and 2016. On appeal, the U.S. Supreme Court held the district court had disregarded the presumption of legislative good faith and improperly reversed the burden of proof when it required the state to show a lack of discriminatory intent in

adopting new districting plans. The Supreme Court reversed all the holdings of the district court with regard to the congressional plan and House plan, except its holding that HD 90 in Tarrant County (Fort Worth) was a racial gerrymander that needed to be redrawn.

VIRGINIA

***Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), 137 S. Ct. 788 (2017), No. 18-1134, (June 17, 2019)**

TOPIC(S) ADDRESSED: Racial Equal Population

RELATING TO: Legislative Redistricting

Voters in Virginia filed suit in federal district court alleging that the Virginia General Assembly violated the Equal Protection Clause when it drew state House districts in 2011. The General Assembly drew new lines for 12 state House districts that ensured that each of these districts would have a black voting-age population (BVAP) of at least 55%. The General Assembly claimed they did so to comply with the Voting Rights Act. On the merits, the district court rejected the challenge to 11 of the 12 districts. The U.S. Supreme Court held that the federal district court applied the wrong standard with regard to establishing racial predominance. The Court reasserted the controlling standard established in *Miller v. Johnson*, 515 U.S. 900, 916 (1995), that challengers may show predominance "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." What is crucial when evaluating predominance is the actual considerations of the General Assembly for drawing the district lines, not an after-the-fact evaluation of what appear to be district lines that deviate from traditional criteria. The Court remanded the case to the district court. After a new trial, the trial court held that the 11 remaining districts were drawn predominantly based on race, without sufficient justification. The court ordered the General Assembly to draw new lines. When the House of Delegates failed to draw a remedial plan, the district court imposed one to be used in the 2019 state election. The House of Delegates appealed the district court's order to redraw the districts. The House of Delegates also appealed the district court's remedial plan, alleging it was a racial gerrymander. The Supreme Court dismissed this appeal for a lack of standing.

***Personhuballah v. Alcorn* (aka *Page v. Va. State Bd. of Elections*, *Cantor v. Personhuballah*, and *Wittman v. Personhuballah*), 239 F. Supp. 3d 929 (E.D. Va. 2017)**

TOPIC(S) ADDRESSED: Partisanship and Legislative Privilege

RELATES TO: Congressional Redistricting

Plaintiffs alleged that their rights under the Equal Protection Clause of the U.S. Constitution were violated by the racial gerrymander of Virginia Congressional District 3 during the 2011-12 redistricting cycle. Plaintiffs subpoenaed documents related to the 2012 Virginia redistricting process—including

draft maps and communications about the maps—from a consultant retained as an independent contractor by the House Republican Campaign Committee. The consultant moved to quash the subpoena or for a protective order, asserting legislative privilege as to some of the documents. The federal district court held that, since the consultant was not an employee of the House, a committee or an individual member, he was not "so critical to the performance of the legislature that he should be treated as a legislative alter ego and extended the benefit of legislative privilege." Even if he were entitled to claim the privilege, the court used a five-factor analysis to determine that "he would be entitled to withhold only those documents concerning the actual deliberations of the Legislature once the redistricting legislation had been formally introduced." The three-judge court struck down Congressional District 3 as a racial gerrymander because the use of race in drawing district lines was not narrowly tailored to serve a compelling governmental interest. The U.S. Supreme Court vacated and remanded the decision for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*. The federal district court again found Congressional District 3 was a racial gerrymander. When the Virginia General Assembly failed to enact a remedial plan, the district court ordered Virginia to implement a plan drawn by a special master for elections in 2016.

***Vesilind v. Va. State Bd. of Elections*, 295 Va. 427, 813 S.E.2d 739 (2018)**

TOPIC(S) ADDRESSED: State Constitutional Challenges and Legislative Privilege

RELATES TO: Legislative Redistricting

Challengers filed suit in state court alleging that six Senate and five House districts were not as compact as the Virginia Constitution requires. Legislative members, staff and consultants were subpoenaed to testify about their role in the redistricting process. They claimed legislative privilege. The defendants first requested the court to quash the discovery requests and subpoenas relating to the redistricting process, but then consented to be found in contempt of the trial court's order compelling discovery from some of the members, staff and consultants to facilitate an appeal of the order to the Virginia Supreme Court. On appeal, the Virginia Supreme Court found for the defendants since the actions of the members, staff and consultants fell within the sphere of legitimate legislative activity because they acted as an "alter ego" of the legislator in performing a legislative activity. They were deemed to be functioning in a legislative capacity on behalf of and at the direction of a legislator. Therefore, legislative privilege applied to these communications. After a trial on the merits of the case, the circuit court held in favor of the defendants, ruling against the plaintiffs' claim that the alleged districts violated the Virginia Constitution.

WEST VIRGINIA

***Tennant v. Jefferson County*, 567 U.S. 758 (Sep. 25, 2012)**

TOPIC(S) ADDRESSED: Equal Population and State Constitution Challenge

RELATES TO: Congressional Redistricting

The Jefferson County Commission and residents of Jefferson County alleged that West Virginia's 2011

congressional plan violated the "one-person, one-vote" principle of Article I, Section 2, of the U.S. Constitution. West Virginia created a redistricting plan that had a maximum population deviation of 0.79% (the variance between the smallest and largest districts). The state conceded that it could have made a plan with less deviation, but that other traditional redistricting principles—such as not splitting counties, avoiding contests between incumbents, and preserving the cores of prior districts—were legitimate state objectives. The district court held that "the State's asserted objectives did not justify the population variance." The U.S. Supreme Court held that the Legislature did provide a sufficient record connecting the state's interests and the necessary deviation needed to sustain those interests. The court reversed and remanded the case to the district court. The federal district court then dismissed the case, without prejudice to refiling in the appropriate state court because the case asserted claims under state law.

WISCONSIN

***Baldus v. Brennan*, 849 F. Supp. 2d 840 (E.D. Wis. 2012)**

TOPIC(S) ADDRESSED: Partisanship, Equal Population and Legislative Privilege

RELATES TO: Legislative Redistricting and Congressional Redistricting

Plaintiffs alleged that the Wisconsin legislative and congressional plans violated the Equal Protection Clause of the 14th Amendment and Section 2 of the Voting Rights Act in various ways. Specifically, the plaintiffs alleged the plans were unconstitutional because they violated traditional redistricting principles and failed to protect communities of interest; constituted an impermissible partisan gerrymander; and disenfranchised nearly 300,000 voters who were shifted from even-numbered Senate districts to odd-numbered Senate districts (meaning they could not vote for a Senator for an extra two years). The plaintiffs further alleged the plan "cracked" the Milwaukee Latino community into two districts, neither of which was a majority-minority district of citizen-voting-age Latinos, in violation of Section 2 of the Voting Rights Act. On March 22, 2012, the court upheld the plans as constitutional, but found that Assembly districts 8 and 9 violated Section 2 of the Voting Rights Act by diluting the voting power of Latino voters in Milwaukee. The court held the plan violated federal law because it failed to create a majority-minority district for the Latino community in Milwaukee. The court enjoined the state from using the existing Assembly districts 8 and 9 and ordered creation of new maps affecting only those districts. The court then gave the Legislature the first opportunity to redraw the districts but noted that the Legislature must act quickly given upcoming elections. On April 11, 2012, the court adopted a remedial plan for Assembly districts 8 and 9 drawn by plaintiffs. The court explained that the Hispanic citizen-voting-age population in the maps proposed by the defendants was too low, whereas the plaintiffs' proposed maps provided an effective majority-minority district for the Latino community in Milwaukee and balanced traditional redistricting criteria. For this reason, the court selected the proposed maps submitted by the plaintiffs and ordered that the maps be substituted for Assembly districts 8 and 9 in the original map.

***Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), 138 S. Ct. 1916 (2018)**

TOPIC(S) ADDRESSED: Partisanship and State Constitutional Challenge

RELATES TO: Legislative Redistricting

Voters in Wisconsin challenged the Wisconsin Legislature's state Assembly plan adopted in 2011. Plaintiffs alleged that the Wisconsin Legislature drew the districts with excessive partisan intent, intending to hurt the opposing party. A three-judge federal district court struck down the map as a partisan gerrymander. The court's opinion considered, without depending on, a new standard: the "efficiency gap." The efficiency gap is a mathematical metric that calculates how many votes each party wastes compared to the other party. A wasted vote for a party is the number of votes above 50% plus one in a district won, and the total votes received by the losing candidate. These totals are compiled for both parties and then compared to each other. If one party has significantly more wasted votes than the other party, then that plan is called into question.

On appeal, the U.S. Supreme Court sent the case back to the district court for further proceedings, consistent with its opinion that a partisan gerrymandering case alleging vote dilution under the Equal Protection Clause of the 14th Amendment must be considered district by district, rather than statewide. Plaintiffs had alleged that Democratic votes had been diluted by packing them into some districts and cracking them among other districts, but plaintiffs had not identified which districts were packed or were cracked and that at least one plaintiff resided in each of the challenged districts. Further, plaintiffs had not sought to prove at trial that they lived in a packed or cracked district or identify the harm to them as individuals. After the 5-4 opinion in *Rucho v. Common Cause* (North Carolina) and *Lamone v. Benisek* (Maryland), the district court dismissed the case.

Glossary

This glossary includes key redistricting terms. Although a few are terms of art or slang and do not have a well-defined meaning in the context of redistricting, they are widely used. Please note this information is intended to be for informational purposes only. The terms have been selected and defined by the NCSL redistricting team.

Alternative population base—A count other than total population from the federal decennial census that is used for redistricting.

Apportionment—The process of assigning seats, or apportioning them, in a legislative body among pre-existing political subdivisions such as states or counties. In the past, some states assigned districts on the basis of county boundaries and therefore continue to call their redistricting process "apportionment."

At-large—When a district elects more than one member, all candidates run against each other on one ballot, and they are elected by the entire district population.

Census—A complete count or enumeration of the population; the federal decennial census is mandated by the U.S. Constitution in Article 1, Section 2.

Census block—The smallest and lowest level of geography defined for decennial census tabulations. States may have input into the boundaries through the first phase of the Redistricting Data Program—the Block Boundary Suggestion Project (BBSP). The Census Bureau provides redistricting data down to the lowest level of census geography, the block level. Blocks can have any population, including no people.

Census block group—Block groups (BGs)—statistical divisions of census tracts—generally contain between 600 and 3,000 people. BGs tend to follow neighborhoods. They are used to present data and control block numbering. A block group consists of clusters of blocks within the same census tract that have the same first digit of their four-digit census block number. Most BGs were delineated by local participants in the Census Bureau's Participant Statistical Areas Program.

Census Bureau—The U.S. Census Bureau, which is part of the Department of Commerce, conducts the decennial Census of Population and Housing as well as numerous ongoing projects for the federal government. The mission for the bureau is to "Count Everyone Once, Only Once and in the Right Place" in the decennial census.

Census geography—The geographic units for which census information is tabulated and reported with several hierarchies; from smallest to largest, these are census blocks, census block groups, census tracts, counties and states.

Census tract—Census tracts are small, relatively permanent geographic entities within counties (or the statistical equivalents of counties) delineated by a committee of local data users. Generally, census tracts have between 2,500 and 8,000 residents and boundaries that follow visible features. When first established, census tracts were to be as homogeneous as possible with respect to population characteristics, economic status and living conditions. Tracts were first defined in 1970, and the Census Bureau maintains them as consistently as possible across the decades.

Commission—A statutory or constitutional body charged with researching, advising or enacting policy. Redistricting commissions have been used to draw districts for legislatures and Congress.

Communities of interest—Geographical areas, such as neighborhoods of a city or regions of a state, where the residents have common demographic and/or political interests that do not necessarily coincide with the boundaries of a political subdivision, such as a city or county.

Compactness—Having the minimum distance between all the parts of a district. Various methods have been developed to measure compactness.

Contiguity—All parts of a district are connected geographically at some point with the rest of the district. Limits on contiguity by point or by water vary by state.

Cracking—A term used when the electoral strength of a particular group is divided by a redistricting plan.

Deviation—The measure of how much a district or plan varies from the ideal population, however defined, per district. Deviation can be expressed as an absolute number or as a percentage.

District—The geographic area that defines the region from which a public official is elected.

Effective minority district—A district that allows minority voters to elect their preferred candidate of choice.

Gerrymander—A term of art to describe a plan or a district intentionally drawn to give one group or party advantage over another.

Geographic Information System (**GIS**)—Computer software used to create or revise plans and analyze geographically oriented data.

Ideal population—The total population or alternative for the state or top-level jurisdiction divided by the number of seats in a legislative body.

Influence district—Term used to describe a district where a racial minority does not constitute a majority but is populous enough to influence electoral outcomes.

Justiciable—A case is "justiciable" if it relates to a matter that a court can decide. If a case is non-justiciable, then it is not something on which a court can rule.

Legislative body—Any entity that performs governmental legislative duties, with membership elected by the people; also known as a representational body.

Majority-minority districts—Term used by courts for seats where a group or a single racial or language minority constitutes a majority of the population. These are also are referred to as "effective districts."

Metes and bounds—A detailed and specialized description of district boundaries using specific geographic features and street directions such as those usually found in describing real property for legal purposes.

Minority opportunity district—A district with at least a 50% minority citizen voting age population.

Multi-member district—A single district that elects two or more members to a legislative body.

Natural boundaries—District boundaries that include natural geographic features such as bodies of water, mountains, etc.

Nested—When multiple districts of a legislature's lower chamber are wholly contained within the geographic boundaries of one of the upper chamber's districts.

One-person, one-vote—A constitutional standard established by the U.S. Supreme Court that means all districts for representational bodies should be approximately equal in population. The degree of equality may vary in congressional plans versus legislative and/or local plans.

Overall range—The difference in population between the largest and smallest districts in a districting plan in either absolute (people) or relative (percentage) terms.

Packing—A term used when one group is consolidated as a super-majority in a smaller number of districts, thus reducing its electoral influence in nearby districts.

Partisan gerrymandering—See gerrymander.

Plan—A set of boundaries for all districts of a representational body, also known as a map.

PL 94-171—Federal law enacted in 1975 that requires the U.S. Census Bureau to provide the states with data for use in redistricting and also mandates the program where the states define the geography for collecting data.

Plurality—The margin by which the votes for the winning candidate exceeds the votes for the losing candidate with the highest number of votes. If the winners receive more than 50% of the total votes, they win with a majority; otherwise they win with a plurality.

Racial Gerrymandering—See gerrymander.

Reapportionment—See apportionment.

Redistricting—The redrawing or revision of boundaries for representational districts.

Sampling—Technique or method that measures part of a population to estimate the same characteristic for the entire population.

Section 2 of the Voting Rights Act—Part of the federal law that protects racial and language minorities from discrimination by a state or other political subdivision in voting practices.

Section 5 of the Voting Rights Act (**VRA**)—Part of the federal law that requires certain states and localities to pre-clear all election law changes with the U.S. Department of Justice or the federal district

court for the District of Columbia before those laws take effect. The provision has become limited in scope since the 2013 *Shelby County v. Holder* decision, where the U.S. Supreme Court invalidated Section 4(b), which delineates the coverage of the section. This decision effectively suspended Section 5 of the VRA.

Single-member district—District electing only one representative; in the U.S. House of Representatives, states that are granted more than one seat must use single-member districts. States that have only one seat often are referred to as at-large states.

Single-member election—Election in which only one candidate is elected. While this is how all elections are held in single-member districts, it also can occur in mulit-member districts if seats within the district are uniquely designated and not all are elected at the same time.

Standard deviation—A statistical formula measuring variance from the average for the entire set of data.

Tabulation—The totaling and reporting of census data from individual responses for all levels of census geography.

Topologically Integrated Geographic Encoding and Referencing (**TIGER**)—The system and digital database developed at the U.S. Census Bureau to support computer maps used by the census.

Voting age population (**VAP**)—The number of people age 18 years and older.

Voting district (**VTD**)—A census term for a geographic area, such as an election precinct, where election information and data are collected; boundaries are provided to the Census Bureau by the states. Since boundaries must coincide with census blocks, VTD boundaries may not be the same as the election precinct and may include more than one precinct.

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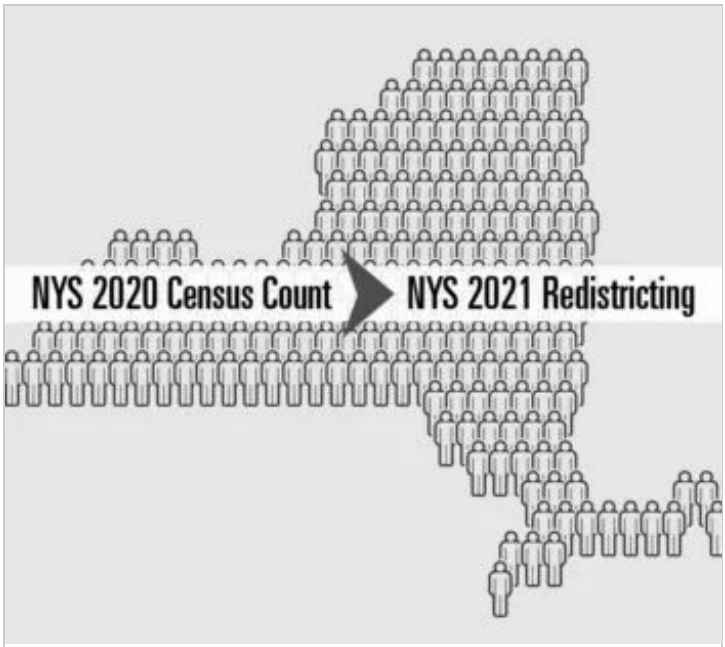
Mapping the New Senate, Assembly & Congressional Districts

July 1, 2020 (https://www.citylandnyc.org/mapping-the-new-senate-assembly-congressional-districts/)



Credit: CityLaw

New York State in 2021 must redraw the State's senate, assembly and congressional districts. The process will be different from the process used to draw legislative and congressional district lines in the past. Previously, the State legislature redrew the districts for its own members and for the State's congressional members. After years of efforts to reform a process seen as too self-interested, New York State voters in 2014 approved an amendment to the State constitution that created a new Redistricting Commission that will propose new district lines to the legislature. The legislature still gets the last word, but the commission process opens the redistricting process up, provides an outside entity to act as the initial proposer, and adds guidelines for map design for fairness.

This article provides background on past redistrictings and information on what to expect ahead. It explains the Redistricting Commission's composition and rules, and the role for judicial review. It also identifies anticipated timelines, opportunities for public input, and particular factors that are likely to affect the shape of districts to be used over the next decade.

Past Redistricting

The State Legislature in the past redistricted itself and New York's congressional districts following each decennial census by enacting chapter laws that established the new legislative and congressional districts. The New York system and similar systems in other states were criticized by reformers who argued that legislators drew districts benefitting themselves and their incumbency. A national effort to take redistricting out of the hands of legislatures and to create independent commissions came to New York after

California, Arizona and other states enacted redistricting commissions through popular referendums. In New York, reformers looked to amending the state constitution since New York does not provide for constitutional changes through referenda.

The State Legislature in 1978 had created the "Legislative Advisory Task Force on Reapportionment and Demographic Research," known as LATFOR. At that time, LATFOR was seen as a major step towards opening up the redistricting process because LATFOR included two non-legislators who were separately appointed by the Speaker and the Temporary President in addition to members of the legislature appointed by the four legislative leaders (Speaker of the Assembly, Senate Temporary President and the two minority leaders). The appointment of the two non-legislators made the panel semi-public. For the redistricting process following the 1980 census, LATFOR pioneered the use of computer technology to draw maps and developed senate, assembly and congressional redistricting plans to the legislature.

In 2009, with Democrats controlling both legislative chambers, reformers and activists mobilized to advocate further change to the way New York drew its legislative district lines. The reformers advocated for the creation of a redistricting commission independent of the legislature. Former New York City Mayor Ed Koch and several civic organizations advanced a "sign the pledge" campaign effort to enlist State legislators to support an independent commission before the 2011 redistricting process started. Instead, Governor Cuomo and legislative leaders compromised in early 2012 by permitting the legislature to draw its own lines in return for a promise to agree to a constitutional amendment to be submitted to the voters after 2012.

While the legislative debate continued, LATFOR produced new assembly and senate plans for the 2012 election cycle, but only after a series of public meetings, draft plans, litigation and debate. The lengthy process concluded just shy of the time needed for new districts to be in place in time for the 2012 elections. The LATFOR process was criticized for its lack of input from senate democrats who were again in the minority. One minority party legislator complained that "the entire process has been a farce, a sham, has been a waste of money, and I believe that we have not listened to the citizens of the state of New York." (LATFOR hearing, 3/14/12).

The 2014 Constitutional Amendment

The constitutional amendment that emerged from the 2012 agreement created a Redistricting Commission that would submit to the legislature for approval up to two sets of redistricting plans for congressional, senate and assembly districts. The amendment passed the legislature in 2013 and again in 2014, which sent the amendment to voters for approval. (Constitutional Proposal No. 1, 2014)

The 2012 agreement was seen as a compromise. It permitted the legislature to draw district lines for one more decade and avoided Governor Cuomo's threat to veto a plan drawn by the legislature. The aim of the compromise was to ensure that in future redistricting cycles both the majority and minority parties would participate, and to create a more transparent, fair and open process.

In 2014, before the ballot question to approve the constitutional amendment was placed before the voters, a State judge removed wording from the question's ballot information description that described the Redistricting Commission as completely independent of the legislature. Justice Patrick J. McGrath explained that use of the word "independent" could mislead voters because the legislature still maintained control of the redistricting process. *Leib v. Walsh,* No. 4275-14 (Sup. Ct. Albany Cty 2014) Judge McGrath found that "not only can the legislature disapprove the Commission's decision, but it can do so without giving any reason or instruction for future consideration of these new principles…. [T]he Commission's plan is little more than a recommendation to the legislature, which can reject it for unstated reasons and draw lines of its own."

Voters approved the constitutional amendment in November 2014 by a vote of 57.7 percent in favor of the amendment.

The constitutional amendment left intact most provisions of the State's 1894 constitution and added a new Section 5-b to create the Independent Redistricting Commission. The Redistricting Commission consists of ten members. Eight of the ten members are appointed by the four legislative leaders. Two members each are appointed by the Speaker of the Assembly, Senate Temporary President and the assembly and senate minority leaders, respectively. Those eight commissioners then appoint two additional commission members who cannot have been registered as Democrats or Republicans during the last five years. The commissioners select a chair from amongst themselves. No tie breaking odd number member was included. (Art III, Sec 5b)

To be eligible for Redistricting Commission membership, individuals cannot have served in the last three years as a State legislator, member of congress, statewide elected official, a legislative or state employee, political party chair or lobbyist. Spouses of State legislators, congressional members, and statewide elected officials are also barred from commission membership. (Art III, Sec B)

The amendment provides for two co-executive directors who must be of different political parties. The co-directors are empowered to hire staff pursuant to a plan that the Redistricting Commission must first approve. Since the current State legislature is controlled by the Democratic Party, the co-directors will be appointed by a majority of the Redistricting Commission members in a vote that includes one appointee of each of the four legislative leaders. This year, one registered Democrat and one registered Republican are eligible to serve as a co-director. (Art III, Sec 5-ii)

The FY 2020-21 budget included $750,000 in funding to operate and staff the Redistricting Commission, which must complete its initial work by January 1, 2022. Members of the Redistricting Commission are entitled to compensation and reimbursement of travel expenses. (Art III, Sec 4-i).

The New Redistricting Commission

The new Redistricting Commission has not yet begun work, but eight of the ten commission members have been appointed:

– Assembly Speaker Carl Heastie appointed **Elaine Frazier** who has worked in the State legislature, Division of the Budget and for the State Comptroller, and **Eugene Benger**, an attorney at Debevoise & Plimpton.

– Senate Temporary President Andrea Stewart Cousins appointed **Dr. John Flateau**, a Professor and Chair of the Department of Business Administration at the School of Business, Medgar Evers College, CUNY, and **David Imamura**, also an Attorney at Debevoise & Plimpton).

– Senate Minority Leader John Flanagan appointed **George H. Winner, Jr.**, who served in the State assembly and senate for 32 years, and **Ed Lurie**, a former executive director of the New York Republican State Committee and the New York Senate Republican Committee.

– Assembly Minority Leader William Barclay appointed **Charles Nesbitt**, a former Assembly Minority Leader, and **Keith Wofford**, an attorney and 2018 candidate for State Attorney General.

Under the constitutional amendment, these eight commission members will select the two additional members.

Redistricting Criteria

Under the constitutional amendment the new Redistricting Commission is tasked with developing redistricting plans based on the decennial census for congressional, senate and assembly districts that comply with the federal Voting Rights Act and the federal constitution's "one person/one vote" population equality requirement. In addition to population equality, the 2014 amendment to the State constitution added for the first time new written criteria for districts:

– Voting rights protections where districts cannot deny or abridge racial minority voting groups;

– An equal population standard where districts must contain equal numbers of people;

– Requirements that all districts consist of contiguous territory and be as compact in form as practicable;

– A prohibition on drawing districts that discourage competition or that favor or disfavor incumbents or partisan candidates; and

– A requirement to consider maintaining the cores of existing districts or pre-existing political subdivisions and to consider "communities of interest."

The criteria are not ranked in any priority order, leaving it to the Redistricting Commission or the legislature to balance the rules as they deem necessary. (Art 4, Sec 1- 5)

Public Hearings and Outreach

The Redistricting Commission must hold twelve public hearings around the State including the cities of Albany, Buffalo, Syracuse, Rochester, and White Plains; and in the following counties: Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk. (Art III, Sec 6)

The Redistricting Commission is also required to publicize the hearings well in advance. The Redistricting Commission must make public its draft plans, data and other relevant information public by print and other means at least 30 days before the first public hearing and do this no later than September 15, 2021. The public should be provided enough information to enable for adequate review and to develop alternative plans that can be presented to the commission at the public hearings. (Art 4, Sec 5)

Approval Requirements

The Redistricting Commission must combine the senate and assembly plans in one proposed bill and submit it to the legislature by January 1, 2022, with an allowance to submit as late as January 15, 2022 if necessary. The legislature has the option to consider the congressional redistricting plan in the same bill or to consider it separately. (Art 4, Sec b) The legislature can approve the first proposed plan without amendments and send it to the governor to be enacted as a chapter amendment to State law or reject the plan. The governor has the right to veto the plan.

If the legislature rejects the first plan or the governor vetoes it, the Redistricting Commission must submit a second plan to the legislature no later than February 28, 2022 and, if approved, without amendments, send it to the governor to be enacted as a chapter amendment. The governor can also veto the second plan even if approved by the legislature. (Art III, Sec. 4-b)

If the second plan is rejected by the legislature or vetoed by the Governor, the legislature can amend the second plan "as it deems necessary." Gubernatorial vetoes of the first and second plans can be overridden. While the legislature must follow the same substantive constitutional criteria as the commission does, the legislature would have more leeway to make accommodations. (Art 4, Sec b). Since the constitutional criteria for drawing districts are not ranked in priority order, the legislature can develop plans more in line with the legislative leadership's goals. A third plan developed by and agreed to by the senate and assembly is also subject to the governor's approval and a veto can be overridden.

Without minority party support, plans cannot be approved by the legislature, a marked change from the past. Different vote requirements apply depending on party control of the assembly and senate. If the chambers have divided partisan control, at least a majority of the legislators elected to each chamber must vote to approve the plans. If the legislature is under the control of one political party, at least two-thirds of the members of each chamber must approve the plans. If the chambers are under divided control and the Redistricting Commission did not approve a plan, at least 60 percent of the legislators elected to each chamber must vote in favor to approve a plan. The different voting requirements were designed to ensure that the minority party has a participatory, if not deciding, role in the redistricting process and plan approval. (Art III, Sec 1-3)

Court Review

The amendment provides for State Supreme Court review of an approved redistricting plan when challenged by a citizen. The deadline for a decision by the trial court is 60 days after the petition was filed. The legislature is empowered to develop a remedial plan to correct legal issues found in violation of the law. (Art III, Sec 5). While the amendment only addresses the role of the State Supreme Court, it is assumed that appeals can be taken before the appellate division and the court of appeals.

Other Issues

Prisoner Reallocation: The constitutional amendment did not address how the Redistricting Commission was to accommodate the State's 2010 chapter law requiring that, for State senate and assembly districts, the voting residence for State prisoners be reallocated from their place of incarceration to their permanent home address. Prior to 2010, redistricting plans counted prisoners in the communities where the prisons were located, a system that increased the population in those communities housing large numbers of prisoners. According the Prison Policy Initiative, "By inflating the apparent size and therefore the political influence of areas with incarceration facilities, prison gerrymandering violates our constitutional right to equal political power based on population size."

The Redistricting Commission will also have to consider how to make prisoner allocation with respect to congressional districts. The constitutional amendment did not address this issue and the 2010 chapter law did not re-allocate prisoners for congressional redistricting purposes because of legal concerns that it might not have been permissible. The Supreme Court has since determined that re-allocating prisoners for congressional redistricting would be permissible. Fletcher v. Lamone 133 S.Ct. 129 (2012)

Limiting Senate Population Deviations: The 2014 amendment repealed a rule that required assembly districts within each county to be equipopulous (known as the "block on border" rule for cities and the "town on border" rule for counties). This arcane rule was left to still apply to senate districts. This rule was originally designed to restrain gerrymandering by limiting flexibility in drawing districts for incumbent or partisan advantage. (Art 4, sec. a)

Population Deviation: In 2012, the Governor approved a law that prevents the legislature from drawing districts maps that exceed two percent in population deviation among districts if the legislature had rejects the Redistricting Commission's first two plans and opts to draw another set of maps. This limitation was not included in the constitutional amendment and may generate controversy and legal challenges.

2022 Election Calendar: While the constitutional amendment contemplated a redistricting schedule that could be completed by March 2022, State legislative and congressional primaries are now held in June pursuant to a 2019 State law change rather than September. The legislature and governor will need to consider and reconcile the differences in the 2022 election calendar to work with the constitutional amendment's schedule, possibly by changing the dates for 2022 primaries.

What to Expect

The COVID-19 pandemic has put the Redistricting Commission's early organizing stages on hold. While the legislative leaders made their appointments to the Redistricting Commission, the Redistricting Commission has not itself met to choose the remaining two members. Co-directors need to be recruited and a staff hired. With Census 2020 enumeration operations delayed, the US Department of Commerce recently asked congress to extend the deadlines for congressional reapportionment and delivery of redistricting data to the states, adding further uncertainty to the overall schedule. If congress moves the deadline for the Census Bureau to deliver detailed redistricting data to the State from April 1, 2021 to July 31, 2021, the Redistricting Commission will have five months to analyze the data, hold hearings, and develop a plan to present to the legislature by January, 2022, condensing a process that was expected to take up to nine months. Like every other activity, the State's redistricting process can only move forward once the COVID-19 process abates and activities can resume.

Citizen participation in redistricting. New York Law School created a Census & Redistricting Institute to help New Yorkers understand and participate in federal, State and local redistricting processes and enable the public to have greater impact on how new district lines are drawn. Redistricting has long been considered an arcane and complex process. Partisan and racial gerrymandering in New York and across the nation has drawn considerable media attention and has made redistricting a front burner issue. In addition to conducting an educational program on redistricting, New York Law School's Institute will promote Mapping New York, a public mapping project that will provide the public with the ability to draw and review redistricting maps that can be submitted to the advisory state commission, state legislature, and local governments.

The Institute's first meeting of New York Redistricting Roundtable met in February and will continue to convene major stakeholders, litigators and activist organizations to update on post-2020 congressional and State legislative redistricting planning.

By: **Jeffrey M. Wice**, Adjunct Professor & Senior Fellow

This entry was posted in CityLaw (https://www.citylandnyc.org/category/citylaw/) and tagged census (https://www.citylandnyc.org/tag/census/), CityLaw (https://www.citylandnyc.org/tag/citylaw/), redistricting (https://www.citylandnyc.org/tag/redistricting/). Bookmark the permalink (https://www.citylandnyc.org/mapping-the-new-senate-assembly-congressional-districts/).

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One thought on "Mapping the New Senate, Assembly & Congressional Districts"

Joel Rothschild

August 12, 2021 at 5:38 pm (https://www.citylandnyc.org/mapping-the-new-senate-assembly-congressional-districts/#comment-150069)

Dear Prof. Wice:
Today the Census Bureau is releasing the data needed in order to draw Congressional District boundaries.

I am concerned that a catastrophic error following the 2010 census not be repeated. I refer to the lumping of the Central Harlem and Dominican communities into the same Congressional District, thereby forcing natural allies into competition for the same Congressional seat.

I am convinced that this is unnecessary, but that will depend on the actual numbers. I will appreciate any help in accessing the date a rapidly as possible, hopefully at the Election District level.
Thank you,
Joel Rothschild 212-928-8111

Reply

Leave a Reply

Matter of Harkenrider v Hochul
2022 NY Slip Op 02833 [38 NY3d 494]
April 27, 2022
DiFiore, J.
Court of Appeals
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, November 23, 2022

[*1]

In the Matter of Tim Harkenrider et al., Respondents-Appellants,
v
Kathy Hochul, as Governor, et al., Appellants-Respondents, et al., Respondents.

Argued April 26, 2022; decided April 27, 2022

Matter of Harkenrider v Hochul, 204 AD3d 1366, modified.

{**38 NY3d at 501} OPINION OF THE COURT

Chief Judge DiFiore.

In 2014, the people of the State of New York amended the State Constitution to adopt historic reforms of the redistricting process by requiring, in a carefully structured process, the creation of electoral maps by an Independent Redistricting Commission (IRC) and by declaring unconstitutional certain undemocratic practices such as partisan and racial gerrymandering. No one disputes that this year, during the first redistricting cycle to follow adoption of the 2014 amendments, the IRC and the legislature failed to follow the procedure commanded by the State Constitution. A stalemate within the IRC

resulted in a breakdown in the mandatory process for submission of electoral maps to the legislature. The legislature responded by creating and enacting maps in a nontransparent manner controlled exclusively by the dominant political party—doing exactly what they would have done had the 2014 constitutional reforms never been passed. On these appeals, the primary questions before us are whether this failure to follow the prescribed constitutional procedure warrants invalidation{**38 NY3d at 502} of the legislature's congressional and state senate maps and whether there is record support for the determination of both courts below that the district lines for congressional [*2]races were drawn with an unconstitutional partisan intent. We answer both questions in the affirmative and therefore declare the congressional and senate maps void. As a result, judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.

I.

Every 10 years, following the federal census, reapportionment of the state senate, assembly, and congressional districts in New York must be undertaken to account for population shifts and potential changes in the state's allocated number of congressional representatives (*see* NY Const, art III, § 4). Redistricting—which is "primarily the duty and responsibility of the State" (*Perry v Perez*, 565 US 388, 392 [2012] [internal quotation marks and citation omitted]; *see Growe v Emison*, 507 US 25, 34 [1993])—is a complex and contentious process that, historically, has been "within the legislative power . . . subject to constitutional regulation and limitation" (*Matter of Orans*, 15 NY2d 339, 352 [1965]). In New York, prior to 2012, the process of drawing district lines was entirely within the purview of the legislature,[FN1] subject to state and federal constitutional restraint and federal voting laws, as well as judicial review.

Particularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines—often necessitating federal court involvement in the development of New York's congressional maps (*see e.g. Favors v Cuomo*, 2012 WL 928223 *2, 2012 US Dist LEXIS 36910, *10 [ED NY, Mar. 19, 2012, No. 11-CV-5632 (RR)(GEL)(DLI)(RLM), Raggi, Lynch and Irizarry, JJ.]; *Rodriguez v Pataki*, 2002 WL 1058054, *7, 2002 US Dist LEXIS 9272, *25-27 [SD NY, May 24, 2002, No. 02 Civ 618(RMB), Walker, Ch. J., Koeltl and Berman, JJ.]; *Puerto Rican Legal Defense & Educ. Fund, Inc. v*{**38 NY3d at 503}*Gantt*, 796 F Supp 681, 684 [ED NY 1992]). Among other concerns, the redistricting process has been plagued with allegations of partisan gerrymandering—that is, one political party manipulating district lines in order to disproportionately increase its advantage in the upcoming elections, disenfranchising voters of the opposing party (*see generally Rucho v Common Cause*, 588 US —, —, 139 S Ct 2484, 2494 [2019]).

By adopting the 2014 constitutional amendments, the people significantly altered both substantive standards governing the determination of district lines and the redistricting process established to achieve those standards. Given the history of legislative stalemates and persistent allegations of partisan gerrymandering, the constitutional reforms were intended to introduce a new era of bipartisanship and transparency through the creation of an independent redistricting commission and the adoption of additional limitations on legislative discretion in redistricting, including explicit prohibitions on partisan and racial gerrymandering (*see* Assembly Mem in Support of 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem in Support of 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). The Constitution now requires that the IRC—a bipartisan commission working under a constitutionally mandated timeline—is charged with the obligation of drawing a set of redistricting maps that, with appropriate implementing

legislation, must be submitted to the legislature for a vote, without amendment (*see* NY Const, art III, §§ 4 [b]; 5-b [a]).[FN2] If this first set of maps is rejected, the IRC is required to prepare a second set that, again, would be subject to an up or down vote by the legislature, without amendment (*see* NY Const, art III, § 4 [b]). Under that constitutional framework, only upon [*3]rejection of a second{**38 NY3d at 504} set of IRC maps is the legislature free to offer amendments to the maps created by the IRC (*see* NY Const, art III, § 4 [b]) and, even then, a statutory restriction enacted as a companion to the constitutional reforms precluded legislative alterations that would affect more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

II.

Following receipt of the results of the 2020 federal census, the redistricting process began in New York—the first opportunity for district lines to be drawn under the new IRC procedures established by the 2014 constitutional amendments. Due to shifts in New York's population, the state lost a congressional seat and other districts were malapportioned, undisputedly rendering the 2012 congressional apportionment—developed by a federal court following a legislative impasse (*see Favors*, 2012 WL 928223, *2, 2012 US Dist LEXIS 36910, *10)—unconstitutional and necessitating the drawing of new district lines. Throughout 2021, the IRC held the requisite public hearings, gathering input from stakeholders and voters across the state to inform their composition of redistricting maps. In December 2021 and January 2022, however, negotiations between the IRC members deteriorated and the IRC, split along party lines, was unable to agree upon consensus maps. According to the IRC members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC declined to continue negotiations on a consensus map, insisting they would

proceed with discussions only if further negotiations were based on their preferred redistricting maps.

As a result of their disagreements, the IRC submitted, as a first set of maps, two proposed redistricting plans to the legislature—maps from each party delegation—as is constitutionally permitted if a single consensus map fails to garner sufficient votes (*see* NY Const, art III, § 5-b [g]). The legislature voted on this first set of plans without amendment as required by the Constitution and rejected both plans. The legislature notified the IRC of that rejection, triggering the IRC's obligation to compose—within 15 days—a second redistricting plan for the legislature's review (*see* NY Const, art III, § 4 [b]). On January 24, 2022—the day before the 15-day deadline but more than one month before the February 28, 2022 deadline—the IRC announced that it was deadlocked and, as a result, would{**38 NY3d at 505} not present a second plan to the legislature. Within a week, the Democrats in the legislature—in control of both the Senate and Assembly—composed and enacted new congressional, senate, and assembly redistricting maps (*see* 2022 NY Senate-Assembly Bill S8196, A9167; 2022 NY Senate-Assembly Bill S8172A, A9039A; 2022 NY Senate-Assembly Bill S8197, A9168; 2022 NY Senate-Assembly Bill S8185A, A9040A), undisputedly without any consultation or participation by the minority Republican Party.[FN3] On February 3rd, the Governor signed into law this new redistricting legislation, which also superseded the two percent limitation imposed in 2012 on the legislature's authority to amend IRC plans (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17 at 11, 2012 McKinney's Session Laws of NY at 1484-1485).

That same day, petitioners—New York voters residing in several different congressional districts—commenced this special proceeding under article III, § 5 of the State Constitution and McKinney's Unconsolidated Laws of NY § 4221 against various state respondents, including the Governor,[FN4] Senate

Majority Leader, Speaker of the Assembly, and the New York State Board of Elections, challenging the congressional and senate maps. Petitioners alleged that the process by which the 2022 maps were enacted was constitutionally defective because the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments and, as such, the legislature lacked authority to compose and enact its own plan. Petitioners also asserted that the congressional map is unconstitutionally gerrymandered in favor of the majority party because it both "packed" minority-party voters into a select few districts and "cracked" other pockets of those voters across multiple districts, thereby diluting the [*4]competitiveness of those districts. Petitioners asked Supreme Court to enjoin{**38 NY3d at 506} any elections from proceeding on the 2022 congressional map and to either adopt its own map or direct the legislature to cure the infirmities. Petitioners subsequently sought to amend their petition to include similar challenges to the state senate map. The state respondents answered that petitioners lacked standing to challenge most of the districts they claimed were gerrymandered, that the IRC's failure to perform its duty did not strip the legislature of its enduring authority to enact redistricting plans, and that petitioners could not meet their burden of proving that the maps were unconstitutionally partisan.

A trial ensued, at which petitioners and the state respondents presented expert testimony regarding the maps. Petitioners' expert, Sean P. Trende—a doctoral candidate who has a Juris Doctor, a master's degree in political science, and a master's degree in applied statistics, and who has participated as an expert in several redistricting proceedings in other states—was qualified as an expert in election analysis with particular knowledge in redistricting, with no objection from the state respondents or any request for a *Frye* hearing to challenge the efficacy of his methodology or the basis of his opinion. Trende testified that a comparison of the enacted congressional map to ensembles of 5,000 or 10,000 maps created by computer simulation revealed that the enacted map was an

"extreme outlier" that likely reduced the number of Republican congressional seats from eight to four by "packing" Republican voters into four discrete districts and "cracking" Republican voter blocks across the remaining districts in such manner as to dilute the strength of their vote and render such districts noncompetitive.

Opposing experts called by the state respondents challenged Trende's methodology and asserted that the enacted congressional map actually resulted in more Republican districts than the simulated maps, although several conceded that they did not analyze the level of competitiveness of the new districts. Further, the State's experts defended various choices made by the legislature as justifiable based on constitutionally required considerations, contending that the enacted maps were not reflective of partisan intent.

After determining petitioners had standing to challenge the statewide maps, Supreme Court declared the congressional, state senate, and state assembly maps "void" under the State Constitution, reasoning that the legislature's enactment of{**38 NY3d at 507} redistricting maps absent submission of a second redistricting plan by the IRC was unconstitutional and that 2021 legislation purporting to authorize the enactment (the 2021 legislation) was also unconstitutional (76 Misc 3d 171 [Sup Ct, Steuben County 2022]). Further, crediting Trende's testimony, Supreme Court found that petitioners had proved that the congressional map violated the constitutional prohibition on partisan gerrymandering by packing Republican voters into four districts while ensuring there were "virtually zero competitive districts" (76 Misc 3d at 189-190). Supreme Court declared all three maps void, enjoined the state respondents from using the maps in the impending 2022 election, and directed the legislature to submit new "bipartisanly supported" maps that meet constitutional requirements for the court's review by a particular date (76 Misc 3d at 194-195).

The state respondents appealed, and a Justice of the Appellate Division stayed much of Supreme Court's order pending that appeal, including the deadline for submission of new redistricting maps by the legislature. However, the stay order did not prohibit Supreme Court from retaining a neutral expert to prepare a proposed new congressional map, which would have no force and effect until certain contingencies occurred, including the legislature's failure to proffer its own new congressional maps by April 30th—30 days after the date of Supreme Court's order.[FN5] Thereafter, in a divided decision, the Appellate Division modified Supreme Court's order by denying the petition, in part, vacating the declaration that the senate and assembly maps and the 2021 legislation were unconstitutional, but otherwise affirmed and remitted, with three Justices agreeing with Supreme Court that petitioners had met their burden of proving that the constitutional prohibition against partisan gerrymandering had been violated with respect to the 2022 congressional map, rendering that map void and unenforceable (204 AD3d 1366 [4th Dept 2022]).[FN6] In reaching that conclusion, the Appellate Division relied on "evidence {**38 NY3d at 508}of [*5]the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende" (*id.* at 1371). However, the Court rejected petitioners' argument that both the congressional and senate maps were void due to the failure to adhere to the constitutional procedure, with one Justice dissenting on that point. The parties now cross-appeal as of right (*see* CPLR 5601 [b] [1]), challenging certain aspects of the Appellate Division order.

III.

As a threshold matter, relying on common-law standing principles, the state respondents assert that petitioners lack standing to challenge many of the districts that they claim reflect unconstitutional partisan gerrymandering

because none of the individual petitioners reside in those districts. Even absent the procedural challenge applicable to all districts, this contention is unavailing because standing is expressly conferred by constitution and statute. Article III, § 5 of the New York Constitution provides that "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, *at the suit of any citizen*, under such reasonable regulations as the legislature may prescribe" (emphasis added; *see* 3 Rev Rec, 1894 NY Constitutional Convention at 987; *Matter of Dowling*, 219 NY 44, 50 [1916]; *Schieffelin v Komfort*, 212 NY 520, 529 [1914]). Moreover, statutes may identify the class of persons entitled to challenge particular governmental action, relieving courts of the need to resolve the question under common-law principles (*see Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 50 n 2 [2019]; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]; *Wein v Comptroller of State of N.Y.*, 46 NY2d 394, 399 [1979]; *see e.g.* State Finance Law § 123) and, here, Unconsolidated Laws § 4221 likewise authorizes "any citizen" of the state to seek judicial review of a legislative act establishing electoral districts. We therefore turn to consideration of the merits of petitioners' challenges to the 2022 redistricting maps.

Petitioners first assert that, in light of the lack of compliance by the IRC and the legislature with the procedures set forth in{**38 NY3d at 509} the Constitution, the legislature's enactment of the 2022 redistricting maps contravened the Constitution. To conclude otherwise, petitioners contend, would be to render the 2014 amendments—touted as an important reform of the redistricting process—functionally meaningless. We agree.

Legislative enactments, including those implementing redistricting plans, are entitled to a "strong presumption of constitutionality" and redistricting legislation will be declared unconstitutional by the courts " 'only when it can be shown beyond reasonable doubt that it conflicts' " with the Constitution after

" 'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Wolpoff v Cuomo*, 80 NY2d 70, 78 [1992] [some internal quotation marks omitted], quoting *Matter of Fay*, 291 NY 198, 207 [1943]; *see Cohen v Cuomo*, 19 NY3d 196, 201-202 [2012]). Nevertheless, invalidation of a legislative enactment is required when such act amounts to " 'a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein' " (*Cohen*, 19 NY3d at 202, quoting *Matter of Sherrill v O'Brien*, 188 NY 185, 198 [1907]).

To determine whether the legislature's 2022 enactment of redistricting legislation comports with the Constitution, our starting point must be the text thereof. "In construing the language of the Constitution as in construing the language of a statute, . . . [we] look for the intention of the People and give to the language used its ordinary meaning" (*Matter of Sherrill*, 188 NY at 207; *see White v Cuomo*, 38 NY3d 209, 219-220 [2022]; *Burton v New York State Dept. of Taxation & Fin.*, 25 NY3d 732, 739 [2015]; *Matter of Carey v Morton*, 297 NY 361, 366 [1948]). Upon careful review of the plain language of the Constitution and the history pertaining to the adoption of the 2014 reforms, it is evident that the legislature and the IRC deviated from the constitutionally mandated procedure.

From a procedural standpoint, the Constitution—as amended in 2014—requires that, every 10 years commencing in 2020, an "independent redistricting commission" comprising 10 members—eight of whom are appointed by the majority and minority leaders of the senate and assembly and the remaining two by those eight appointees—shall be established (*see* NY Const, art III, § 5-b [a]). The members must be a diverse group of registered voters and cannot be (or recently have been){**38 NY3d at 510} members of the state or federal legislature, statewide elected officials, state officers or legislative employees,

registered lobbyists, or political party chairmen, or the spouses of state or federal elected officials (*see* NY Const, art III, § 5-b [b], [c]).

[*6]

Under the Constitution, the IRC must make its draft redistricting plans available to the public and hold no less than 12 public hearings throughout the state regarding proposals for redistricting, ensuring transparency and giving New Yorkers a voice in the redistricting process (*see* NY Const, art III, § 4 [c]). After considering public comments and working together across party lines to compose new redistricting lines, the IRC must submit its approved plan and implementing legislation to the legislature no later than January 15th in a redistricting year (*see* NY Const, art III, § 4 [b]), with the caveat that, if the IRC is unable to muster the requisite number of votes for a single plan, it must provide the legislature with each plan that "garnered the highest number of votes in support of its approval by the [IRC]" (NY Const, art III, § 5-b [g]). If the legislature rejects the IRC's first plan, the Constitution requires the IRC to go back to the drawing board, work to reach consensus, and "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation" to the legislature within 15 days and in no case later than February 28th (NY Const, art III, § 4 [b]). "If" the legislature fails to approve the second plan without amendment, the Constitution then directs that "each house shall introduce such implementing legislation"—a clear reference to the IRC's second plan—with any amendments each house of the legislature deems necessary (NY Const, art III, § 4 [b]). As a further safeguard against one party dominating redistricting, the Constitution dictates that the number of votes required for the IRC and legislature to approve a plan differs depending on whether the legislature is controlled by one political party or control of the houses are split between the parties (*see* NY Const, art III, §§ 4 [b] [1]-[3]; 5-b [f] [1], [2]).

The Redistricting Reform Act of 2012, legislation enacted in conjunction with the 2012 constitutional resolution, further provides as a matter of statutory law that "[a]ny amendments by the senate or assembly to a redistricting plan submitted by the [IRC] . . . shall not affect more than two percent of the population of any district contained in such plan" (L 2012, ch 17, § 3). As the sponsor of the legislation explained, "[i]f the [IRC's] second plan [was] also rejected . . . , each house may {**38 NY3d at 511}then amend *that plan* prior to approval except that such amendments . . . cannot affect more than two percent of the population of any district *in the commission's plan*," a limitation designed to "provide reasonable restrictions on the legislature's changes to the commission's plans" (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17 at 15, 2012 McKinney's Session Laws of NY at 1487 [emphasis added]).

The plain language of article III, § 4 dictates that the IRC "*shall* prepare" and "*shall* submit" to the legislature a redistricting plan with implementing legislation, that IRC plan "*shall* be voted upon, without amendment" by the legislature, and—in the event the first plan is rejected—the IRC "*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation," which again "*shall* be voted upon, without amendment" (NY Const, art III, § 4 [b] [emphasis added]). "*If*" and only "if" that second plan is rejected, does the Constitution permit the legislature to introduce its own implementing legislation, "with any amendments" to the IRC plans deemed necessary that otherwise comply with constitutional directives (NY Const, art III, § 4 [b] [emphasis added]).

"In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect" and "[i]t must be presumed that its framers understood the force of the language used and, as well, the people who adopted it" (*People v Rathbone*, 145 NY 434, 438 [1895]). Our Constitution is "an instrument framed deliberately and with care, and adopted by the people as

the organic law of the State" and, when interpreting it, we may "not allow for interstitial and interpretative gloss . . . by the other [b]ranches [of the government] that substantially alters the specified law-making regimen" set forth in the Constitution (*Matter of King v Cuomo*, 81 NY2d 247, 253 [1993]).

Article III, § 4 is permeated with language that, when given its full effect, permits the legislature to undertake the drawing of district lines *only* after two redistricting plans composed by the IRC have been duly considered and rejected.[FN7] Moreover, the text of section 4 contemplates that any redistricting act{**38 NY3d at 512} ultimately adopted must be founded upon a plan submitted by the IRC; in the event the IRC plan is rejected, the Constitution authorizes "amendments" to such plan, not the wholesale drawing of entirely new maps (NY Const, art III, § 4 [b]; *see* NY Assembly Debate on 2012 NY Assembly Bill A9557, Mar. 15, 2012 at 39 ["The Constitutional amendment allows the (l)egislature to *amend* the plan [*7]submitted by the independent redistricting commission *if* the (l)egislature has twice rejected submitted plans" (emphasis added)]).[FN8]

Despite clear constitutional language, the state respondents posit that it is wrong to interpret the 2014 constitutional amendments as requiring two separate IRC plans as a precondition to the legislature's exercise of its long-standing and historically unbridled authority to enact redistricting legislation.[FN9] They further rely on the 2021 legislation authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps as permissibly filling a purported gap in the constitutional design. However, in addition to being contrary to the text of the Constitution as we have explained, the state respondents' arguments are also belied by the purpose of the 2014 amendments and the relevant legislative history—including the legislature's own statements regarding the intent and effect of the 2014 constitutional reform effort.{**38 NY3d at 513}

Indeed, the state respondents studiously ignore events that gave rise to the 2014 amendments. During the previous redistricting cycle in 2012, the New York Legislature was unable to reach agreement on legislation setting the congressional district lines and, as a result, a federal court ordered the adoption of a judicially-drafted congressional redistricting plan (*see Favors*, 2012 WL 928223, *2, 2012 US Dist LEXIS 36910, *10). While the 2012 legislature did agree on state senate and assembly maps, the proposed maps were widely criticized as a product of partisan gerrymandering, prompting the then-Governor to threaten to veto the plans absent a concrete legislative commitment to redistricting reform (*see* Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U Rich L Rev 771, 829 [2013]; Thomas Kaplan, *An Update on New York Redistricting*, NY Times, Mar. 7, 2012, § A at 25; Thomas Kaplan, *An Update on New York Redistricting*, NY Times, Mar. 9, 2012, § A at 25). Thus, as we have discussed, in conjunction with enactment of the 2012 redistricting acts (*see* L 2012, ch 16), the legislature affirmed its commitment to redistricting reform by passing the Redistricting Reform Act of 2012 (*see* L 2012, ch 17) and the first of the two concurrent resolutions proposing the constitutional amendments creating the IRC process (*see* 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526 [Mar. 11, 2012]). Characterizing the legislature's 2012 senate and assembly district lines as "significantly flawed," the Governor nevertheless approved the redistricting legislation that year in light of the legislature's demonstrated agreement to "permanent[ly]" and "meaningful[ly]" reform the redistricting process for future years and "provide[ ] transparency to a process [otherwise] cloaked in secrecy and largely immune from legal challenges to partisan gerrymandering" (Governor's Approval Mem, Bill Jacket, L 2012, ch 17 at 5-6, 2012 NY Legis Ann at 12-13).

As the surrounding context and history of the 2014 amendments illustrate, the constitutional amendments adopted by the two consecutive legislatures and the voters—from the provisions detailing the composition of the IRC to those setting forth the voting metrics—were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to [*8]pursue consensus to draw district{**38 NY3d at 514} lines. The procedural amendments—along with a novel *substantive* amendment of the State Constitution expressly prohibiting partisan gerrymandering, discussed further below—were enacted in response to criticism of the scourge of hyper-partisanship, which the United States Supreme Court has recognized as "incompatible with democratic principles" (*Arizona State Legislature v Arizona Independent Redistricting Comm'n*, 576 US at 791 [internal quotation marks, brackets and citation omitted]).

As reflected in the legislative record, the IRC's fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting. The legislative record shows that the 2012 legislature—the drafters of the constitutional amendments—intended to "comprehensively" reform and "implement historic changes to achieve a fair and readily transparent process" to "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body"—rather than entirely by the legislature itself (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). As the sponsors explained, the reforms were designed to "substantively and fundamentally" alter the redistricting process, allowing "[f]or the first time, both the majority and minority parties in the legislature [to] have an equal role in the process of drawing lines," with these "far-reaching" constitutional reforms touted as a template "for independent

redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086).

The senate debate indicates that the constitutional provision allowing the legislature to amend the second redistricting plan submitted by the IRC only after twice voting on and rejecting IRC plans was intended to encourage bipartisan participation by the legislature in the redistricting process. The senate sponsor explained that "[o]n the third enactment, there could be amendments under this provision. But again, it would be the third time—not first time, not the second time, but the third time in order to get ultimately a product produced" (NY Senate Debate on 2013 NY Assembly Bill A2086, Jan. 23, 2013 at 222). In other words, "[i]f there cannot be agreement, if the Governor vetoes the provision twice, . . . that third time the Legislature {**38 NY3d at 515}would be acting. But not until that time" (*id.* at 224) because "the intent of th[e] resolution [wa]s to have the Legislature act and vote on . . . a [second] plan" before undertaking any amendments of its own (*id.* at 226). Answering a charge that the IRC would essentially be only "an advisory commission" since the legislature could ultimately reject both sets of IRC maps, the senate sponsor explained that the IRC process was intended, in part, to impose consequences on the legislature for rejecting plans developed through a bipartisan process by forcing it to take a public position refusing to adopt district lines that were developed with an "enormous amount of citizen input" and effort (*id.* at 228).

It is no surprise, then, that the Constitution dictates that the IRC-based process for redistricting established therein "*shall* govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e] [emphasis added]). Contrary to the state respondents' contentions, the detailed amendments leave no room for legislative discretion regarding the particulars of implementation; this is not a scenario where the Constitution fails

to provide "specific guidance" or is "silen[t] on th[e] issue" (*Cohen*, 19 NY3d at 200, 202). Under the 2014 amendments, compliance with the IRC process enshrined in the Constitution is the *exclusive* method of redistricting, absent court intervention following a violation of the law, incentivizing the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process.[FN10]

That the IRC process was intended to operate as a limitation on the legislature's power to compose district lines is further {**38 NY3d at 516} underscored by the Redistricting Reform Act of 2012 (*see* L 2012, ch 17). That legislation, adopted simultaneously with the 2012 constitutional resolution, instituted the two percent limitation on the legislature's authority (*see* L 2012, ch 17, § 3). In describing this particular reform, the sponsor of the bill explained that "[i]f the legislature fails to pass" the IRC's second plan "it may then amend such plans and vote upon them as amended. However, any such amendments shall be limited . . . to affect no more than two percent of the population of any district in such plan" (Senate Introducer's Mem in Support, Bill Jacket, L 2012, ch 17 at 11, 2012 McKinney's Session Laws of NY at 1484-1485). Thus, although the legislature retains the ultimate authority to enact districting maps upon completion of the IRC process, the constitutional reforms were clearly intended to promote fairness, transparency, and bipartisanship by requiring, as a precondition to redistricting legislation, that the IRC fulfill a substantial and constitutionally required role in the map drawing process.[FN11]

Indeed, recent events suggest that the legislature itself recognized that the Constitution did not permit it to proceed with redistricting absent compliance with the bipartisan IRC process. Apparently forecasting that the IRC would not comply with its constitutional obligations, in the summer of 2021—before the IRC had even been given a chance to fulfill its constitutional role—the legislature attempted to amend the Constitution to add language authorizing it to

introduce redistricting legislation "[i]f . . . the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline" for any reason (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). After New York voters rejected this constitutional amendment (among others)—and with the first redistricting cycle since the 2014 amendments on the horizon—the legislature attempted to fill a purported "gap" in constitutional language by *statutorily* {**38 NY3d at 517}amending the IRC procedure in the same manner (*see* L 2021, ch 633). In this Court, the state respondents attempt to rely on the 2021 legislation to justify the deviation from constitutional requirements. Needless to say, the bipartisan process was placed in the State Constitution specifically to insulate it from capricious legislative action and to ensure permanent redistricting reform absent further amendment to the Constitution, which has not occurred. The 2021 legislation is unconstitutional to the extent that it permits the legislature to avoid a central requirement of the reform amendments (*see Matter of King*, 81 NY2d at 252 ["The (l)egislature must be guided and governed in this particular function by the Constitution, not by a self-generated additive"]).

In sum, there can be no question that the drafters of the 2014 constitutional amendments and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation. In urging this Court to adopt their view that the IRC may abandon its constitutional mandate with no impact on the ultimate result and by contending that the legislature may seize upon such inaction to bypass the IRC process and compose its own redistricting maps with impunity, the state respondents ask us to effectively nullify the 2014 amendments. This we will not do. Indeed, such an approach would encourage partisans involved in the IRC process to avoid consensus, thereby permitting the legislature to step in and create new maps merely by engineering a stalemate at any stage of the IRC process, or even by failing to appoint members or

withholding funding from the IRC. Through the 2014 amendments, the people of this state adopted substantial redistricting reforms aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines. We decline to render the constitutional IRC process inconsequential in the manner requested by the state respondents, a result that would "violat[e] . . . the plain [*9]intent of the Constitution and . . . disregard [the] spirit and the purpose" of the 2014 constitutional amendments (*Cohen*, 19 NY3d at 202 [internal quotation marks omitted]).{**38 NY3d at 518}

IV.

Having addressed the procedural violation, we turn to the substantive partisan gerrymandering claim. As a threshold matter, despite our invalidation of the maps on procedural grounds, we nevertheless must determine on the state respondents' cross appeal whether the courts below properly declared that the congressional map was also substantively unconstitutional.[FN12]

In addition to the procedural amendments, in 2014, the people also amended the New York State Constitution to include certain substantive limitations on redistricting, including an express prohibition on partisan gerrymandering, commanding that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]).[FN13] This amendment was made in recognition that the practice of partisan gerrymandering "jeopardizes '[t]he {**38 NY3d at 519}ordered working of our Republic, and of the democratic process' " and, "[a]t its most extreme, the practice amounts to 'rigging elections,' " which violates "the most fundamental of all democratic principles—that 'the voters should choose their representatives, not the other

way around' " (*Gill v Whitford*, 585 US —, —, 138 S Ct 1916, 1940 [2018], quoting *Arizona State Legislature*, 576 US at 824).

In this case, petitioners asserted that, along with being procedurally flawed, the 2022 congressional map enacted by the legislature violates the constitutional provision prohibiting partisan gerrymandering. To prevail on such claim, petitioners bore the burden of proving beyond a reasonable doubt that the congressional districts were [*10]drawn with a particular impermissible intent or motive—that is, to "discourage competition" or to "favor[ ] or disfavor[ ] incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]). Such invidious intent could be demonstrated directly or circumstantially through proof of a partisan process excluding participation by the minority party and evidence of discriminatory results (i.e., lines that impactfully and unduly favor or disfavor a political party or reduce competition).

Here, at the conclusion of the nonjury trial, Supreme Court—based on the partisan process, the map enacted by the legislature itself, and the expert testimony proffered by petitioners—found by "clear evidence and beyond a reasonable doubt that the congressional map was unconstitutionally drawn with political bias" to "significantly reduce[ ]" the number of competitive districts (76 Misc 3d at 190-191). The Appellate Division affirmed, similarly drawing an inference of invidious partisan purpose based on "evidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende," finding that "the 2022 congressional map was drawn to discourage competition and favor democrats" (204 AD3d at 1371).

We reject respondents' assertion that the evidence was legally insufficient to establish an unconstitutional partisan{**38 NY3d at 520} purpose. Viewing the

evidence in the light most favorable to petitioners and drawing every inference in their favor, there is a "valid line of reasoning and permissible inferences which could possibly lead [a] rational [factfinder] to the conclusion reached by the [factfinder] on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Moreover, where, as here, this Court is presented with affirmed findings of fact in a civil case, our review is limited to whether there is record support for those findings (*see Matter of Rittersporn v Sadowski*, 48 NY2d 618 [1979]). There is record support in the undisputed facts and evidence presented by petitioners for the affirmed finding that the 2022 congressional map was drawn to discourage competition. Indeed, several of the state respondents' experts, who urged the court to draw the contrary inference, concededly did not take into account the reduction in competitive districts. Thus, we find no basis to disturb the determination of the courts below (*see Matter of Rittersporn*, 48 NY2d at 619).[FN14]{**38 NY3d at 521}

V.

[*11]Based on the foregoing, the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional, and the congressional map is also substantively unconstitutional as drawn with impermissible partisan purpose, leaving the state without constitutional district lines for use in the 2022 primary and general elections.[FN15] The parties dispute the proper remedy for these constitutional violations, with the state respondents arguing no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway. In other words, the state respondents urge that the 2022 congressional and senate elections be conducted using the unconstitutional maps, deferring any remedy for a future election.[FN16] We reject this invitation to subject the people of this state to an election conducted pursuant to an unconstitutional reapportionment.

"The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by [the United States Supreme] Court but appropriate action by the States in such cases has been specifically encouraged" (*Scott v Germano*, 381 US 407, 409 [1965]; *see Growe*, 507 US at 33).[FN17] Indeed, our State Constitution both requires expedited judicial review of redistricting{**38 NY3d at 522} challenges (*see* NY Const, art III, § 5)—as occurred here—and authorizes the judiciary to "order the adoption of, or changes to, a redistricting plan" in the absence of a constitutionally-viable legislative plan (NY Const, art III, § 4 [e]). Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps had been enacted. Prompt judicial intervention is both necessary and appropriate to guarantee the people's right to a free and fair election.

We are cognizant of the logistical difficulties involved in preparing for and executing an election—and appreciate that rescheduling a primary election impacts administrative officials, candidates for public office, and the voters themselves. Like the courts below, however, we are not convinced that we have no choice but to allow the 2022 primary election to proceed on unconstitutionally enacted and gerrymandered maps. With judicial supervision and the support of a neutral expert designated a special master, there is sufficient time for the adoption of new district lines.[FN18] Although it will likely be necessary to move the congressional and senate primary elections to August, New [*12]York routinely held a bifurcated primary until recently, with some primaries occurring as late as September. We are confident that, in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and{**38 NY3d at 523} compliance with

federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act (*see* 52 USC § 20302).

Finally, the state respondents protest that the legislature must be provided a "full and reasonable opportunity to correct . . . legal infirmities" in redistricting legislation (NY Const, art III, § 5). The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.[FN19] Although the state respondents assert that, even following a constitutional violation, the legislature possesses exclusive jurisdiction and unrestricted power over redistricting, the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality—a function familiar to the courts given their obligation to safeguard the constitutional rights of the people under our tripartite form of government. Thus, we endorse the procedure directed by Supreme Court to "order the adoption of . . . a redistricting plan" (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard.[FN20]

{**38 NY3d at 524}Nearly a century and a half ago, we wrote that "[t]he Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded" (*Matter of New York El. R.R. Co.*, 70 NY 327, 342 [1877]). Thirty years later, we relied on that fundamental principle to conclude that "[a] legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions have [*13]been disregarded . . . [because] [a]ny other determination by the courts might result in the constitutional standards being broken down and wholly disregarded" (*Matter of Sherrill v O'Brien*, 188 NY at 198). Today, we again uphold those constitutional standards by adhering to the will of the people

of this state and giving meaningful effect to the 2014 constitutional amendments.

We therefore remit the matter to Supreme Court which, with the assistance of the special master and any other relevant submissions (including any submissions any party wishes to promptly offer), shall adopt constitutional maps with all due haste. Accordingly, the Appellate Division order should be modified, with costs to petitioners, in accordance with this opinion and, as so modified affirmed.

Troutman, J. (dissenting in part). I agree with the majority that petitioners have standing, and I further agree with the majority's holding that the 2022 congressional and state senate redistricting plans (2022 plans) were not enacted by the legislature in compliance with the constitutional process. However, I dissent as to the majority's advisory opinion on the substantive issue of whether the plans constitute political gerrymandering and as to the remedy.

The majority correctly concludes that sections 4, 5, and 5-b of article III of the State Constitution, as ratified by the citizens of the state, provide the exclusive process for redistricting (*see* NY Const, art III, § 4 [e]). This process requires, among other things, that any redistricting plan to be voted on by the legislature must be initiated by the Independent Redistricting Committee (IRC) (*see* § 4 [b]). Once this Court holds that the {**38 NY3d at 525} 2022 plans were unconstitutionally enacted and must be stricken on that threshold basis, it should not then step out of its judicial role to further opine on the purely academic issue of whether the 2022 congressional map failed to comply with the substantive requirements of section 4 (c) (5). The 2022 plans, which the majority concludes are void ab initio, are no longer substantively at issue, nor can the majority seriously claim them to be so. Furthermore, although the majority purports to provide "necessary guidance to inform the development of a new congressional map on remittal" (majority op at 518 n 12), the majority's

opinion provides no such guidance. Its conclusion, based on affirmed findings of fact that the congressional map was drawn with partisan intent, is not illuminating in the least because the majority does not engage in the kind of careful district-specific analysis that might provide any practical guidance to an actual mapmaker, nor could it on this record (*cf.* Wilson, J., dissenting op at 534-543). By opining on this academic issue, the majority renders "an inappropriate advisory opinion" by "prospectively declar[ing] the [redistricting] invalid on additional . . . constitutional grounds" (*T.D. v New York State Off. of Mental Health*, 91 NY2d 860, 862 [1997]; *see Self-Insurer's Assn. v State Indus. Commn.*, 224 NY 13, 16 [1918, Cardozo, J.] ["The function of the courts is to determine controversies between litigants . . . They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function"]).

[*14]

Given the procedural violation flowing from the breakdown in the constitutional process, we must fashion a remedy that matches the error.[FN*] The Constitution contemplates that a court may be "required to order the adoption of . . . a redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e]). In so ordering, where a court finds that redistricting legislation violates article III, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities" (§ 5). Consistent with these provisions, this Court should order the legislature to adopt either of the two plans that the IRC has already approved pursuant to section 5-b (g). Those plans show significant areas of bipartisan consensus among the IRC commissioners. The boundaries of the districts of Upstate New York, in particular, are nearly identical between the two plans and similar to those in the procedurally infirm plan{**38 NY3d at 526} enacted by the legislature (*see Matter of Harkenrider v Hochul*, 204 AD3d 1366, 1377-1378 [4th Dept, Apr. 21, 2022, Whalen, P.J. &

Winslow, J., dissenting in part]). Given the existence of these IRC-approved plans, there is no need for a redistricting plan to be crafted out of whole cloth and adopted by a court. Rather, the legislature should be ordered to adopt one of the IRC-approved plans on a strict timetable, with limited opportunity to make amendments thereto. As part of our judicially crafted remedy, we could order that any amendments to either plan "shall not affect more than [2%] of the population of any district contained in such plan" (L 2012, ch 17, § 3). In other words, the legislature would be bound by its own self-imposed restrictions, which were in effect at the time these plans were first presented for legislative approval.

Such a remedy not only adheres more closely to the constitutional redistricting process, but it discourages political gamesmanship. Throughout this proceeding, respondents have asserted that the legislature has near-plenary authority to adopt a redistricting plan, whereas petitioners have sought to take the process out of the hands of the legislature and to place it into the hands of the judiciary. It is of course disputed why the constitutional process broke down, but it is readily apparent that the IRC's bipartisan commissioners failed to fulfill their constitutional duty. None of the parties is entitled to the resolution that he or she seeks.

In addition, this remedy allows the legislature to enact a plan that minimizes the impact on the reliance interests of both the voters and candidates. Petitions have been circulated, citizens have contributed monetary donations to the candidates of their choice, and eligible voters have had the opportunity to educate themselves on the candidates who are campaigning for their votes, all in reliance on the procedurally infirm redistricting plan enacted by the legislature. Of course, entrenched candidates have the party apparatus to support them in the event that further redistricting causes excessive upset to the current plan. In such a circumstance, outside candidates, upstart candidates, and independent

candidates, who lack the resources of the well-heeled, will be disadvantaged most, leaving the voters who support them without suitable options. The legislature, duly elected by the citizens of this state, is in the best position to take these considerations into account.

Yet, the remedy ordered by the majority takes the ultimate decision-making authority out of the hands of the legislature{**38 NY3d at 527} and entrusts it to a single trial court judge. Moreover, it may ultimately subject the citizens of this state, for the next 10 years, to an electoral map created by an unelected individual, with no apparent ties to this state, whom our citizens never envisioned having such a profound effect on their democracy. That is simply not what the people voted for when they enacted the constitutional provision at issue. Although the IRC process is not perfect, it is preferable to a process that removes the people's representatives entirely from the process. The majority states that it "decline[s] to render the constitutional IRC process inconsequential in the manner requested by the state respondents" (majority op at 517); however, the majority does just that by crafting a remedy that cuts the legislature out of the process. The citizens of the state are entitled to a resolution that adheres as closely to the constitutional process as possible. By ordering the legislature to enact redistricting legislation duly initiated by the IRC, this Court could afford the legislature its "full and reasonable" opportunity while honoring the constitutional process ratified by the people.

Wilson, J. (dissenting). I agree with Judge Troutman that article III, § 5 of the New York Constitution means that the majority's referral of this matter to a special referee is not allowable, and I further agree that her proposed solution of requiring the legislature to act on the Independent Redistricting Commission (IRC) maps that have been submitted, though novel, would be acceptable in the unusual circumstances presented here. I also fully concur in Judge Rivera's dissenting opinion, and I do not view Judge Rivera's opinion as necessarily

inconsistent with Judge Troutman's proposed remedy. Therefore, I address the merits of the claim that the 2022 redistricting itself violates the Constitution. It does not.

The burden a plaintiff must meet to overturn legislative action as violative of the New York Constitution is extraordinarily high. We have often (though not always) described that burden as proving unconstitutionality "beyond reasonable doubt" (*Matter of Wolpoff v Cuomo*, 80 NY2d 70, 78 [1992]; *but see Matter of City of Utica [Zumpano]*, 91 NY2d 964 [1998] [upholding a state statute's constitutionality without reference to the beyond a reasonable doubt standard]; *Matter of Sherrill v O'Brien*, 188 NY 185, 198 [1907] ["A legislative apportionment act cannot stand as a valid exercise of discretionary power by the legislature when it is manifest that the constitutional provisions{**38 NY3d at 528} have been disregarded"]; *Matter of Whitney*, 142 NY 531, 533 [1894] [upholding the apportionment of Kings County into assembly districts because, although flawed, "the division has seemed to us a reasonable approach to equality, and under all the circumstances of the case a substantial obedience to the writ"]). Both Supreme Court and the Appellate Division described the test that way. Thus, to prevail, the petitioners need to have proved beyond a reasonable doubt that the legislature's 2022 congressional and state senatorial districts were "drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (NY Const, art III, § 4 [c] [5]). It is important to pay close attention to the wording of the Constitution. It does not prohibit the creation (or maintenance) of districts that are highly partisan in one direction or the other. Indeed, both in New York [*15]and around the rest of the nation, voters tend to cluster in geographic areas that reflect party affiliation. As a simple example, rural areas in New York and in the United States generally tend to have much higher concentrations of Republican voters than do urban areas. What the Constitution

prevents is purposefully drawing districts to discourage competition or favor particular parties or candidates.

After a review of the record, I am certain that the petitioners failed to satisfy the "beyond reasonable doubt" standard. By that, I do not mean to say that I know the legislature did not draw some districts in a way that violated our State Constitution; rather, the evidence here does not prove that to be the case at the level of certainty required to invalidate the 2022 redistricting as unconstitutional. Perhaps with a different record, petitioners could make such a showing, but they have failed to do so here.

The question before us, then, is whether the petitioners introduced sufficient evidence to discharge their very high burden of proving that the legislature adopted gerrymandered district lines in violation of the Constitution. That is unequivocally a question of law, and thus within the heartland of our Court's power of review (*see Glenbriar Co. v Lipsman*, 5 NY3d 388, 392 [2005]; *see also People v Jin Cheng Lin*, 26 NY3d 701, 719 [2016] [noting that whether "the proof does not meet the reasonable doubt standard" is "a matter of law" (brackets omitted)]; *People v Tarsia*, 50 NY2d 1, 13 [1980] [evaluating "the total evidence" as to whether "the proof was insufficient as a matter of law to support the affirmed findings that defendant's{**38 NY3d at 529} inculpatory statements . . . were voluntary"]; *People v Anderson*, 42 NY2d 35, 39 [1977] ["(W)hether the proof met the reasonable doubt standard at all is a matter of law"]; *People v Leonti*, 18 NY2d 384, 389 [1966] ["(W)hether the evidence adduced meets the standard required is one of law for our review"]). The majority incorrectly treats this as an unreviewable question of fact, characterizing Supreme Court's finding that the 2022 congressional map was drawn to discourage competition as a factual "determination" that has "record support" and thus should not be "disturb[ed]" (majority op at 520)—a distinct,

and here inapt, standard (*see Stiles v Batavia Atomic Horseshoes*, 81 NY2d 950, 951 [1993]).

Indeed, it is remarkably inaccurate to suggest that our Court is without power to review the Appellate Division's ruling on the partisan gerrymander claim. This case is before us as an appeal as of right based on CPLR 5601 (b). This case satisfies the conditions for an appeal as of right because the question presented—whether a congressional map, i.e., a legislative enactment, is constitutionally invalid—is a question of law that is reviewable by this Court (*see Cayuga Indian Nation of N.Y. v Gould*, 14 NY3d 614, 635 [2010] ["(A) query concerning the scope and interpretation of a statute or a challenge to its constitutional validity" is a "pure question of law"]).

Petitioners' evidence falls into three basic categories. First, petitioners primarily rely on the testimony of Sean P. Trende, an elections analyst and doctoral candidate at Ohio State University. At best, Mr. Trende's results are incomplete and inconclusive, but they are also legally insufficient to meet the above standard. Second, petitioners rely on the projected loss of four Republican congressional seats (out of eight that currently exist). The difficulty with that proof is that it assumes that factors unrelated to how the districts were drawn have not caused the result. Third, petitioners contend that the 2022 redistricting was accomplished through the complete exclusion of Republican members of the legislature from the process and a failed attempt by Democrats to further amend the Constitution, followed by the enactment of a statute. I view that as their best argument in support of their gerrymander claim but one that, without more, does not meet the high bar for invalidating the legislature's 2022 redistricting plan.

I.

The petitioners, Supreme Court, and the Appellate Division plurality each relied heavily on the testimony of Mr. Trende.{**38 NY3d at 530} Mr. Trende's testimony is based on simulations in which a computer algorithm uses demographic data, takes parameters set by the user, and draws districting maps for the region (in this case, New York State) specified by the user. This is the first time Mr. Trende has testified in a case in which he prepared redistricting simulations of any kind. Instead of using the Markov Chain Monte Carlo simulation algorithm, which has been regularly used in redistricting cases, Mr. Trende used a new simulation algorithm developed by Dr. Kosuke Imai, a Harvard professor, along with publicly available political and demographic data at the census block and precinct levels. Dr. Imai's new algorithm appeared in an unpublished paper that had yet to be peer-reviewed. In that paper, Dr. Imai reported that he [*16]had tested the reliability of his new model by applying it to a 50-precinct map and running 10,000 simulations. By comparison, New York State has more than 14,000 precincts; uncontroverted evidence (including from Mr. Trende) establishes that the complexity of producing a working algorithm increases as the number of precincts increases.

In brief, Dr. Imai's algorithm draws possible maps, starting from a blank page, but taking into account parameters the user sets. For example, a user can specify to avoid splitting a county (or city) into different districts, though sometimes splitting is inevitable and may be accomplished in myriad ways. By running thousands of simulations and comparing them to what the legislature has done, the model allows for measurement of the difference in party breakdown between the collection of simulated maps and the legislatively drawn map. The model can produce summary statistics showing, for example, that, when compared to the legislative map, the simulated maps distribute voters of one party or another (here, Republicans) in a way that concentrates a lot of them into some districts where Republicans would likely have won elections anyway, thus removing them from districts where Democrats might have faced

a close election. In simple terms, Mr. Trende concluded that the legislative map consolidated Republican voters into a few Republican-leaning districts and spread Democratic voters in an efficient fashion. Of course, the model cannot tell you *why* the legislature drew the districts that way, but, provided that a scientific method is proved to be reliable, the data entered is of good quality, the parameters chosen are correct, and the results are robust (i.e., not susceptible to material swings in output when parameters are varied within reasonable{**38 NY3d at 531} ranges for those parameters), the law allows intent to be inferred from results in a variety of areas (*e.g. People v Guzman*, 60 NY2d 403, 412 [1983] [discriminatory intent inferred from underrepresentation in grand jury selection]; *Matter of 303 W. 42nd St. Corp. v Klein*, 46 NY2d 686, 695 [1979] [discriminatory intent inferred from "a convincing showing of a grossly disproportionate incidence of nonenforcement against others similarly situated in all relevant respects save for that which furnishes the basis of the claimed discrimination"]).

Again, article III, § 4 (c) (5) of the Constitution states that "[d]istricts shall not be drawn *to* discourage competition or *for the purpose of* favoring or disfavoring incumbents or other particular candidates or political parties" (emphasis added). The prohibition, then, is against drawing maps *with the intention to* discourage competition or favor or disfavor incumbents, political candidates, or political parties. In other words, if a given map ends up discouraging competition or favoring a political party, that map does not necessarily run afoul of the Constitution's prohibition. Instead, an *intent* to discourage competition or to favor that political party must be shown for the map to violate the Constitution.

Staten Island provides a good example to keep in mind, one to which I will return later. Staten Island is traditionally Republican. It does not have quite enough people in it to constitute an entire congressional district, but it forms the

vast portion of Congressional District 11, both in the 2012 districting and the legislature's 2022 districting, with the added voters coming from Brooklyn. No one suggests that, by keeping Staten Island intact within a single congressional district instead of splitting it across two districts with more Brooklynites, the legislature in 2012 or 2022 did so with the intent to advantage Republicans. If you split Staten Island into two different congressional districts and added enough Brooklynites to fill out those districts, each of the districts would have more Brooklynites than Staten Islanders, and the strength of the Republican voting of Staten Island would be diluted. The two new districts might be more competitive—i.e., closer to 50/50 than District 11 is or has been—but it is sufficient, to reject a claim of intent to advantage Republicans by keeping Staten Island whole within a single district, to say that it is an island and people there live in communities that are distinct from those in Brooklyn. Again, the *why* is important, not the *what*.{**38 NY3d at 532}

Mr. Trende's testimony and analysis were legally insufficient to bear on the question of intent for three reasons. First, the New York Constitution *requires* the consideration of several specifically identified factors when creating congressional districts, with some additional factors required for state senatorial districts. Thus, Mr. Trende's results at most show that if we amended the New York Constitution to strike out those factors, he could conclude the legislature acted with intent to disfavor Republicans or reduce competition. Second, close examination of districts in the real world, as compared to those hidden in thousands of hypothetical unseen maps, further exposes the unreliability of Mr. Trende's conclusions. Finally, the novelty of Dr. Imai's algorithm and the opacity of Mr. Trende's implementation of it create very substantial doubt as to his conclusions. The method is novel and not peer-reviewed. Mr. Trende did not attempt the established Markov Chain Monte Carlo simulation to compare it to his results, nor did he provide the model, inputs, data sets, or output maps that formed the basis for his analysis. Indeed,

neither he nor anyone has seen the algorithm-produced maps underlying his analysis. We are being asked to determine unconstitutionality based on shadows.

New York's Constitution requires that the following factors be considered when drawing congressional districts:

1. Compliance with "the federal constitution and statutes" (NY Const, art III, § 4 [c]);
2. "[W]hether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights" (*id.* § 4 [c] [1]);
3. "Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice" (*id.*);
4. "Each district shall consist of contiguous territory" (*id.* § 4 [c] [3]);
5. "Each district shall be as compact in form as practicable" (*id.* § 4 [c] [4]);{**38 NY3d at 533}
6. "Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties" (*id.* § 4 [c] [5]);
7. Consideration of "the maintenance of cores of existing districts" (*id.*); and
8. Consideration of the maintenance of "pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest" (*id.*).

For senatorial districts, the Constitution adds requirements that "senate districts not divide counties or towns, as well as the 'block-on-border' and 'town on border' rules" (*id.* § 4 [c] [6]).

Mr. Trende admittedly did not attempt to have his simulations account for several of the constitutionally required factors listed above. For that reason alone, his simulations do not provide evidence of the legislature's intent to disfavor Republicans or reduce competition. Putting aside all other

methodological and implementation problems, a proper comparison would ask: what would an unbiased mapmaker (the algorithm) do if given the same constitutional requirements as the legislature has? Instead, Mr. Trende has attempted to answer a different question: what would an unbiased mapmaker do if it lacked some of the constitutional requirements the legislature is required to follow?

This is not merely a conceptual problem, which is readily seen by identifying the constitutional factors Mr. Trende omitted. First, under the Equal Protection Clause and the federal Voting Rights Act (VRA), the composition of congressional districts must not discriminate on the basis of race or color (52 USC § 10301; US Const, Amend XIV, § 1). New York's constitutional requirements, listed as items 2 and 3 above, represent similar protections not just on the basis of race, but language as well. Mr. Trende gave no instruction to his algorithm to take any consideration of those constitutional requirements for drawing districts. Mr. Trende noted that his "simulated maps are not drawn with any racial data available to the simulation"—that is, the simulation could not even take race into account in drawing districts if Mr. Trende had specified that as a parameter. Likewise, nothing in the record suggests that Mr. Trende's simulation used any data concerning the language of inhabitants, and he made no claim to have done so.

[*17]

Faced with criticism that he had omitted consideration of factors 1 through 3 above, Mr. Trende responded generally that{**38 NY3d at 534} "every one of Respondents' experts could readily demonstrate that . . . fixing the purported omissions might lead this Court to arrive at different conclusions," which, as explained below, attempts to shift the burden of proof onto respondents. He then explained his omission on the ground that "there is no evidence proffered by any party of racially polarized voting in New York City or in particularized

boroughs, nor is there evidence that any single minority group can form a reasonably compact majority in a district." Besides lacking any evidentiary support, his assertion is patently and commonly understood to be wrong. Looking just to last year's New York City mayoral election, Curtis Sliwa, the Republican nominee, "scored 44% of the vote in precincts where more than half of residents are Asian—surpassing his 40% of votes in white enclaves, 20% in majority-Hispanic districts and 6% in majority-Black districts" (Rong Xiaoqing et al., *Chinese Voters Came Out in Force for the GOP in NYC, Shaking Up Politics*, The City, Nov. 11, 2021, https://www.thecity.nyc/politics/2021/11/11/22777346/chinese-new-yorkers-voted-for-sliwa-gop-republicans). In the same election, now-Mayor Eric Adams "dominated" the "Black Bloc," a "63 percent non-Hispanic Black and 23 percent college-educated swath of Brooklyn and Queens," where Adams grew up and where he won "63 percent of first-place votes" (Nathaniel Rakich, *How Eric Adams Won The New York City Mayoral Primary*, FiveThirtyEight, Aug. 25, 2021, https://fivethirtyeight.com/features/how-eric-adams-won-the-new-york-city-mayoral-primary/).

Mr. Trende attempted to make some account of the omission of the federal and state protections for racial minority voting rights by "freezing" certain census blocks in nine districts to remove them from his analysis, explaining that those districts are "plausible candidates for protection under the VRA or the State Constitution." Even assuming that his choice of districts is sound, his results demonstrate the importance of his omission of constitutionally required factors: his "frozen" simulations produced results that "mak[e] Petitioners' case more difficult." Specifically, those "plausible" protections for minority voters produced results that "accept[ ] the Legislature's decision to pair Yorktown with Yonkers in the Sixteenth District, and to crack Republican-leaning areas in Midwood and Sheepshead Bay between the Ninth and Eighth districts." In other words, by including even a rough proxy for protection of minorities, he admits

that some of what he described as gerrymandering{**38 NY3d at 535} is explainable instead by protection of minority voting rights. Mr. Trende's utter lack of consideration of the constitutional requirement to consider protection of non-English language groups inherently means his simulations do not show what an unbiased mapmaker would do if that constitutional command mattered.

Likewise, Mr. Trende completely neglected considering keeping "communities of interest" together (item 8 above), as the Constitution requires. Keeping in mind that differences in party affiliation within a district do not matter unless they were created with the *intent* to disadvantage a party or candidate or to reduce competition, Mr. Trende ignored that the IRC—composed in equal parts of persons appointed by Democrats and Republicans—reached agreement on keeping together many communities of interest. For example, both sets of IRC maps (one produced by the Democratic faction and the other by the Republican faction) agreed that the Southern Tier of New York should be unified in a district. The Southern Tier is a strip of eight counties along upstate New York's southern edge, the part of the state that shares a border with Pennsylvania.[FN1] Those counties are grouped as a region in New York State's materials on economic development (*see* New York State Empire State Development, Southern Tier, https://esd.ny.gov/regions/southern-tier [last accessed Apr. 26, 2022]). Indeed, the region has a storied history of being a manufacturing powerhouse, though the region also faced struggles within the past decade due to a decline in manufacturing and uncertain economic development (Susanne Craig, *New York s Southern Tier, Once a Home for Big Business, Is Struggling*, NY Times, Sept. 29, 2015, https://www.nytimes.com/2015/09/30/nyregion/new-yorks-southern-tier-once-a-home-for-big-business-is-struggling.html). Those counties are more Republican than Democratic; in a show of how culturally distinct the region is, hundreds of residents in the Southern Tier in 2015 rallied in support of seceding from the state of New York (*id.*). One Republican lawmaker even applauded the

fact that the maps proposed by the Democratic and Republican commissioners to the IRC both kept the Southern Tier [*18]intact (Rick Miller, *Southern Tier Congressional District Essentially Maintained in NY*{**38 NY3d at 536}*Redistricting Maps*, Olean Times Herald, Jan. 4, 2022, available at https://www.oleantimesherald.com/news/southern-tier-congressional-district-essentially-maintained-in-ny-redistricting-maps/article_56c5d543-6c8a-55d3-a3de-e662bdb0f6dd.html). For Upstate New York, the Democratic Commissioners and the Republican Commissioners agreed that there should be three Republican-leaning districts: one uniting the Southern Tier, one uniting the North Country, and one by Lake Ontario. The Commissioners from the two parties also agreed that there should be Democratic-leaning districts in the four urban areas in Upstate New York: in and around Albany, Syracuse, Rochester, and Buffalo. The result of those bipartisan decisions by the IRC demonstrates that those districts (broadly, all of Upstate New York, about which the IRC had no substantial disagreements) should have been excluded from Mr. Trende's simulations. But even though the Southern Tier and the other upstate counties and cities were bipartisanly districted as "communities of interest," Mr. Trende made no effort to keep the Southern Tier, or other communities of interest, intact in his model. Indeed, Mr. Trende "didn't pay any attention to what any of those [IRC] commissioners had done in their proposals," had not read any of the testimony before the IRC, and did not know whether there was any testimony before the IRC about communities of interest.

Instead, he told Supreme Court that such communities are too difficult to code, even though he also acknowledged that in a redistricting exercise he undertook for Virginia, he and his co-researcher accounted for communities of interest. Mr. Trende did not do any sort of proxy analysis as he did for race, and because neither he nor anyone else ever looked at the 10,000 maps his simulation drew, he has no idea what his algorithm did to the Southern Tier or any other upstate areas. But Dr. Imai's own data provides some insight.

Mr. Trende used Dr. Imai's model and data. The record includes three sample maps from a set of 5,000 simulations for New York prepared by Dr. Imai himself. Two of the sample maps from Dr. Imai's simulations broke up the North Country. All three of the sample maps broke up the Southern Tier. None of Dr. Imai's sample maps maintained Democratic-leaning districts around all of Albany, Syracuse, Rochester, and Buffalo. Those samples strongly suggest that Mr. Trende's conclusions about intentional gerrymandering depend on comparison to maps that would have broken up congressional districts arrived{**38 NY3d at 537} at by bipartisan consensus. Of course, had Mr. Trende looked at his own maps, or even turned them over for respondents to examine, we would be able to know how many of his "less gerrymandered" simulations were incompatible with districting actually arrived at bipartisanly, with regard for the Constitution's directions.[FN2] Instead, it is clear that, just as with the racial and language protections in the Constitution, Mr. Trende's exclusion of communities of interest has made his analysis legally irrelevant: at most, it answers what an unbiased mapmaker would do if that mapmaker was told to disregard protection of racial minorities, language minorities and communities of interest.

One final example from Dr. Imai's work illustrates the unsoundness of Mr. Trende's conclusions. His conclusions are based on comparing the algorithm-drawn simulated districts, which purportedly are "less gerrymandered," against the legislature's redistricting plan. Because neither we nor Mr. Trende knows what his[*19]"less gerrymandered" maps look like, we cannot know whether they are sensible maps that should be included in such a comparison. But because Dr. Imai, using the same data and same model, displayed some sample maps, we can observe the kind of maps Mr. Trende has relied on for his conclusions. Sample plan 1 from Dr. Imai's simulation placed Schuyler County and Franklin County into the same congressional district. Schuyler County is near Upstate New York's southern border with Pennsylvania, and Franklin

County is one of the northernmost counties in New York, on the border with Canada—that is, those two counties are on opposite {**38 NY3d at 538}sides of Upstate New York. Their county seats are 262 miles away via highway (Google, Google Maps Driving Directions from Watkins Glen, New York to Malone, New York, https://perma.cc/L3KH-DN5B [last accessed Apr. 26, 2022]). In essence, what Mr. Trende is showing is that the partisan imbalance of some congressional districts could be reduced by radically rejiggering them in a way that no human mapmaker (or resident of either of those counties) would think remotely sensible. Interesting though it may be, it is legally irrelevant.

Apart from the omitted constitutional requirements, the creation of districts requires balancing among the different constitutional requirements. Some are relatively inflexible—such as districts of equal population (*see Baker v Carr*, 369 US 186 [1962]), compliance with the VRA or, for senatorial districts, the "block-on-border" rule; others, such as compactness or protection of communities of interest, allow for an exercise of judgment in how to balance them. Mr. Trende made no explicit decision in how to balance the factors he did include, was uninformative about what balance was implied, and did not vary the relative weights of his parameters to determine the robustness of his conclusions. For instance, Mr. Trende included a parameter for the compactness of districts, which the Constitution instructs should be considered. When asked how he valued compactness, he testified to selecting a value of "1" in Dr. Imai's model because he knew that "the other choices don't work well." He agreed that the compactness parameter could be set at less than 1, or more than 1, but provided no explanation for what the settings meant, how much priority a change in setting gave to compactness versus any other factor, or even what was meant by other values not working well—which may simply mean that when he tested for robustness of the parameter, he found that changing the relative weight given to compactness resulted in statistics that did not support his

conclusions or that the model ceased to function, neither of which should give us confidence sufficient to hold the redistricting unconstitutional.

Similarly, Mr. Trende said that Dr. Imai's model allowed an "on" or "off" switch on whether to split counties. He put that switch "on," even though New York map drawers must balance county preservation with other considerations—effectively meaning he gave county integrity a superpriority over other constitutional factors. Nothing in the Constitution requires the legislature to prefer county integrity over any other factor, or {**38 NY3d at 539} even to give the same priority to county integrity for every county. Rather, the Constitution gives the legislature flexibility in weighting many of the required considerations differently in different circumstances, but Mr. Trende implicitly assigned fixed and universal relative weights to every one of those that he included. Faced with the potential for differently weighting parameters, responsible modelers alter the parameters within reasonable bounds to see whether the alterations make a difference. When the difference is not great, models are robust; when they are great, models are lacking in probative value (*see e.g.* Amariah Becker et al., *Computational Redistricting and the Voting Rights Act*, 20 Election LJ 407, 430 and n 31 [2021]). When nobody tests for robustness, invalidating districts as unconstitutional beyond a reasonable doubt is sheer guesswork.

Respondents pointed out the many deficiencies in Mr. Trende's model. In addition to the examples explained in detail above, Mr. Trende repeatedly and improperly answered in a way that attempted to shift the burden of proof from petitioners onto respondents. For instance, in response to respondents' assertion that his failure to consider all the relevant constitutional considerations undermined the validity of his methodology, Mr. Trende asserted that "[e]very one of Respondents' experts is more than capable of either re-running the relevant simulation algorithm that I employed or executing a competing

algorithm" and "[i]f there are indeed important communities of interest to be protected, however, any of Respondents' experts could program a simulation that respected those communities of interest and potentially harm Petitioners' case." On cross-examination, he reiterated that "if there is something that [the respondents'] experts believe . . . is missing that makes a difference—they think makes a difference, they can do it."

[*20]

The lower courts erroneously acceded to Mr. Trende's burden shifting, which itself is a legal error requiring reversal (*Matter of Harkenrider v Hochul*, 204 AD3d 1366, 1378 [4th Dept 2022, Whalen, P.J., and Winslow, J., dissenting]).[FN3] Proof beyond a reasonable doubt is an exacting standard: a party bearing that{**38 NY3d at 540} burden must remove all reasonable doubt, which is not met by saying that the opponent has the ability to disprove an assertion. Faulting the respondents for the petitioners' failure to account for constitutionally required redistricting criteria improperly reverses the burden of proof; it is the *petitioners'* burden to prove unconstitutional partisan intent beyond a reasonable doubt.

In short, the factors set out in the Constitution must be considered during redistricting with flexibility in the relative weighting on a case-by-case basis. Maintaining the Southern Tier as a community of interest may be powerfully important; maintaining the Upper West Side as one may not be. Mr. Trende acknowledged that his algorithm cannot undertake that balancing, and to his credit explained that "the more that you adequately control all of the variables that the actual mapmakers actually used, the more you can infer intent, and the less you adequately control for those variables, the less you can infer intent" to gerrymander. Because Mr. Trende's analysis omitted constitutionally required factors and fixed implicit weights for others without allowing for flexibility, all his analysis demonstrates, at best, is that if our Constitution read very

differently, he could find an intent to gerrymander. That conclusion is orthogonal to the issue here.[FN4]

II.

Apart from Mr. Trende's opinion, the Appellate Division plurality concluded that the " 'application of simple common sense' from the enacted map itself and its likely effects on particular districts" supports petitioners' argument that the legislative districts were intentionally created to disfavor a party or candidate or render certain districts less competitive (204 AD3d at 1374 [citation omitted]). There are three significant problems with that conclusion. First, as noted above, for the great majority of congressional (and senatorial) districts,{**38 NY3d at 541} the Republican and Democratic factions of the IRC substantially agreed as to the district boundaries, and the legislative plan does not deviate materially in the case of those districts. Of course, that does not resolve the question for districts on which the IRC factions disagreed or for which the legislature's plan was materially different, but it should remove most districts from the dispute.

Second, the Appellate Division relied on the following observation: "under the 2012 congressional map there were 19 elected democrats and 8 elected republicans and under the 2022 congressional map there were 22 democrat-majority and 4 republican-majority districts" (204 AD3d at 1371). The majority acknowledged that, standing alone or even in conjunction with the lack of Republican input into, or vote for, the 2022 map, the evidence would not be strong enough to surmount the high standard for invalidating the 2022 redistricting as unconstitutional. However, the mere change in the number of majority Democratic and Republican districts says nothing about *why* those changes occurred or about intent. The inference that the change is nefarious ignores important undisputed data.

[*21]

The 2012 districts are obsolete and not a relevant source of comparison. Population and registration shifts demonstrate that New York's voting populace has changed in the Democrats' favor. In the past 10 years, Democratic voter registration has outstripped Republican voter registration 10-to-1: Democratic voter registration increased by more than one million people statewide between April 2012 and February 2021, whereas Republican voter registration increased by less than 100,000 people during the same period. Similarly, over the decade, Democrat-leaning counties have increased in population, whereas Republican-leaning counties have decreased in population. It is unsurprising that such drastic shifts would occur in just a 10-year time horizon; that's why the Constitution requires decennial redistricting (NY Const, art III, § 4 [a]).

The characterization of the outgoing 2012 map as having 19 Democrat-leaning and eight Republican-leaning districts—in comparison to the four Republican-leaning districts in the 2022 map—is misleading because it disregards the changes of the last decade. To start, it is undisputed that one Republican seat under the 2012 map, former District 22, was eliminated due to substantial population shifts and New York's loss of a congressional seat. But more importantly, it is undisputed that, based on the 2020 census data, the 2012 map would also produce only four Republican-leaning districts.{**38 NY3d at 542}

Third, and most importantly, it is undisputed that the 2022 legislative redistricting was slightly *more* favorable for Republicans than the array of simulated "unbiased" maps produced by Mr. Trende's simulation. The Appellate Division contended that, by "boldly asserting" that the Democratically created 2022 plan tended to favor Republicans more than Mr. Trende's supposedly neutral maps, "respondents have created a further inference that they acted with

a partisan purpose favoring democrats" (204 AD3d at 1374). That claim confuses intent with effect. I return to Staten Island to illustrate the point.

Staten Island has historically been treated as a community of interest and not split into different congressional districts. If Staten Island is to be kept that way (wholly within District 11), it needs to include voters from somewhere else because Staten Island does not have enough people to make up a full congressional district. Because of contiguity requirements, that must be Brooklyn. The 2012 map of District 11 included all of Bay Ridge (which is just north of the Verrazano Bridge) and Bath Beach, a few blocks of Bensonhurst, and Gravesend (all south of the bridge). The legislature's 2022 redistricting keeps Bay Ridge to the north (itself a community of interest) with Staten Island, but instead of then going south, it drops out Bath Beach, the bit of Bensonhurst and Gravesend, and goes north and incorporates Sunset Park and a small bit of Park Slope.

Among the thousands of comments sent to the IRC after it publicly released its draft report for comments, looking just at the Richmond and Kings County submissions (https://nyirc.gov/storage/archive/Kings_Richmond_Redacted.pdf), numerous letters asked the IRC to keep various groups together. Among those is a letter from OCA-NY (formerly known as the Organization for Chinese Americans), a "non-profit, non-partisan organization dedicated to protecting the rights of Asian Americans in New York City." That letter urged the IRC that, with regard to District 11, which contained Staten Island, "Bensonhurst and Bath Beach should NOT be with Staten Island. . . . Staten Island does not share a similar concentration of Asians, nor the culture of Asian businesses as Bath Beach/Bensonhurst, nor do residents in Bath Beach/Bensonhurst travel on a regular basis to Staten Island and vice versa." Justin Wood, a Staten Islander, asked the IRC to "counter decades of artificial gerrymandering" by "extend[ing] NY11 northward into Bay {**38 NY3d at 543}Ridge and Sunset Park to unify

linguistic and ethnic communities with shared interests." Karen Zhou, the past president of Homecrest Community Services, wrote the IRC noting that "Sunset Park, Bensonhurst, Homecrest, Sheepshead Bay, Dyker Heights, Bath Beach and Gravesend . . . [have] an interconnection bounded by common culture, language and socioeconomic factors," further requesting that Bensonhurst and Homecrest be "together in one Congressional district . . . [to] ensur[e] communities of interest are not ignored or neglected."

District 11 has been made less Republican by paying attention to unifying Asian American communities (which relates to the racial, language and community of interest requirements in the Constitution), for which the comments to the IRC were uniformly supportive. Because of contiguity requirements, there was nowhere to go but further north. The Appellate Division's observation that the reduction in Republican-leaning districts (or in the strength of the Republican lean) demonstrates an *intent* to gerrymander rather than an attempt to pay attention to the [*22]Constitution is unsupportable. Data tells you effect only. But the record before the IRC shows that various members of the Asian American community—and one Staten Islander—urged the IRC to go north instead of south specifically to serve the ends of the VRA and the constitutional provision requiring weight be given to communities of interest. The algorithmic comparators on which the lower courts relied, by omitting considerations required by the Constitution, gave zero weight to those considerations, effectively saying that the Asian American community does not matter. That, in turn, leads to an unfounded inference that the 2022 redistricting was *intended* to disadvantage Republicans, when, in the case of Staten Island, it was intended to protect Asian American voting rights and community interests, as the Constitution requires.

III.

The remaining evidence on which petitioners rely to demonstrate that the 2022 redistricting was done with intent to disfavor Republicans or make certain districts less competitive relates to procedural issues concerning the 2021 legislation, a failed 2021 constitutional amendment, and the creation of the 2022 districts in a three-day period after the IRC failed to deliver a revised report. Unlike the prior two factors, these are{**38 NY3d at 544} not legally irrelevant. As the Appellate Division concluded, however, as to petitioners' arguments on the process pursued to enact the 2022 map and its projected loss of Republican seats: without more and even with every reasonable inference taken in petitioner's favor, they do not meet the standard to declare the 2022 redistricting plan unconstitutional (204 AD3d at 1369-1370).

First, petitioners claimed that Democrats unilaterally drafted the 2022 redistricting map without any input or involvement from Republicans. The Appellate Division plurality further pointed to the "largely one-party process used to enact the 2022 congressional map" as partial support for its conclusion that petitioners met their burden of proving an inferred intent to favor the Democratic party (*id.* at 1371). That the process was dominated by one party, however, is a result of the current political reality of the legislature. Put another way, the legislature reflects the current choice of the people as to who will best represent their interests. Indeed, even had the IRC not shirked its duty, the Democratic supermajority in both houses could have rejected all IRC plans and then, consistent with the Constitution, adopted a plan without any Republican support. That result would be "partisan" in a sense, but not in the sense that would be necessary to show an intent to violate the Constitution. That the vote was along party lines could just as well suggest that the Republicans wanted to prevent a redistricting map that corrected past gerrymandering favoring Republicans (or an electoral shift that diminished their chances) as it could that Democrats sought to exclude Republicans for their party's benefit.

Next, petitioners contend that the (Democratically controlled) legislature, in June 2021, passed legislation providing for the possibility that the IRC might not vote on any redistricting plans, which the Governor signed in November 2021, and that the statute provides evidence of partisan intent to gerrymander because it provides that the legislature will conduct the redistricting in that eventuality. As with the above claim, the statute's adoption is not particularly probative as to intent. It is equally possible that the legislature, seeing the possibility of electoral chaos in the event that the IRC failed to act as required, clarified that the outcome would be the same as if the IRC produced plans that the legislature rejected. The fact that the statute was passed without Republican support might suggest a future intent by Democrats to gerrymander. It might{**38 NY3d at 545} suggest an intent by Republicans to oppose any measures that would correct existing imbalances. Or it might suggest that legislators simply sought to provide for something not contemplated by the Constitution.

Finally, petitioners point to a failed attempt by Democrats to further amend the Constitution as supporting an inference that the Democrats intended to favor a political party through the 2022 map. In November 2021, the legislature proposed a constitutional amendment to the voters. Under that proposed constitutional amendment—if the IRC failed to vote on any redistricting plan or plans by the date required—the Commission would submit to the legislature all plans in its possession, completed and in draft form, and the data upon which those plans were based (2021 NY Senate Bill S515, § 4 [proposing amendment adding NY Const, art III, § 5-b (g-1)]). If the IRC so failed in voting and had to submit its plans to the legislature, that failure would require the legislature to create its own redistricting plan, to be enacted by the Governor (*id.* § 3 [proposing amendment to NY Const, art III, § 4 (b)]). The proposed constitutional amendment also included other changes, including increasing the number of state senators (*id.* § 1 [proposing amendment to NY Const, art III,

§ 2]), establishing a timeline for 2022 redistricting (*id.* § 3 [proposing amendment to NY Const, art III, § 4 (b)]), and requiring that incarcerated people be re-numerated to their last place of residence for the purpose of drawing redistricting lines (*id.* [proposing amendment to NY Const, art III, § 4 (c) (6)]). On one hand, the petitioners argue that the voters' rejection of the amendment shows that the voters would also have disapproved of the statute, and that both the failed amendment and statute were part of a plan by Democrats to bypass the IRC. On the other hand, as with the statute, it is perfectly feasible that Democrats worried that the IRC process would break down and wanted to clarify what should occur in that instance for the sake of election efficiency and integrity.

Taking all of this together, and taking every inference in favor of petitioners, one could colorably believe that the legislature was attempting to position itself to be able to draw legislative districts unfettered by the IRC if the IRC deadlocked. As the Appellate Division concluded, however, that evidence, standing alone, does not prove intent to gerrymander beyond a reasonable doubt (204 AD3d at 1369-1370).{**38 NY3d at 546}

IV.

I agree with the principles underlying the majority's opinion. Election districts should not be created for the purpose of disadvantaging political opponents. Nor should they be created to disadvantage racial or ethnic minorities, or constructed in ways that minimize the responsiveness of elected officials to their constituents by, for example, splitting cities or communities of interest apart. I also do not rule out that, with a sound analysis, these plaintiffs or others could prove that the 2022 legislative plan violated the Constitution, at least in some districts. My disagreements are threefold:

• I read the constitutional provision as Judge Rivera does—leaving the redistricting authority ultimately in the hands of the legislature;

• I am convinced these petitioners have not adduced legally sufficient evidence to demonstrate gerrymandering; and
• given my first two disagreements, I believe the majority's remedy inappropriately strips from the legislature the right clearly provided in article III, § 5: "In any judicial proceeding relating to redistricting . . . [i]n the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." This case is such a proceeding. As the majority says, "[t]he Constitution is the voice of the people speaking in their sovereign capacity, and it must be heeded" (majority op at 524, quoting *Matter of New York El. R.R. Co.*, 70 NY 327, 342 [1877]). Why, then, does the majority not heed the Constitution's command that the legislature must be given a "full and fair opportunity" to address the legal infirmities identified in this judicial proceeding?

Rivera, J. (dissenting). I would reverse the Appellate Division judgment because petitioners failed to establish that the legislature violated the state's redistricting procedures or constitutional mandates. The legislature acted within its authority by adopting the redistricting legislation challenged here after the Independent Redistricting Commission (IRC) chose not to submit a redistricting plan by the second constitutional deadline. Thus, there is no procedural error rendering the redistricting legislation void ab initio. Petitioners' claim of{**38 NY3d at 547} a substantive violation based on gerrymandering is also without merit as their evidence fell far short of proving that the legislature's congressional map was unconstitutional beyond a reasonable doubt.

I.

In interpreting a constitutional provision, the primary role of this Court is to give effect to its unambiguous text and the intent of the people in adopting the provision (*see White v Cuomo*, 38 NY3d 209, 216-217 [2022]). This appeal requires that we interpret article III, §§ 4 and 5 of the New York Constitution. Under section 4, the IRC shall prepare decennially a redistricting plan to establish state assembly and senate and federal congressional districts and submit such a plan and implementing legislation to the legislature for its consideration, without amendment (*see* NY Const, art III, § 4 [b]). If the legislature fails to approve the proposed legislation, the IRC shall prepare and submit a second redistricting plan and necessary implementing legislation

for consideration again without amendment (*see id.*). If the legislature fails to approve the second plan, the legislature shall approve its own implementing legislation (*see id.*). Section 4 (e) acknowledges that the redistricting procedure may not be followed where "a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." Section 5 further provides that upon a judicial finding that a redistricting law violates article III, such law shall be "invalid in whole or in part," and that "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." Here, the IRC initially submitted two redistricting plans by the first deadline. The legislature failed to approve either. When the IRC chose not to make another submission by the second deadline, the legislature drafted and approved redistricting implementing legislation which the Governor signed.[FN1]

{**38 NY3d at 548}Petitioners, residents of several New York districts, claim that the legislature avoided the exclusive redistricting process set forth in sections 4 and 5 by enacting redistricting legislation in the absence of an IRC submission by the second deadline, because a second IRC submission is a constitutional requirement that triggers the legislature's authority to act. Petitioners further claim that the redistricting legislation is the product of intentional gerrymandering by the Democratic members of the State Legislature, in violation of section 4 (c) (5) of article III of the Constitution. As I discuss, petitioners are wrong as a matter of law on their procedural challenge and have failed to prove their gerrymandering allegation.

II.

There is no procedural error of constitutional magnitude warranting invalidation of the legislature's redistricting implementing legislation. That conclusion is supported by either of two analytic paths.

A.

By one view, the process followed by the legislature here does not violate the text or purpose of article III because the IRC in fact submitted two plans, albeit all at once, in furtherance of the purpose of section 4, and, in any case, the legislature is not bound to approve an IRC plan as drafted.[FN2] Under that view, the legislature acted appropriately on the unique

facts of this case. First, the Constitution does not mandate legislative adoption of any IRC-proposed implementing legislation; the legislature may opt to reject the IRC submissions and proceed to draft implementing legislation, which would then be submitted to the Governor for action (*see* NY Const, art III, § 4 [b]).[FN3] That is exactly what happened here. Second, the Constitution requires that in the event that more than one draft plan receives an equal number of IRC member votes for approval,{**38 NY3d at 549} above the votes garnered for any other plan, the IRC must submit all of those plans to the legislature in accordance with section 4 (b) of article III of the Constitution (*see id.* § 5-b [g]). Thus, if the IRC fails to garner a majority vote, the IRC is empowered to submit more than one redistricting plan and implementing legislation for the legislature's consideration. That is also what happened here. Third, nothing in the Constitution expressly prohibits the legislature from acting if the IRC chooses not to submit yet another plan after the legislature has considered and failed to approve all the plans with the highest number of IRC votes. The Constitution is simply silent on how to address the IRC's choice to forgo submission of a redistricting plan and implementing legislation before the second deadline. Nor does the constitutional framework command that the legislature remain idle in the face of an IRC decision not to submit a plan despite section 4 (b)'s mandatory language setting forth deadlines for submission. The Constitution requires the legislature approve redistricting legislation, upon consideration of one IRC plan and, if necessary, a second plan. The legislature did exactly that, reviewing two IRC plans and determining not to approve either, but instead adopting legislation which it maintains wholly comports with the Constitution.[FN4] The majority's decision leaves the legislature hostage to the IRC, and thus [*23]incentivizes political gamesmanship by the IRC members—the exact scenario the majority claims it avoids by interpreting the second IRC submission as a mandatory predicate to legislative action (*see* majority op at 515).

The majority claims that upholding the legislative action here would undermine the redistricting process adopted by the 2014 constitutional amendment and thwart the purpose of the amendment (*see id.* at 512). That is only true if we ignore the salutary aspects of the entire redistricting process and how it informs the legislature's decisions. Under the Constitution, the IRC is tasked with drafting proposed districts that are contiguous, compact, and equipopulous,

while considering the maintenance {**38 NY3d at 550} of cores of existing districts and political subdivisions, and avoiding line-drawing that denies or abridges the rights of communities of interest, including racial and minority language groups, or the formation of districts that favor or disfavor political candidates or parties (*see* NY Const, art III, § 4 [c]). The goal of fair, non-gerrymandered line drawing is furthered, in part, by a robust public hearing and comment process that allows the IRC to consider diverse viewpoints when preparing its redistricting plan (*see id*.). In turn, the legislature benefits from this same process when it considers the IRC's draft plan. Here, in accordance with the Constitution, the legislature considered both of the plans submitted by the IRC, fully aware of the public process that preceded the approval of both plans by a concededly split IRC membership. Unfortunately, like the IRC, the legislature could not agree on only one of those plans. When the IRC chose not to make a submission by the second deadline—of a plan that would be subject to legislative amendment, unlike the two plans submitted by the first deadline—nothing in the Constitution prohibited the legislature from drafting and approving redistricting legislation that it determined was in compliance with the constitutional mandates set forth in article III.

The majority also concludes that the legislature may only "amend[ ]" redistricting plans submitted by the IRC (*see* majority op at 510, quoting NY Const, art III, § 4 [b]). The extent of the legislature's authority to redraw the IRC's proposed maps, however, is not before us since that did not occur here. Moreover, the majority's interpretation ignores that legislative plans may include "*any* amendments" that are "deem[ed] necessary" (NY Const, art III, § 4 [b] [emphasis added]), giving the legislature significant discretion to reject the IRC's proposals. Likewise, the two percent rule—which the majority seems to interpret as a constitutional requirement (*see* majority op at 516 n 11)—is also not properly before us, and in any case, that statutory rule applies only when the IRC submits a plan by the second deadline, which concededly it did not do. In sum, the majority is incorrect that the legislature's authority to approve redistricting legislation is subject to the two percent rule after it decides not to approve the first IRC plan as drafted because that legislative authority can only be triggered after the IRC submits a plan pursuant to the second deadline.

Even assuming the majority is correct that the Constitution provides the legislature with express and exclusive choices—{**38 NY3d at 551}either approve, as drafted, the IRC implementing legislation submitted by the first or the second constitutional deadlines, or don't approve either and amend and approve bicamerally the second submission which is then presented to the governor for action—the majority correctly concedes that the legislature is not required to adopt, without change, the IRC recommendations (*see* majority op at 510). Instead, the legislature must exercise its constitutional duty to ensure that New York's district lines comply with the constitutional factors set forth in article III and do not otherwise violate federal or state law (*see* NY Const, art III, § 4 [c]; Voting Rights Act of 1965, 52 USC § 10101 *et seq.*, as added by Pub L 89-110, 79 US Stat 437). As this Court has made clear, redistricting is a complex and intricate task, involving a "[b]alancing" of "myriad requirements imposed by both the State and the Federal Constitution," which is ultimately "entrusted to the [l]egislature" (*Matter of Wolpoff v Cuomo*, 80 NY2d 70, 79 [1992]; *see Matter of Schneider v Rockefeller*, 31 NY2d 420, 431 [1972] ["The gerrymander(ing) is . . . rather deep in the 'political thicket' "]). Thus, and contrary to the majority's conclusion (*see* majority op at 514-515), the legislature was not required to ignore its constitutional duty because the IRC "abandon[ed] its constitutional mandate" (*id.* at 517). And, despite the majority rhetoric about redistricting reform—that the IRC process was designed to "incentiviz[e] the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process" (*id.* at 515)—it is the majority's interpretation of the Constitution that effectively places the redistricting process at the mercy of the IRC, which cannot be what the people of the State of New York intended when they approved the amendment and even though the Constitution does not mandate legislative approval of any IRC plan. Indeed, recognition that the legislature retains the ultimate authority to enact a redistricting plan does not, as the majority posits, "render the 2014 amendments . . . functionally meaningless" (*id.* at 508-509); it merely confirms that the legislature must step in when the IRC fails in its task.

B.

[*24]Even if the plain text of the Constitution did not support the legislative action taken here, there is an alternative analytic basis for rejecting the petitioners' procedural argument. The

Constitution is silent as to how to respond when the IRC does{**38 NY3d at 552} not submit a plan in accordance with article III, as in this case where the IRC chooses not to make a second deadline submission. Notably, petitioners did not sue the IRC to secure compliance with what they and the majority maintain is the "*exclusive* method of redistricting" (majority op at 515). Nor have petitioners requested the courts to adopt either of the IRC plans even though petitioners, like the majority, claim that the IRC's submissions are a constitutional predicate to legislative action (*see id.* at 515-516).

However, the legislature anticipated just such a failure in the IRC process by passage of an amendment to the Redistricting Reform Act of 2012 (L 2012, ch 17), which provides that

"if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan and the commission submitted to the legislature . . . all plans in its possession, both completed and in draft form, and the data upon which such plans are based, each house shall introduce such implementing legislation with any amendments each house deems necessary" (*see* Redistricting Reform Act § 4 [c], as amended by L 2021, ch 633, § 1).[FN5]

That statute, having been properly enacted, controls and provided the legislature with the authority to act as it did here.[FN6]

III.

Turning to petitioners' second claim, that the legislative plan is an unlawful gerrymander, we review this challenge, like other constitutional attacks on redistricting plans, de novo and not, as the majority suggests, under a deferential standard of{**38 NY3d at 553} review (*see Matter of Wolpoff*, 80 NY2d at 78 ["(W)e examine the balance struck by the (l)egislature in its effort to harmonize competing Federal and State requirements"]; *Matter of Schneider*, 31 NY2d at 427 ["Our duty is . . . to determine whether the legislative plan substantially complies with the Federal and State Constitutions"]). Thus, petitioners are held to the highest burden in our law—one generally enshrined in criminal law—proof beyond a reasonable doubt:

"A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and

reconciliation has been found impossible' " (*Matter of Wolpoff*, 80 NY2d at 78, quoting *Matter of Fay*, 291 NY 198, 207 [1943]; *accord Cohen v Cuomo*, 19 NY3d 196, 201-202 [2012]).

Upon review of the record before us, I conclude that petitioners failed to meet their heavy burden. As three Justices concluded below, and as Judge Wilson explains, other than the petitioners' expert analysis alleging gerrymandering, the petitioners' other evidence cannot satisfy their burden of proof (*see* 204 AD3d 1366, 1371 [4th Dept 2022 plurality]; Wilson, J., dissenting op at 543-545).[FN7] I have already discussed why [*25]there was no constitutional procedural violation, but even if there had been, the legislature's approval of a redistricting plan in the absence of a second IRC submission does not establish intentional gerrymandering. This case does not rest on "the credibility issue routinely seen in battle-of-the-experts cases," but rather turns on petitioners' expert evidence and its "probative {**38 NY3d at 554}force . . . regardless of respondents' opposition" (204 AD3d at 1378 [Whalen, P.J., and Winslow, J., dissenting in part]). For reasons discussed at length in Judge Wilson's thorough and compelling analysis of petitioners' evidence and gerrymandering claim, which I fully join, petitioners failed to carry their burden. In sum, petitioners relied on an expert who failed to account for several constitutional requirements and who used an untested, unverified algorithm (*see* Wilson, J., dissenting op at 529-530 *cf. People v Wakefield*, 38 NY3d 367, 394-403 [2022, Rivera, J., concurring in result]). No district line drawer could do so and still comply with the Constitution.

I dissent.

Judges Garcia, Singas and Cannataro concur. Judge Troutman dissents in part in an opinion, in which Judge Wilson concurs in part in a dissenting opinion, in which Judge Rivera concurs in part. Judge Rivera dissents in a separate dissenting opinion, in which Judge Wilson concurs.

Order modified, with costs to petitioners, in accordance with the opinion herein and, as so modified, affirmed.

Footnotes

Footnote 1:A legislative advisory task force on apportionment—created by statute and comprising lawmakers and staff selected by legislative leaders—conducted studies and proffered recommendations and proposed maps for the legislature's consideration (*see* Legislative Law § 83-m; L 1978, ch 45, § 1).

Footnote 2: Many other states have also turned to independent redistricting commissions to curtail partisan gerrymandering (*see e.g.* Ariz Const, art IV, part 2, § 1; Cal Const, art XXI, § 2; Colo Const, art V, §§ 44-48.4; Conn Const, art III, § 6; Haw Const, art IV, § 2; Idaho Const, art III, § 2; Me Const, art IV, part 3, § 1-A; Mich Const, art IV, § 6; Mont Const, art V, § 14; NJ Const, art II, sec 2, §§ 1-9; Ohio Const, arts XI, XIX; Va Const, art II, § 6-A; Wash Const, art II, § 43). In upholding a state constitutional delegation of redistricting authority to an IRC, the United States Supreme Court has recognized that IRCs "generally draw their maps in a timely fashion and create districts both more competitive and more likely to survive legal challenge" and "have succeeded to a great degree [in limiting the conflict of interest implicit in legislative control over redistricting]" (*Arizona State Legislature v Arizona Independent Redistricting Comm'n*, 576 US 787, 798, 821 [2015] [internal quotation marks and citation omitted]).

Footnote 3: As one house of the legislature explained during this litigation, in their view "there [was no] reason for the Democratic super-majorities in both houses of the [l]egislature to seek 'input or involvement' from the Republican minorities" regarding the development of these legislative maps, characterizing such communications as inviting "time-wasting political theater" (reply brief for respondent-appellant Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins at 13 in *Matter of Harkenrider v Hochul*, 204 AD3d 1366 [4th Dept 2022]).

Footnote 4: Notwithstanding respondent Governor's contentions to the contrary, any petition challenging redistricting legislation must be served upon the Attorney General, President of the Senate, Speaker of the Assembly and the Governor, who are proper parties to this proceeding (*see* Uncons Laws § 4221).

Footnote 5: Supreme Court also analyzed whether the state senate map was an unconstitutional partisan gerrymander after granting petitioners' request to amend the petition to challenge the senate map but concluded petitioners did not meet their burden of proof on such claim. Petitioners have not sought review of that determination.

Footnote 6: Supreme Court, as permitted by the stay, has procured the services of a neutral redistricting expert "to serve as special master to prepare and draw a new neutral, non-partisan [c]ongressional map" and has established a schedule by which the parties and other interested persons may submit commentary and proposed redistricting plans for consideration prior to a planned hearing. Petitioners and several interested parties have already proffered submissions to that court.

Footnote 7: Indeed, the description on the 2014 ballot informed voters considering whether to support the constitutional amendments that "the legislature may only amend the redistricting plan . . . if the commission's plan is rejected twice by the legislature."

Footnote 8: Judge Rivera's contention that the IRC process was not violated because two sets of maps were simultaneously submitted by the IRC in the first round—one by the Democratic delegation and one by the Republican delegation—is remarkable. Under her view, this was the functional equivalent of the successive presentations required by the Constitution. Aside from being directly contrary to the text of the Constitution, the intent of the people who adopted the 2014 reforms, and the relevant legislative history, such contention has not been advanced by any party before this Court, a reflection of its total lack of merit.

Footnote 9: In a reply brief submitted in the Appellate Division, one of the state respondents candidly acknowledged that the constitutional process was not followed here, asserting that "[e]veryone agrees" that the Constitution requires two rounds of IRC recommendations "and that the [l]egislature vote up or down on each Commission proposal without amendment before exercising its authority to make any amendments"; and that "nobody suggests that 'the process' is optional" (reply brief for respondent-appellant Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins at 2-3 in *Matter of Harkenrider v Hochul*, 204 AD3d 1366 [4th Dept 2022]). Despite acknowledging the constitutional violation, however, they essentially view it as irrelevant because the legislature could ultimately have adopted its own maps through the amendment process following a properly completed IRC procedure. This view ignores the fact that procedural requirements matter and are imposed precisely because, as here, they safeguard substantive rights.

Footnote 10: The state respondents and Judge Rivera assert that giving force to the constitutional language risks gamesmanship by minority members of the IRC, claiming such members could potentially derail the redistricting process by refusing to participate. In giving effect to the constitutional reforms endorsed by the people of this state, our decision does not leave the legislature hostage to that body as Judge Rivera contends. Legislative leaders appoint a majority of the IRC members and, in the event those members fail either to appear at IRC meetings or to otherwise perform their constitutional duties, judicial intervention in the form of a mandamus proceeding, political pressure, more meaningful attempts at compromise, and possibly even replacement of members who fail to faithfully perform their duties, are among the many courses of action available to ensure the IRC process is completed as constitutionally intended. The IRC may not be a panacea, but to accept the crabbed description of that body proffered by the state respondents and Judge Rivera would be to render the body nothing more than "window dressing" masquerading as meaningful reform.

Footnote 11: In 2022—the very first time that the legislature had occasion to implement the IRC procedure and the two percent rule (L 2012, ch 17, § 3)—that provision was disregarded. The legislature wholly superseded the two percent rule by prefacing the 2022 redistricting legislation with language indicating that such districts were enacted as provided therein "notwithstanding any other provision of law to the contrary" and providing that the new legislation "shall supersede any inconsistent provision of law including but not limited to" the two percent rule (L 2022, chs 13, 14, 15, 16). Despite this attempted end run, however, the 2012 redistricting reform legislation provides relevant evidence of the drafters' intent.

Footnote 12: While we agree with Judge Troutman that this Court should not issue advisory opinions, her suggestion that no actual case or controversy is presented by the state respondents'

appeal—here as of right on the substantial constitutional question of whether the Appellate Division erred in invalidating the congressional map on the ground of partisan gerrymandering—is quite extraordinary. Even if the state respondents were not otherwise entitled to review of the declaration that the apportionment legislation was infected by such invidious intent, there are substantial arguments before this Court concerning the proper remedy in the event of a constitutional violation—arguments that turn, in part, on whether the violation involved procedural or substantive constitutional provisions. The question of whether the congressional map amounts to a partisan gerrymander is also relevant to the issue of whether the primary election should be permitted to proceed on the maps drawn by the legislature, despite the determination of procedural unconstitutionality. Moreover, given our conclusion that new maps must be drawn in light of the procedural violation—a conclusion with which Judge Troutman agrees—resolution of the issue is critical to provide necessary guidance to inform the development of a new congressional map on remittal.

Footnote 13: The 2014 constitutional amendments also forbid racial gerrymandering, in a provision that similarly prohibits an invidious intent or motive, requiring that district lines "shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of" the voting rights of racial or minority language groups (NY Const, art III, § 4 [c] [1]). Other requirements added that year directed certain results, namely, that redistricting, to the extent possible, maintain cores of existing districts, preexisting political subdivisions—such as counties, cities, and towns—and communities of interest (*see* NY Const, art III, § 4 [c] [5]). These requirements supplement the long-standing constitutional constraints on redistricting embodied in the State Constitution requiring, to the extent practical, that districts "contain as nearly as may be an equal number of inhabitants," "consist of contiguous territory," and be "as compact in form as practicable" (NY Const, art III, § 4 [c] [2]-[4]), and those required by federal law—such as conformity with the "one person, one vote" principle (*Abrams v Johnson*, 521 US 74, 98 [1997]; *see Wesberry v Sanders*, 376 US 1, 8 [1964]) and with the federal Voting Rights Act (*see generally* 52 USC § 10301).

Footnote 14: Although purporting to treat the question as an issue of law, Judge Wilson impermissibly performs a weight of the evidence analysis, largely parroting the points in the state respondents' briefs. Tellingly, however, Judge Wilson repeatedly acknowledges that an inference of intent could rationally be drawn from proof in the record. Determining whether to draw such an inference when multiple inferences are possible is a quintessential function of a finder of fact and, here, the courts below—which, unlike this Court, possessed fact-finding authority—credited Trende's testimony. Contrary to Judge Wilson's contention, the burden of proof was not impermissibly shifted to the state respondents. As noted, respondents did not seek exclusion of Trende's testimony on the basis that his methodology or the computer algorithm on which he relied—drafted by a recognized expert and, according to Trende, a "state-of-the-art" program repeatedly accepted by other courts—was insufficiently reliable. Although Trende did observe that the state respondents completely failed to refute any of his simulations with simulations of their own, he also responded substantively to the criticisms of his methodology. Trende explained that his map ensemble "perform[ed] comparably to the enacted plan in terms of compactness," "minority-majority districts," and county lines. He ran additional simulations, freezing municipalities kept intact by the enacted plan, freezing district cores, freezing every "ability-to-elect district," and even conceding the split in southeast Brooklyn to respondents.

Trende testified that even when the simulations were run in a manner "incredibly generous" to the state respondents by "ced[ing] to [respondents] . . . a third of the districts drawn in New York," the simulations produced "the same basic output," showing the same cracking and packing patterns in the enacted maps. As even a short rendition of just some of the proof presented by petitioners demonstrates, Judge Wilson refuses to apply the proper standard of review, which—even in cases where the legal standard is proof beyond a reasonable doubt—requires that the evidence be viewed in the light most favorable to petitioners, the prevailing party at trial.

Footnote 15: Inasmuch as petitioners neither sought invalidation of the 2022 state assembly redistricting legislation in their pleadings nor challenge in this Court the Appellate Division's vacatur of the relief granted by Supreme Court with respect to that map, we may not invalidate the assembly map despite its procedural infirmity.

Footnote 16: The state respondents' reliance on the federal *Purcell* principle is misplaced (*see Purcell v Gonzalez*, 549 US 1 [2006]). The *Purcell* doctrine cautions *federal* courts against interfering with state election laws when an election is imminent (*see Republican National Committee v Democratic National Committee*, 589 US —, —, 140 S Ct 1205, 1207 [2020]) and does not limit state judicial authority where, as here, a *state* court must intervene to remedy violations of the State Constitution. Indeed, most recently the principle was cited to justify the United States Supreme Court's decision not to disturb a state court order requiring alteration of North Carolina's existing congressional maps for the upcoming 2022 primary (*Moore v Harper*, 595 US —, —, 142 S Ct 1089, 1089 [2022, Kavanaugh, J., concurring in denial of application for stay]).

Footnote 17:A number of other state courts have been called upon to intervene in redistricting just this year (*see League of Women Voters of Ohio v Ohio Redistricting Commn.*, — Ohio St 3d —, — NE3d —, 2022-Ohio-789 [2022]; *Harper v Hall*, 380 NC 317, 323, 868 SE2d 499, 510, 2022-NCSC-17, ¶ 6 [2022]; *Johnson v Wisconsin Elections Commn.*, 401 Wis 2d 198, 210, 972 NW2d 559, 565, 2022 WI 19, ¶ 3[2022]; *Carter v Chapman*, 270 A3d 444, 450 [Pa 2022]).

Footnote 18: Delaying a remedy until the next election would substantially undermine the people's efforts to temper partisan gerrymandering. Here, the legislature enacted maps within one week of the IRC's abdication—which itself came more than a month before the Constitution's outer end date for the IRC process—and petitioners commenced this proceeding on the same day. If there is insufficient time to order a remedy for the 2022 primary election under these circumstances, it is unlikely there would ever be sufficient time to challenge a redistricting plan and obtain relief before an upcoming primary election. Such a conclusion would be contrary to the Constitution, which contemplates that the IRC process may not be completed until February 28th (to be followed by legislative action) but nevertheless expressly authorizes expedited judicial review and modification or adoption of redistricting plans by the courts. Delaying a remedy in this election cycle—permitting an election to go forward on unconstitutional maps—would set a troubling precedent for future cases raising similar partisan gerrymandering claims, as well as other types of challenges, such as racial gerrymandering claims.

Footnote 19: To the extent the 2022 redistricting legislation, which we invalidate here, purported

to render any court order "tentative" for a period of 30 days (L 2022, ch 13, § 3 [i]) such a limitation on judicial authority appears inconsistent with (among other things) the constitutional provision authorizing judicial review without limitation and requiring "disposition" of the claim by Supreme Court within 60 days. The Constitution does not contemplate an advisory order. In any event, here, due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, the legislature is incapable of unilaterally correcting the infirmity.

Footnote 20: While accusing this Court of "step[ping] out of its judicial role" (Troutman, J., dissenting op at 524-525), Judge Troutman crafts a remedy that is neither consistent with the constitutional text nor requested by any of the parties to this proceeding. She proposes that the legislature should be directed to adopt one of the two plans submitted by the IRC and already rejected by the legislature (although she does not specify which one). Judge Troutman's position is incongruous; she agrees that the legislature lacked authority to enact redistricting legislation absent a second submission from the IRC but, paradoxically, she suggests that we should now order the legislature to enact redistricting legislation despite their inability to cure the procedural violation. Moreover, although Judge Troutman posits that the people would not approve of a court-ordered redistricting map that is, in fact, exactly what the people have approved in the State Constitution as a remedy by declaring that the IRC "process . . . shall govern . . . except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e]). Just as puzzling, Judge Wilson begins his dissent with a nonsensical advisory opinion, indicating that although he concludes no violation of the constitution occurred, he nonetheless agrees with Judge Troutman's proposed remedy—a solution to a problem that, in his view, does not exist.

Footnote *: The majority seems unwilling to grasp this concept (majority op at 523-524 n 20).

Footnote 1: The Southern Tier has long been recognized as a cohesive political unit (*see* Warren Moscow, *GOP Held Strong in Southern Tier*, NY Times, Oct. 16, 1946, available at https://timesmachine.nytimes.com/timesmachine/1946/10/16/107146657.html?pageNumber=31).

Footnote 2: Mr. Trende's decision not to examine his own maps and not to permit anyone else to see them poses a separate reliability issue. Dr. Imai's algorithm generates huge numbers of redundant maps, which should be weeded out before analysis is conducted. Mr. Trende himself did so when working on a redistricting map for Maryland. There, he completed three sets of 250,000 simulations. He then eliminated the duplicates, which ranged from 220,000 to 160,000 for each of his sets—that is, 64% to 88% of the maps produced were duplicates that he discarded (*Szeliga v Lamone*, Md Cir Ct, Anne Arundel County, Mar. 25, 2022, Battaglia, J., Nos. C-02-CV-21-001816, C-02-CV-21-00173, slip op at 63, ¶¶ 99, 102-104). Furthermore, New York State is significantly larger than Maryland; whereas Maryland only has eight congressional districts, New York has 26 congressional districts. Mr. Trende acknowledged that the more precincts that are involved, the more complicated it becomes to accurately use redistricting simulations to draw conclusions. Yet, in spite of acknowledging that using simulations for New York would be more difficult than for Maryland, Mr. Trende inexplicably generated only 10,000 simulations for New York and subsequently failed to check even that small set for duplicates.

Footnote 3: For example, Supreme Court noted that Mr. Trende "d[id] not include every constitutional consideration" (76 Misc 3d 171, 190 [Sup Ct, Steuben County 2022])—which should render his evidence legally insufficient. Supreme Court explained away that deficiency by saying that "none of respondents' experts attempted to draw computer generated maps using all the constitutionally required considerations" (*id.*), a clear example of improper burden shifting.

Footnote 4: The error in the majority's sole, footnoted response, contending that I have performed a weight of the evidence analysis (majority op at 520-521 n 14), can be illustrated as follows: Mr. Trende uses a Ouija board to determine that the districts have been gerrymandered, and, when communicating with the spirits in the netherworld, directs them to the provisions in North Carolina's constitution instead of New York's. The lower courts rely on that evidence to hold that the New York Legislature has engaged in gerrymandering. According to the majority, the New York Court of Appeals could not conclude an error of law has been made. The majority is right about one thing: I disagree that my job is so limited.

Footnote 1: Contrary to the majority's view, the IRC was not required to submit a different set of second plans. Indeed, the lead Republican IRC Commissioner noted that the Republican members of the IRC had considered agreeing to submit the same plans during the second round, but he concluded that "he would prefer for the Legislature to begin its process then postpone it one week with presumably voting down maps that he claims have not changed" (Joshua Solomon, *Independent Redistricting Commission Comes to a Likely Final Impasse*, Times Union, Jan. 24, 2022, available at https://www.timesunion.com/state/article/Independent-Redistricting-Commission-comes-to-a-16800357.php).

Footnote 2: The majority incorrectly asserts that the legislature's alleged violation of the constitutional procedure is undisputed (*see* majority op at 501). In fact, respondents have maintained that the IRC, not the legislature, is at fault here.

Footnote 3: Several of the states cited by the majority (*see* majority op at 503 n 2) have adopted redistricting commissions which are not subject to legislative approval (*see e.g.* Cal Const, art XXI, § 2; Colo Const, art V, § 48; Mich Const, art 4, § 6; *see generally* Loyola Law School, *All About Redistricting: National Summary*, https://redistricting.lls.edu/national-overview/?colorby=Institution&level=Congress&cycle=2020 [last visited Apr. 27, 2022]).

Footnote 4: The majority, in claiming that my view ignores the constitutional text and purpose (*see* majority op at 512 n 8), ignores that under the unique facts here, we must harmonize the constitutional process with the overriding intent of the amendment—to create a process for public, bipartisan input in redistricting to provide the legislature with background data and options for redistricting. The majority view rests on a distinction without a difference; had the IRC merely submitted the competing plans in succession, and if the legislature had not approved either, the majority would conclude, as I do, that there was no procedural error.

Footnote 5: The majority's discussion of the legislative history of the 2014 amendment is incomplete (*see* majority op at 513-515). Several legislators and commentators recognized, prior to adoption, that—contrary to the views of its sponsors—the amendment did not guarantee that

the IRC would follow the constitutional process (*see e.g.* NY Senate Debate on Assembly Bill A2086, Jan. 23, 2013 at 252 [warning that an evenly-divided IRC might "foster gridlock"]).

Footnote 6: The statute's two percent rule would also control. If failure to comply with that rule were the sole alleged problem with the legislature's redistricting plan, the courts could mandate compliance as a targeted and narrow remedy rather than reject the entire redistricting plan as the majority does, thus creating confusion for candidates and their supporters, and necessitating the adoption of new deadlines (*see* majority op at 522-523; Troutman, J., dissenting op at 526).

Footnote 7: With respect to one of those alleged grounds, the majority is incorrect to the extent that it suggests that the legislature did not consider Republican views (*see* majority op at 505 n 3). As Judge Troutman and Judge Wilson explain in their dissents, the legislature enacted a plan that includes similar upstate boundaries as the two IRC plans actually submitted to the legislature (*see* Troutman, J., dissenting op at 525-526; Wilson, J., dissenting op at 535-536). As for the other ground—that the legislature's redistricting differs from the 2012 district lines—the purpose of redistricting is to address demographic changes and so it is no surprise that population shifts in New York State would result in a different redistricting map in accordance with constitutional requirements (*see* Wilson, J., dissenting op at 541).

State of New York
Court of Appeals

OPINION

No. 90
In the Matter of Anthony S. Hoffmann, et al.,
Respondents,
v.
New York State Independent Redistricting Commission, et al.,
Respondents,
Independent Redistricting Commissioner Ross Brady, et al.,
Appellants,
Tim Harkenrider, et al.,
Appellants.

Misha Tseytlin, for Harkenrider appellants.
Timothy F. Hill, for Brady appellants.
Aria C. Branch, for Hoffman respondents.
Jessica Ring Amunson, for Jenkins respondents.
Andrea W. Trento, for amici curiae Kathy Hochul et al.
Lawyers Democracy Fund, League of Women Voters of New York State, Mark Favors et al., amici curiae.

WILSON, Chief Judge:

In 2014, the voters of New York amended our Constitution to provide that legislative districts be drawn by an Independent Redistricting Commission (IRC). The Constitution demands that process, not districts drawn by courts. Nevertheless, the IRC failed to discharge its constitutional duty. That dereliction is undisputed. The Appellate Division concluded that the IRC can be compelled to reconvene to fulfill that duty; we agree. There is no reason the Constitution should be disregarded.

I.

Every ten years, congressional, state senate, and state assembly districts are reapportioned based on the federal decennial census (*see* NY Const, art III, § 4 [a]). Historically, as is true for the vast majority of states, New York's redistricting process was controlled almost entirely by the legislature,[1] subject to certain limitations imposed by federal law (such as the Equal Protection Clause or the Voting Rights Act). Unfettered legislative redistricting led to decade after decade of stalemates, allegations of partisan gerrymandering, and judicially drafted plans. Thus, in 2014, New Yorkers voted to amend the Constitution to "significantly and permanently" reform the redistricting process (Governor's Approval Mem, Bill Jacket, L 2012, ch 17 at 5).

As we noted in *Harkenrider*, the surrounding context and history of the 2014 amendments illustrate that they were "carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is *constitutionally required* to pursue consensus to draw district lines" (*Matter of Harkenrider v Hochul*, 38 NY3d 494, 513-514 [2022] [emphasis added]). Prior to the amendments, exclusive legislative control often left opposing political parties—particularly with respect to the congressional maps—unable to reach consensus on district lines (*see id.* at 502). The process was "plagued with allegations of partisan

[1] The State Legislative Task Force on Demographic Research and Reapportionment was created in 1978 as an advisory task force composed of lawmakers and staff selected by legislative leaders to conduct studies and develop redistricting plans for the New York State Legislature (*see* Legislative Law § 83-m; L 1978, ch 45, § 1; *see also Rodriguez v Pataki*, 308 F Supp 2d 346, 354 [SDNY 2004]).

gerrymandering" (*id.* at 503) and often resulted in "predictable" litigation in federal courts every ten years (*Favors v Cuomo,* 2012 WL 928223, *1 [EDNY 2012]; *see also Rodriguez v Pataki*, 2002 WL 1058054, *1 [SDNY 2002]; *Puerto Rican Legal Defense & Educ. Fund, Inc. v Gantt*, 796 F Supp 681, 684 [EDNY 1992]; *Flateau v Anderson,* 537 F Supp 257, 258 [SDNY 1982]).

Notably, in each decennial redistricting dating back to 1982, the legislature's redistricting quagmire resulted in eerily similar bouts of litigation.[2] As to each of those redistrictings, parties requested courts to step in and conduct the redistricting with the aid of special masters (in federal court) or special referees (in state court).

1982

In 1982, the State Legislative Task Force on Demographic Research and Reapportionment's (Task Force) deadlock led to the creation of three redistricting plans for senate and congressional districts in the following order: (1) plans wholly created by

[2] Indeed, legal challenges to New York legislative apportionment and redistricting go farther back than 1982 (*see Matter of Sherrill v O'Brien*, 188 NY 185 [1907]; *Matter of Reynolds*, 202 NY 430 [1911]). In 1964, the Supreme Court of the United States held both houses of the New York legislature were malapportioned, violating the Fourteenth Amendment to the federal constitution (*see WMCA, Inc. v Lomenzo*, 377 US 633, 636-637 [1964]). Our Court in *Matter of Orans* effectively judicially modified the apportionment laws that violated federal standards (15 NY2d 339, 350-355 [1965]). The early 1970s were similarly riddled with litigation over New York's apportionment as violative of the Voting Rights Act (*see New York ex rel. New York County v United States*, 419 US 888 [1974]), which concluded with revisions to the redistricting plan that wound up litigated, once again, in the U.S. Supreme Court (*see United Jewish Organizations of Williamsburgh, Inc. v Carey*, 430 US 144, 155 [1977] [holding the New York Legislature seeking to comply with the Voting Rights Act did not violate the Fourteenth and Fifteenth Amendments by deliberately revising its reapportionment plan along racial lines]).

the legislature, which the Justice Department disapproved as violating the Voting Rights Act; (2) plans developed by a special master reporting to a federal court; and (3) plans drafted and ultimately enacted by the legislature but with the Justice Department "guiding its pen" (Roman Hedges & Carl P. Carlucci, *Reapportionment Under the Voting Rights Act: The Case of New York*, 1983 NYS Legislative Task Force on Demographic Research and Reapportionment at 14). The federal court intervened pursuant to a lawsuit in which all but one plaintiff requested the court to "order New York State to enact a constitutional plan of reapportionment" and failing that, requested that the district court "devise a reapportionment plan" (*Flateau*, 537 F Supp at 259). The remaining plaintiff requested that the court itself "immediately redistrict the State" (*id.*). Although the legislature's plan was ultimately enacted, thus began the ten-year cycle of the federal court enlisting the help of a special master to prepare a redistricting plan in the event the legislature failed to do so.

1992

Ten years later, in 1992, partisan politics once again deadlocked the Task Force (*Gantt*, 796 F Supp at 685; *see also Diaz v Silver*, 978 F Supp 96, 99 [EDNY 1997]). Parallel actions in state and federal court sought to compel the development of a lawful redistricting plan (*Diaz*, 978 F Supp at 99). In response, the federal court ordered a special master to develop a redistricting plan that would comply with federal law. The state court appointed a panel of three referees to develop a plan that would comply with federal and state law (*id.*). Each court adopted their respective experts' plans, at which point the federal plan would take effect unless the legislature adopted the state plan (*id.*). The legislature,

"who until then had not been able to agree upon a plan which satisfied both sides of the political aisle, promptly embraced the state court's plan as [its] own and enacted it" (*Gantt*, 796 F Supp at 698). Even though the United States Department of Justice had precleared that plan, three years later, a group of Black and Hispanic voters sued to challenge the plan as unconstitutional. That suit ultimately required the legislature to change the maps once again (*Diaz*, 978 F Supp at 96).

2002

In 2002, both the federal and state courts were once again asked to intervene to "ensure that Congressional district lines [were] drawn in time for the fair and orderly conduct of the primary and general elections to be held in 2002" (*Pataki*, 2002 WL 1058054, *1; *see also Rodriguez v Pataki*, 308 F Supp 2d 346, 355 [SDNY 2004] [the companion state court case requested the court " 'set a reasonable deadline for state authorities to enact redistricting plans and obtain (United States Department of Justice) pre-clearance thereof' and adopt and promulgate new districts in the event of a failure by the Legislature to act in time for the 2002 elections"]). Once again, the federal court appointed a special master and the state court appointed a special referee, with both courts adopting the plans proposed by their respective experts (*Pataki*, 308 F Supp 2d at 357-358). As in 1992, the federal court noted its willingness to defer to the State, offering that it would withdraw the federal plan if the legislature adopted "appropriate and lawful modifications" (*Pataki*, 2002 WL 1058054, *8). Shortly thereafter, the legislature adopted a congressional redistricting plan of its own, which was subsequently precleared, and the federal court withdrew its plan (*Pataki*, 308 F Supp 2d at 358). Elections were held using the

legislature's plan, after which consolidated plaintiffs from the 2002 state and federal companion cases filed suit substantively challenging the congressional map (*id.* at 359). In 2004, the federal court dismissed the plaintiffs' claims, and the U.S. Supreme Court upheld that dismissal (*id.* at 460-461; *Rodriguez v Pataki*, 543 US 997 [2004]).

2012

That tortured history brings us to 2012—the redistricting cycle that immediately preceded the 2014 constitutional amendments. In 2012, with less than 24 hours until the start of the petitioning process for congressional primaries, the legislature failed to pass a congressional plan (*Favors*, 2012 WL 928223, *1 ["In the past, judicial creation of a congressional redistricting plan has spurred the New York legislature to produce its own plan just in time to avoid implementation of the judicial plan. . . . This time is different"]). As a result, the court delegated the task of creating a congressional redistricting plan to a federal magistrate judge (*Favors v Cuomo*, 39 F Supp 3d 276, 285 [EDNY 2014]). With the help of an "expert in election law and redistricting," the magistrate judge drafted a congressional redistricting plan, which the federal court ordered the legislature to implement (*id.*). The result was a judicially drafted congressional redistricting plan and assembly and senate maps enacted by the legislature that were widely criticized as being gerrymandered (*see Harkenrider*, 38 NY3d at 513; *see also* Thomas Kaplan, *An Update on New York Redistricting*, NY Times, March 9, 2012).

2014

The People of New York voted to amend New York's Constitution and create the IRC against that long history. Faced with decades of failed legislative redistricting and the

concomitant court challenges leading to court-drawn districts or the threat of the same to compel legislative compliance, the legislature proposed the constitutional amendments creating the IRC process through concurrent resolutions adopted in 2012 and 2013. The adoption of those resolutions in successive years placed the question before the voters on the November 2014 ballot. The voters approved the reforms by a margin of nearly half a million votes.

The resulting constitutional amendments created the IRC—a bipartisan, ten-person commission mandated to reflect the "diversity of the state"—as a mechanism to provide an "historic level of independence and transparency while protecting minority voting rights and communities of interest" (Governor's Approval Mem, Bill Jacket, L 2012, ch 17 at 7; *see* NY Const, art III, §§ 5-b [a] [1]-[5], [b]-[c]).[3]

That was the promise of the 2014 constitutional amendments—a promise to "unequivocally" reform the "redistricting process permanently" by "provid[ing] transparency to a process cloaked in secrecy" and respite from "legal challenges to partisan gerrymandering" (Governor's Approval Mem, Bill Jacket, L 2012, ch 17 at 5; Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526 Sponsor Memo, S2107). It was a promise adopted by two consecutive legislatures and New York voters by a wide margin to both avoid legislative gerrymandering *and* judicial

[3] The 2014 amendments also placed substantive requirements on the creation of districts including: the protection of racial and language minority voting rights; contiguity and compactness of districts; and a preference for the maintenance of existing districts, of pre-existing political subdivisions, and of communities of interest (*see* NY Const, art III, § 4 [c]).

intervention in the redistricting process except to the minimum necessary (*see Harkenrider*, 38 NY3d at 513).

Thus, our Constitution now mandates that the IRC prepare and submit a redistricting plan, with appropriate implementing legislation, to the legislature for a vote without amendment (*see* NY Const, art III, § 4 [b]). The plan and legislation must be submitted to the legislature "no later than January fifteenth in the year ending in two" (*id.*). If the legislature fails to approve that redistricting plan, or if the governor vetoes it and the legislature does not override the veto, the legislature or the governor must notify the IRC of the rejection (*see id.*). The IRC must then prepare a second redistricting plan with the necessary implementing legislation "[w]ithin fifteen days of such notification and in no case later than February twenty-eighth," and resubmit it to the legislature for a vote without amendment (*id.*). If the second redistricting plan fails to pass the legislature, or if it is subject to a veto, then the legislature may amend the maps drawn by the IRC (*see id.*). According to a statute enacted as a companion to the 2014 constitutional amendments, any legislative alteration of IRC-drawn districts cannot affect more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

Unfortunately, the new constitutional process broke down the first time it became applicable. Following the 2020 census, the newly established IRC convened in 2021 and, as required, held public hearings throughout the state, receiving input from voters and stakeholders on the process (*see* NY Const, art III, § 4 [c]; *Harkenrider*, 38 NY3d at 504). Simultaneously, the legislature recognized that the Constitution did not explicitly state what would happen if the IRC failed to deliver maps and implementing legislation. To

address that lack of clarity, the legislature placed an additional constitutional amendment on the 2021 ballot that would authorize the legislature to introduce its own redistricting legislation if the IRC failed to vote on any plan or implementing legislation by the deadline (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). Voters rejected the proposed amendment by a margin of just over a quarter of a million votes. Upon the failure of the 2021 constitutional amendment, the legislature enacted a statute authorizing the legislature to create its own districts if the IRC failed to deliver maps and implementing legislation—the same remedy the voters had rejected (*see* L 2021, ch 633 [hereinafter the 2021 legislation]). The statute provided that if the IRC "does not vote on any redistricting plan or plans, for any reason, by the date required for the submission of the plan, [then] the [IRC] shall submit to the legislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based" and "each house shall introduce such implementing legislation with any amendments each house deems necessary" (*id.* § 1).

The IRC submitted its first redistricting plan to the legislature on January 3, 2022, twelve days before its January 15, 2022 deadline (*see Harkenrider*, 38 NY3d at 504; NY Const, art III, § 4 [b]). Because the IRC had reached an impasse and was unable to reach a seven-person quorum as specified in the Constitution (*see* NY Const, art III, § 5-b [f]), the first submission consisted of two competing maps that had garnered equal support (*see Harkenrider*, 38 NY3d at 504; NY Const, art III, § 5-b [g]). On January 10, 2022, the legislature rejected both maps, triggering the IRC's constitutional obligation to prepare and submit a second redistricting plan within 15 days but in no case later than February 28, 2022 (*see Harkenrider*, 38 NY3d at 504; NY Const, art III, § 4 [b]). On January 24, 2022—

one day before the 15-day deadline and well before the February 28 deadline—two different factions of the IRC publicly released dueling statements reflecting that the body was deadlocked, with one faction declaring that the IRC would not be submitting a second plan to the legislature (*see Harkenrider*, 38 NY3d at 504-505). Neither faction consisted of a seven-person quorum. Shortly thereafter, relying on the 2021 legislation, the legislature introduced and passed its own redistricting maps, which the Governor signed into law on February 3, 2022 (*see* 2022 NY Senate-Assembly Bill S8196; 2022 NY Senate-Assembly Bill S8172A, A9039A; 2022 NY Senate-Assembly Bill S8197, A9168; 2022 NY Senate-Assembly Bill S8185A, A9040A).

The *Harkenrider* litigation commenced immediately. The *Harkenrider* petitioners sued the state legislature, alleging that the February 3 maps were procedurally and substantively unconstitutional. The *Harkenrider* petitioners argued that the 2021 legislation authorizing the legislature to create its own maps in the event of the IRC's dereliction was unconstitutional, and that because the February 3 maps were enacted pursuant to that statute, they had to fall with it. Because the legislature could not "contravene the Constitution's exclusive process for redistricting in New York through legislative enactment," the *Harkenrider* petitioners argued that the 2022 congressional and state senate maps should be declared invalid; that the Court could not give the "Legislature another opportunity to draw curative districts"; and instead the "Court should draw its own maps for Congress and state Senate prior to the upcoming deadlines for candidates to gain access to the ballot, just as happened regarding the 2012 congressional map."

On April 27, 2022, we held that the 2021 legislation was "unconstitutional to the extent that it permit[ted] the legislature to avoid" compliance with the bipartisan IRC process, a "central requirement of the [redistricting] reform amendments" (*Harkenrider*, 38 NY3d at 517). We further held that "the legislature and the IRC deviated from the constitutionally mandated [redistricting] procedure"; a deviation which required invalidation of the congressional and state senate maps (*id.* at 509; 511). We concluded that "judicial oversight [wa]s required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election" (*id.* at 502). We then remitted the matter to Supreme Court to adopt, with the assistance of a special master, constitutional maps "with all due haste" following any "submissions from the parties, the legislature, and any interested stakeholders who wish to be heard" (*id.* at 523, 524). Less than a month later, Supreme Court certified the maps prepared by a special master as "the official approved 2022 Congressional map and the 2022 State Senate map" (*Harkenrider v Hochul*, 2022 NY Slip Op 31471[U], *1, *3, *4 [Sup Ct, Steuben County 2022]).

Five weeks later, on June 28, 2022, petitioners—ten registered New York voters uninvolved in the *Harkenrider* litigation—commenced this CPLR article 78 proceeding seeking a writ of mandamus to compel the IRC "to 'prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan' as is required by Article III, sections 4 and 5 (b) of the New York Constitution in order to ensure a lawful congressional plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade." Relying on *Harkenrider*, petitioners argued

that the IRC failed to comply with its constitutional duty to submit to the legislature a second redistricting plan. According to petitioners, the IRC continues to have that obligation, even though the 2022 congressional map was judicially adopted.

Three IRC members (hereinafter the Jenkins Respondents) answered, indicating that they did not oppose the specific mandamus relief sought by petitioners. Five other IRC members (hereinafter the Brady Appellants) moved under CPLR 3211 (a) (5) and (7) to dismiss the petition, asserting it failed to state a claim, mandamus to compel does not lie, and that the claim is barred by the statute of limitations. The Brady Appellants argued that February 28, 2022 was the last lawful date on which the IRC could have submitted to the legislature a second redistricting plan, thus petitioners sought to compel the IRC to perform an unconstitutional act. They further argued that a court-ordered redistricting plan was the exclusive remedy for a violation of the redistricting process and that, because the constitutionally prescribed remedial process had played out in *Harkenrider*, the resulting maps could not be redrawn until after the 2030 census. Finally, the Brady Appellants argued that petitioners' mandamus claim accrued when the IRC announced its deadlock on January 24, 2022, which rendered this proceeding barred by the four-month limitations period contained in CPLR 217.

The *Harkenrider* intervenors—fourteen New York voters who had participated in the earlier *Harkenrider* litigation (hereinafter the Harkenrider Intervenors)— intervened in this proceeding and moved to dismiss the petition on three grounds. First, they argued that this proceeding constitutes an impermissible collateral attack on the *Harkenrider* judgment. Second, they argued that the mandamus relief requested by petitioners would

violate the New York Constitution because once the IRC failed to discharge its obligations, the only constitutionally permissible remedy is the judicial creation of maps, which was fully accomplished by Supreme Court in May 2022. Third, they argued that this proceeding is untimely because it was not commenced between January 24, 2022—the date on which the IRC "declared its decision to violate its constitutional duties"—and February 28, 2022, when "the IRC's authority to submit [second proposed] maps expired."

Supreme Court granted the motions and dismissed the petition. The court held that petitioners' claim was timely because it accrued on May 20, 2022—when the 2022 congressional map was certified by Supreme Court—and thus was well within the four-month statute of limitations. However, the court dismissed the petition on the ground that the congressional map certified in May 2022 was to remain in full force and effect until the next redistricting cycle. Petitioners appealed.

With two Justices dissenting, the Appellate Division reversed Supreme Court's judgment on the law and granted the petition. The court held that this proceeding was commenced "well within" the four-month statute of limitations, reasoning that the mandamus claim accrued when the 2021 legislation was deemed unconstitutional by Supreme Court on March 31, 2022 (*Matter of Hoffmann v New York State Ind. Redistricting Commn.*, 217 AD3d 53, 58 [3d Dept 2023]). The court then declined to infer, in "the complete absence of an explicit direction" in our opinion in *Harkenrider*, that the resulting court-drawn districts were intended to apply beyond the 2022 election (*id.* at 60). As a result, the court held that *Harkenrider* did not foreclose the requested mandamus relief

and that petitioners had a clear legal right to the mandamus relief sought. The court therefore ordered the IRC to "commence its duties forthwith" (*id.* at 62).

The Brady Appellants and Harkenrider Intervenors appealed as of right (*see* CPLR 5601 [a]). They subsequently asserted that an automatic stay under CPLR 5519 (a) (1) was in place and the IRC was therefore precluded from working toward the submission of a second redistricting plan during the pendency of appeals. Petitioners moved for a determination that the automatic stay did not apply or, in the alternative, to vacate or modify the stay to permit "the IRC to meet and discuss the upcoming map-drawing process, draft maps, and take any other steps necessary to swiftly comply with the Appellate Division's order should this Court affirm." On September 19, 2023, we held that the Appellate Division's order was automatically stayed pursuant to CPLR 5519 (a) (1), denied the motion to vacate the stay, and clarified that the automatic stay of the Appellate Division's order did not "prohibit the IRC or its members from taking any actions" (*Matter of Hoffmann v New York State Ind. Redistricting Commn.*, 40 NY3d 968 [2023]).

II.

A simple and straightforward proposition disposes of most of the issues the parties have raised. The plain text of the 2014 amendments to the Constitution places express limitations on court-drawn maps. Following the enactment of the 2014 amendments, New York courts no longer have the blanket authority to create decade-long redistricting plans. Instead, the Constitution now limits court-drawn redistricting to the minimum required to remedy a violation of law. Article III, section 4 (e), enacted as part of the 2014 constitutional amendments, reads:

> "The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state *except to the extent that a court is required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law. A reapportionment plan and the districts contained in such plan *shall be in force* until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero *unless modified pursuant to court order*" (NY Const, art III, § 4 [e] [emphasis added]).

Thus, the 2014 constitutional amendments place an explicit limitation on court-created maps. Permitting a judicially created redistricting to last longer than "required" would read the words "to the extent that a court is required" out of the Constitution. Both the dissent and appellants would have us read the Constitution as if it said, instead, that the IRC process "shall govern except if a court orders the adoption of, or changes to, a redistricting plan." But that is not what the Constitution says.

The dissent contends that we have erred grammatically—that " 'to the extent . . . required' does not modify the courts' power 'to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law'—it modifies the subject of the sentence, which is '[t]he process for redistricting . . . established by [§§ 4, 5, § 5-b] shall govern' " (dissenting op at 20). As a grammatical matter, the limiting language is annexed to the clause describing what the courts may do, not what the IRC must do. As a commonsense matter, language directed at the scope of a court-ordered remedy necessarily relates to the courts, not the IRC. What that passage, quoted in full in the text above, clearly states is that the IRC process for creating districts "*shall govern* redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a

redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e] [emphasis added]). The Constitution clearly establishes the IRC process as predominant over court-drawn districts.

"To the extent" and "required" are limiting words that cannot be disregarded. Those words permit court-drawn redistricting only "to the extent" it is "required" to remedy a violation of law. Otherwise, the Constitution requires the IRC map-drawing process. When applied to the maps made pursuant to *Harkenrider*, section 4 (e) authorized the Steuben County Supreme Court to fashion maps to the "extent" it was "required" to do so. Given the impending 2022 election cycle, Supreme Court was "required" to alter the IRC-based redistricting process for that imminent election cycle—and to that "extent" alone. Indeed, Supreme Court quite properly identified the maps pursuant to *Harkenrider* as the "official approved 2022 Congressional map" (*Harkenrider*, 2022 NY Slip Op 31471[U], *3, *4). The Appellate Division reached this same conclusion (*see Hoffmann*, 217 AD3d at 60). In short, section 4 (e) requires a nexus between the violation and the judicial remedy, and a court cannot adopt a remedy beyond what is necessary to cure the violation of law.

Appellants cannot explain why their interpretation does not render those words superfluous. They offer no alternative meaning for them, and none is apparent.[4] We have

[4] Our dissenting colleagues offer that the words "except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" merely "clarifies that the IRC and legislature must comply with the deadlines, voting requirements, and other procedural rules set forth in the referenced constitutional provisions" and "reaffirms . . . the courts' traditional power to remedy violations of law" (dissenting op at 21). Of course, that reading renders the limiting clause as wholly

long and repeatedly held that "in construing the language of the Constitution as in construing the language of a statute, the courts should look for the intention of the People and give to the language used its ordinary meaning" (*Sherrill*, 188 NY at 207). The " 'starting point for discerning legislative intent is the language of the statute itself' " (*Matter of Lynch v City of New York*, 40 NY3d 7, 13 [2023], quoting *Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]), such that the " 'literal language of a statute controls' " (*Lynch*, 40 NY3d at 13, quoting *Matter of Anonymous v Molik*, 32 NY3d 30, 37 [2018]). All parts of the constitutional provision or statute " 'must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof' " (*People v Pabon*, 28 NY3d 147, 152 [2016], quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98 [a]). Indeed, our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid " 'a construction that treats a word or phrase as superfluous' " (*Columbia Mem. Hosp. v Hinds*, 38 NY3d 253, 271 [2022], quoting *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]).

Appellants' failure to offer any other meaning for the words "to the extent that a court is required" properly ends any analysis. Instead of offering any other possible

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superfluous. Under the dissent's reading, striking "to the extent that a court is required" would change neither the IRC's nor the legislature's duties, nor alter the courts' power of review. It is also a quite tortured reading to say that words limiting the power of courts are meant as a direction to the IRC and legislature.

meaning, both the dissent and appellants point to the next sentence of section 4 (e), which provides that reapportionment plans last for a decade (*see* dissenting op at 21). However one reads that sentence, it does not explain what meaning should be ascribed to the words "to the extent that a court is required." Furthermore, that second sentence of 4 (e) bolsters our plain reading of the prior sentence, rather than refutes it. The second sentence reads: "A reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero *unless modified pursuant to court order*" (NY Const, art III, § 4 [e] [emphasis added]). The clause beginning with "unless" specifies that plans modified pursuant to a court order—unlike plans created by the IRC process—might not last until the next federal decennial census.[5] Far from contradicting the plain reading of the first sentence that cabins a court's power to conduct redistricting, the second sentence is completely in harmony with the first. A reading that gives a consistent meaning to both must be accepted in preference to a reading that renders words superfluous.[6]

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[5] Additionally, based on the context and placement of section 4 (e), the "reapportionment plan" mentioned therein is the plan created by the IRC and, if necessary, the legislature, not court-drawn districts—the entirety of section 4, which concludes with section 4 (e), sets forth the IRC redistricting process in detail.

[6] Appellants, though not the dissent, also contend that "modified" in the second sentence of section 4 (e) means only "minor change" or "small change" or "somewhat different." From that, appellants posit that the exclusion beginning with "unless" in that sentence applies only to minor court-ordered changes, and not to the adoption of a complete set of maps created by court order. That argument is not tenable. Under section 4 (e) (and also as an indisputable proposition of law), modifications must be whatever "a court is required to order . . . as a remedy for a violation of law" (NY Const, art III, § 4 [e]). The law might

Appellants and our dissenting colleagues also contend that mid-decade redistricting is disfavored, observing that the 2014 amendments prohibit mid-decade redistricting because the state of Texas deemed as such under its constitution and Congress is considering, but has not acted on, legislation to that effect (dissenting op at 22-23). Putting aside that any such general preference cannot supersede the language of the Constitution, section 5-b (a), which itself is part of the 2014 constitutional amendments, expressly contemplates that a court may issue orders directing an IRC to redo IRC-created or legislatively created districts mid-decade, even though section 4 (e) specifies that such districts are expected to last for a decade.

Section 5-b (a) states, in part:

> "On or before February first of each year ending with a zero *and at any other time a court orders* that congressional or state legislative districts *be amended*,[7] an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices" (NY Const, art III, § 5-b [a] [emphasis added]).

Thus, although not applicable to the judicially created districts involved on this appeal, section 5-b (a) further refutes both the dissent's and appellants' argument that the Constitution prohibits mid-decade redistricting.

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require something drastic or minor, yet whatever is required is the "modification," whether minor or drastic.

[7] As with "modified," appellants would have us read "amended" as limited to small changes. But amendments can be large or small. In any redistricting, the party responsible for the redistricting starts with the preexisting districts and asks what needs to be changed, which fits neatly within the definition of "amended."

Moreover, in the instant proceeding, petitioners are not requesting a court-ordered amendment to any districts. Instead, they have asked the court to issue a writ of mandamus compelling the IRC to deliver to the legislature a second set of maps and implementing legislation. The legislature may adopt those maps, or it may modify them as provided for in the Constitution (and as further constrained by the accompanying legislation). Either way, maps drawn pursuant to our decision will not be maps "ordered" by a court— rather, they will, one way or another, be adopted by the IRC and legislature.

Although the constitutional language is clear, the background against which the constitutional provisions were implemented further supports the conclusion that the Constitution limits court-drawn maps to the minimum time and scope required to cure a violation of law. For more than half a century before the 2014 constitutional amendments, every New York legislative redistricting was subject to court intervention, including the imposition of a judicially created congressional plan in 2012. The People adopted the 2014 amendments creating the IRC against that background and did so because of the frustration over both the legislature's inability to draw lawful districts and the continual requests for districts to be created by the courts. In light of that history, it does not make sense to read the constitutional amendments to require a court to create decade-long electoral districts if the IRC or legislature fails to carry out its constitutional duties.

Court-drawn judicial districts are generally disfavored because redistricting is predominantly legislative. As the U.S. Supreme Court has explained, "our decisions have assumed that state legislatures are free to replace court-mandated remedial plans by

enacting redistricting plans of their own. . . . Underlying this principle is the assumption that to prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper orientation of the political process" (*League of United Latin Am. Citizens v Perry*, 548 US 399, 416 [2006]; *see id.* ["(D)rawing lines for congressional districts is one of the most significant acts a State can perform . . . (a)s the Constitution vests redistricting responsibilities foremost in the legislatures of the State and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts"]; *see also Perry v Perez*, 565 US 388, 392 [2012] [emphasizing that "(r)edistricting is 'primarily the duty and responsibility of the State' " and consistently referring to courts required to take up the state legislature's task as creating, drafting, or devising an "interim map"]; *Wise v Lipscomb*, 437 US 535, 540 [1978] ["(I)t is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan"]; *Reynolds v Sims*, 377 US 533, 586 [1964] [redistricting is "primarily a matter for legislative consideration and determination"]).[8] Given this strong and

[8] We would not be the first state court to order recommencement of a nonjudicial redistricting process mid-decade following the judicial adoption of maps. As petitioners point out, other states' high courts have recognized in similar circumstances that when a redistricting body "fails to enact a new redistricting plan [within the timeframe provided by the state constitution], it is neither deprived of its authority nor relieved of its obligation to redistrict" (*In re Below*, 855 A3d 459, 462 [NH 2004 per curiam]; *see also Lamson v Secretary of Commonwealth*, 341 Mass 264, 273 [Mass 1960] [although the failure of the redistricting body to act "thwarts the intention of the Constitution," an "even more serious nullification of constitutional purpose will result under a construction which would" prohibit a redistricting body from "return[ing] to reapportion"]; *Harris v Shanahan*, 192 Kan 183, 213 [Kan 1963] ["(T)he duty to properly apportion legislative districts is a continuing one, imposed by constitutional mandate upon the legislature, notwithstanding

longstanding body of federal law, it makes complete sense that the 2014 constitutional amendments were drafted to prohibit court-ordered redistricting "except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e]). The 2014 constitutional reforms unambiguously promised New York's citizens an IRC redistricting process with minimal resort to court-drawn districts—only to the extent required to remedy a violation of law.

III.

Because we conclude that the Constitution limits the redistricting power of the courts—including our Court—to the creation of interim districts as the proper means to correct the extant constitutional failure, determining whether *Harkenrider* commanded the creation of a decade-long redistricting plan is wholly irrelevant and simply an academic exercise. Even if *Harkenrider* could be read to have required or allowed Supreme Court to create decade-long court-drawn districts, that reading would run afoul of the Constitution. In other words, if that is what *Harkenrider* intended, it lacked authority to do so because that remedy would have been unnecessary to cure the constitutional violation. Thus, reading the *Harkenrider* tea leaves—which all parties have attempted to do, each claiming something in that writing supports one position or the contrary—is meaningless given our holding today.

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the failure of any previous session to make such a lawful apportionment, and this duty may be performed prior to commencement of the next pending electoral process . . . "]).

In any event, *Harkenrider* is silent about the duration of the remedy. Although there are points that could be read to suggest that the remedy was limited to the 2022 election,[9] it is possible to read some of them as neutral or cutting the other way. Even the passage on which appellants most heavily rely—beginning with the observation that "[t]he procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure"—suggests that the decision was limited to the exigency caused by the impending 2022 election, hence the inclusion of the words "at this juncture" (*Harkenrider*, 38 NY3d at 523). Although appellants contend that ordering the IRC to produce maps in *Harkenrider* would have been quicker than ordering judicially created districts, that contention misses two important points. First, Supreme Court accomplished the redistricting in two months. Second, no party in *Harkenrider* sought to compel the IRC to act, the IRC was not a party to the proceeding, and ordering the IRC to deliver maps would still have left those maps subject to legislative or gubernatorial disapproval and further mapmaking by the legislature, with the historically attendant litigation to follow.

[9] *Harkenrider* starts off with a declaration that judicial oversight was required to facilitate the "expeditious creation of the constitutionally conforming maps for use in the *2022* election" (38 NY3d at 502 [emphasis added]; *see also id.* at 521 [reiterating that the state was left "without constitutional district lines for use in the *2022* primary and general elections" (emphasis added)]). In addition, our Court highlighted the urgency and underlying exigency constraining our 2022 remedy because the maps were "incapable of legislative cure" at "this juncture" (*id.* at 523). In combination with the plain text of the Constitution, our time-specific language and emphasis on the exigency of the then-fast-approaching 2022 election cycle, one could read *Harkenrider* as ordering an interim set of maps. But again, that line of reasoning is hardly conclusive, especially given this Court's silence on that issue.

Regardless, because the 2014 constitutional amendments limited court-ordered districts to only what is required to remedy a violation of law, *Harkenrider* cannot be read to hold that courts may create decade-long redistrictings or that we ordered Supreme Court to do so. Accordingly, the existing judicially drawn congressional districts are limited to the 2022 election.[10]

IV.

Petitioners' writ of mandamus proceeding is timely and not barred by laches. Petitioners filed a special article 78 proceeding in the form of a writ of mandamus to compel the IRC to submit a second set of congressional maps once the exigency of the 2022 elections had passed. Mandamus to compel lies where an administrative body has failed to perform a duty enjoined upon it by law, the performance of that duty is mandatory and ministerial rather than discretionary, and there is a legal right to the relief sought (*see* CPLR 7801 [1]; *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *see also Klostermann v Cuomo*, 61 NY2d 525, 540 [1984] [explaining that the "function of mandamus (is) to compel acts that officials are duty-bound to perform"]). Under CPLR

[10] Of course, if no one challenges the continued use of a judicially created redistricting, it will remain in place by default. But if, for example, a challenge is brought that does not leave enough time for the IRC to act, that challenge may be subject to a laches defense or a court may determine, as we did in *Harkenrider*, that the IRC or legislative processes may be too fraught with delay to prove feasible "at that juncture", and a further court-ordered remedy is required. Our holding today in no way "eliminat[es] . . . judicial review" (dissenting op at 24). Quite to the contrary, by granting a writ of mandamus to compel the IRC to fulfill its constitutional duty, we are asserting the power of the judiciary to ensure compliance with the will of the People of New York, as set forth in the constitutional provision they adopted—not "diminish[ing] the judiciary's role and power" (*id.*).

article 78, a writ of mandamus to compel governmental bodies or officers "must be commenced within four months . . . after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty" (CPLR 217 [1]; *see Austin v Board of Higher Educ.*, 5 NY2d 430, 442 [1959] [where the relief sought is in the nature of a mandamus to compel, the "aggrievement does not arise from the final determination but from the refusal of the body or officer to act or perform a duty enjoined by law"]). It is therefore necessary to make a "demand and await a refusal before bringing a proceeding in the nature of mandamus," wherein the statute of limitations does not run out until "four months after the refusal" (*id.*; *see Matter of Bottom v Goord*, 96 NY2d 870, 872 [2001]; *see also Donoghue v New York City Dept. of Educ.*, 80 AD3d 535, 536 [1st Dept 2011]).

In an appropriate case, the filing of a petition and the answer thereto is one way to establish a "demand" and a "refusal" for the purposes of a mandamus proceeding (*see Matter of Thomas v Stone*, 284 AD2d 627, 628 [3d Dept 2001]; *Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182-1183 [4th Dept 2014]; *Matter of Meegan v Griffin*, 161 AD2d 1143, 1143 [4th Dept 1990], *lv denied* 76 NY2d 710 [1990], *rearg denied* 67 NY2d 1018 [1990]). Petitioners filed a complaint on June 28, 2022, whereupon the Brady Appellants moved under CPLR 3211 (a) (5) and (7) to dismiss, constituting a refusal. Thus, the petitioners demanded the IRC to act, and the IRC refused. Because the filing of the complaint and the IRC's subsequent refusal to act began the running of the period, this

proceeding is decidedly within the four-month limitation period prescribed by CPLR 217 (1).[11]

Appellants, our dissenting colleagues, and the Appellate Division dissenting Justices do not dispute that the Constitution requires the IRC to conduct redistricting but contend that the time to compel the IRC to act has passed. The insuperable problem with their argument is that they have assumed that the court-ordered maps last for the decade. Because they do not, the time to move for a writ of mandamus to compel the IRC to complete its constitutional function as to the remaining elections in this decade has not yet passed. Indeed, it could not have commenced until we ordered Supreme Court to draw its own districts as a remedy. Put differently, because the Constitution requires the IRC to draw districts, if a court has drawn districts, the IRC's constitutional obligation may be enforced at any time unless barred by laches (which, for example, would bar a challenge made insufficiently ahead of the next election cycle to permit the IRC to perform its constitutional function). Effectively, the untimeliness argument is nothing more than a way to undo the constitutional requirement that the court-drawn maps be only what is necessary to cure the violation: by requiring any challenge to be made only at the IRC's initial failure, appellants and our dissenting colleagues would cause court-ordered districts

[11] Appellants repeatedly cite footnote 10 of *Harkenrider* as "confirm[ing] th[e] accrual date" for a mandamus action as January 25, 2022. Neither the footnote nor the text calling it make any mention of an accrual date or January 25. Instead, with no reference whatsoever to timeliness, the footnote lists a mandamus action among several methods that might be used to compel IRC members "either to appear at IRC meeting or to otherwise perform their constitutional duties" (38 NY3d at 515 n 10). That is precisely the relief sought and granted in this appeal.

to last a decade. Because the Constitution says otherwise, mandamus to compel the IRC to complete its constitutional function now, is timely.

Nor is the petition barred by laches. When laches "is invoked in an article 78 proceeding in the nature of mandamus, proof of unexcused delay without more may be enough" (*Matter of Sheerin v New York Fire Dept. Articles 1 and 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]). It is the unreasonable nature of a delay that might constitute laches in such proceedings: "laches is designed to introduce flexibility into the process of determining when rights have been asserted so unseasonably that a point at which they should be barred has been reached" (*id.*). Citing various Appellate Division decisions arising in quite different contexts but disregarding the import of our own decision in *Sheerin*, our dissenting colleagues assert that the laches period can be no greater than the four-month limitations period in CPLR 217 (1) (dissenting op at 10). Here, however, laches has no application. Petitioners are seeking to compel the IRC to send maps to the legislature, as required in the Constitution, to replace the court-drawn maps that are limited to the 2022 elections. They have done so in a more than timely fashion.

As we explained in *Sheerin*, laches in this context functions "as the counterpart of a Statute of Limitations, to which it may be analogized *but to whose provisions it owes no necessary obeisance*" (46 NY2d at 496 [emphasis added]). We pointedly rejected as "too broad an assertion" the proposition that the point at which laches may attach cannot "cover

a period longer or shorter than that prescribed by any available Statute of Limitations" (*id.*).[12]

Petitioners filed this proceeding on June 28, 2022. The petition was filed two months and one day after we decided *Harkenrider*, in which we held the 2021 gap-filling legislation unconstitutional and that a court-ordered redistricting plan must be implemented to the extent required to remedy the legislature's violation of law. Because the Constitution forbade those court-drawn plans from lasting longer than necessary, our *Harkenrider* decision marks the date on which petitioners' right to make the demand of IRC arose and when petitioners knew or should have known of the facts that gave them a clear legal right to relief.

Moreover, as we observed in *Sheerin*, the question for the application of laches is not whether the delay exceeded four months, but whether the time at which the demand was made was reasonable in the circumstances. Here, petitioners are seeking to compel the IRC to act in the future, and the date on which they made a demand was early enough to allow for this proceeding to work its way through the courts with a determination made in time for the IRC to act in advance of the deadlines set forth in the Constitution ahead of the upcoming elections. Given these circumstances, making a demand on June 28, 2022 is hardly unreasonable. We therefore see no basis to impose a laches bar to prevent the citizens of New York from having districts drawn as the Constitution commands.

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[12] *Sheerin* states that the laches period may be "*longer* or shorter" than the statute of limitations (46 NY2d at 496 [emphasis added]), yet the dissent reads it as if "longer or" is missing from that opinion (*see* dissenting op at 16 n 2).

V.

Indisputably, the Constitution requires the IRC to deliver a second set of maps and implementing legislation to the legislature. The court-drawn maps directed by our *Harkenrider* decision may exist only to the extent required to remedy the violation of law at issue in that appeal. They are not now necessary to remedy the continuing violation of law asserted on this appeal, because the IRC has more than sufficient time to complete the constitutionally required process—time it did not have in late April 2022.

The *Harkenrider* litigation did not seek to remedy the violation caused by the IRC's failure to fulfill its constitutional obligation. Indeed, the obligation that now exists did not exist at that time due to the presence of the gap-filling legislation, which allowed for an alternative statutory path to redistricting in the event that the IRC deadlocked or otherwise failed to deliver maps. Instead, the *Harkenrider* petitioners attacked as unconstitutional the legislature's 2021 gap-filling legislation, and the redistricting created by the legislature under that statutory authorization on both procedural and substantive grounds. Even though the *Harkenrider* and *Hoffmann* proceedings share some common background, the two are legally different. As the Appellate Division observed, "*Harkenrider* addresses the IRC's inaction solely by way of factual background" (*Hoffmann*, 217 AD3d at 61). In that same vein, no party in *Harkenrider* sued the IRC to compel it to act consistently with its constitutional duties. Indeed, the IRC and its members were not a party to it (*see Harkenrider*, 38 NY3d at 552 [Rivera, J., dissenting] [petitioners "did not sue the IRC to secure compliance with what they and the (Court's) majority maintain(ed) is the '*exclusive* method of redistricting' " (quoting majority op)]).

Thus, our dissenting colleagues' complaints about the failure to adhere to *stare decisis* are meritless (dissenting op at 18, 20 n 3). *Harkenrider* is silent as to the duration of the maps; the decision does not discuss any interpretation of section 4 (e), and no party advanced any argument about its meaning. It is surely a novel proposition to urge that a court is "derelict" for failing to address an argument no one advanced (*see id.* at 19), or that we are "eager[] to relitigate" an issue that the dissent concedes no party in *Harkenrider* raised and as to which *Harkenrider* is silent (*id.* at 20 n 3). Rather, it is hornbook law that "[a] judicial opinion . . . must be read as applicable only to the facts involved, and is an authority only for what is actually decided" (*Rolfe v Hewitt*, 227 NY 486, 494 [1920]). Indeed, the doctrine of *stare decisis* presupposes the existence of binding precedent, yet issues that have never been addressed nor squarely decided certainly cannot bind future courts (*see Matter of Empire Ctr. for N.Y. State Policy v New York State Teachers' Retirement Sys.*, 23 NY3d 438, 446 [2014] ["Our decisions are not to be read as deciding questions that were not before us and that we did not consider"]).

It follows then that the Harkenrider Intervenors' collateral attack argument likewise fails. Because the instant proceeding revolves around a distinct and previously unraised issue—the interpretation of section 4 (e)'s language limiting judicial redistricting "except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law"—none of the claims or issues raised in this mandamus proceeding is addressed (much less barred) by our prior decision.[13] The

[13] For the same reason, and contrary to the Harkenrider Intervenors' argument, this proceeding was properly brought in Albany. The petition does not seek a modification of

Harkenrider Intervenors' collateral attack argument thus fails because the judicial redistricting ordered by our *Harkenrider* decision cannot constitutionally last longer than necessary to remedy a violation of law. It therefore can have no preclusive effect on future legislative redistricting, except insofar as the redistricting plan we struck down as substantively unconstitutional may have some bearing in any evaluation of the substantive constitutionality of a future redistricting plan.

Accordingly, mandamus to compel lies. The People of New York are entitled to the process set out in the Constitution, for which they voted. That process may include a judicially directed creation of districts that is limited expressly to the "extent" that the court is "required" to do so (NY Const, art III, § 4 [e]), but not at the expense of the IRC process when time exists to follow that process. There is no good argument as to why New Yorkers must be prohibited from ordering the creation of legislative districts through the process the Constitution requires, adopted by the direct vote of the People. Underlying all the dissent's rhetoric is a complaint that this Court is forcing the IRC and legislature to follow the Constitution.

Reduced to its essence, the dissent's and appellants' arguments are that we should not pursue the IRC process because it will never work: ordering the IRC to deliver the required maps and implementing legislation will produce gamesmanship, a never-ending

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a prior court order of the Steuben County Supreme Court. Instead, it seeks to compel the IRC to deliver maps. New maps will supplant the judicially created maps not by judicial modification of Supreme Court's order, but rather by operation of the IRC and legislative process as provided for in the Constitution.

cycle of litigation, and ensure that "politics triumphs over free and fair elections" (dissenting op at 27). But that is precisely what New York faced for decades before the 2014 constitutional amendments and it was the very reason the IRC process was adopted. To allow the IRC to defeat the Constitution encourages gamesmanship and defeats the popular will. Indeed, if we allow the IRC's lack of compliance to stand, we would incentivize the same conduct that deadlocked the IRC and led to court-ordered redistricting.

Compelling the IRC to commence its constitutional duty will not re-open the door to future mid-decade challenges. Instead, once the IRC has submitted a second set of lawful redistricting maps adopted by the legislature, those maps would remain in place through the end of the decade. That, in turn, would send a clear directive to the IRC in subsequent decades that it must comply with the Constitution. In any event, debates about gamesmanship are better addressed to the voters, who can repeal or modify the IRC process if it proves undesirable. Until such time, however, it is our obligation to enforce the constitutional process, not give up on it because of a judicial judgment that it was ill-advised.

We note the irony in the dissent's claim that, by compelling the IRC and legislature to comply with the Constitution, we are "restrict[ing] . . . judicial authority" (dissenting op at 25), or that because the courts may again have to hold the IRC to its constitutional obligations, we are diminishing the role of the judiciary (*id.* at 24). Instead, "the judicial department of the government is charged with the solemn duty of enforcing the Constitution . . . [and] the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority" (*McCray v United States*,

195 US 27, 53-54 [1904]). We are holding the IRC and legislature to what the Constitution demands and will do so as often as necessary to secure compliance with its mandate. That said, we trust that the members of the IRC will act as the Constitution requires without further need for judicial intervention. After all, the IRC members, like us, may not ignore our respective constitutional duties.

VI.

Consistent with our opinion and the Appellate Division's direction, the IRC should comply with its constitutional mandate by submitting to the legislature, on the earliest possible date, but in no event later than February 28, 2024, a second congressional redistricting plan and implementing legislation.[14] Accordingly, the order of the Appellate Division should be affirmed, with costs.

[14] This redistricting process must be based on the 2020 census data, which the IRC has already compiled, and there is no requirement that the IRC conduct any solicitation of public commentary beyond what it has done previously.

CANNATARO, J. (dissenting):

Less than a decade ago, the People of this State amended the New York Constitution to mandate that partisanship be kept out of the decennial redistricting process (*see* NY Const, art III, § 4 [c] [5]). At their first opportunity, the Independent Redistricting Commission (IRC) and legislature failed to follow the constitutional process for enacting

redistricting legislation and disobeyed the Constitution's anti-gerrymandering mandate, requiring this Court to act (*see Matter of Harkenrider v Hochul*, 38 NY3d 494, 501 [2022]). Redistricting plans were drafted by a neutral special master in accordance with our decision in *Harkenrider*, certified by Supreme Court, and then used in the 2022 election, producing a fair and competitive election consistent with the overarching goals of the 2014 constitutional reforms prohibiting gerrymandering.

Today, even though the constitutionality of the existing district lines has not been substantively challenged, the majority reverses course. Recasting the judiciary's long history of safeguarding New Yorkers' right to free and fair elections as the problem in need of correction—with political gerrymandering meriting barely any mention in the majority decision—the Court today strictly curtails the constitutional authority of the judiciary to remedy future legislative overreach, rewriting the Constitution in order to do so.

Under the plain language of the Constitution, the maps we ordered in *Harkenrider* must remain "in force until the effective date of a plan based upon the subsequent federal decennial census . . . unless modified pursuant to court order" to remedy a violation of law (NY Const, art III, § 4 [e]). Since the only violation of law alleged in this proceeding is the previous breakdown of the redistricting process this Court remedied in *Harkenrider*, there is no constitutional basis for this Court to order a new congressional map. The majority's holding to the contrary manufactures a new violation of law to justify overruling *Harkenrider*, rewards petitioners for their inexcusable and strategic delay in commencing this proceeding, and elevates a failed process above the People's substantive rights to free and fair elections. The majority is able to reach this result "for one reason and one reason

only: because the composition of this Court has changed" (*Dobbs v Jackson Women's Health Org.*, 597 US 215, 364 [2022] [Breyer, Sotomayor, and Kagan, JJ., dissenting]). I dissent.

I.

Adoption and Violation of the 2014 Constitutional Amendments

Partisan gerrymandering—the manipulation of district lines to favor a particular political party—is a practice that "debase[s] and dishonor[s] our democracy," "enable[s] politicians to entrench themselves in office as against voters' preferences," "promote[s] partisanship above respect for the popular will," and "encourage[s] a politics of polarization and dysfunction" (*Rucho v Common Cause*, 588 US ___, 139 S Ct 2484, 2509 [2019] [Kagan, J., dissenting]). As the majority recounts, redistricting in New York has been frustrated for decades by partisan gerrymandering and legislative stalemates. And history demonstrates that it was the judiciary that was called upon to guarantee fair elections to New Yorkers.

In 2014, following resolutions enacted by two successive legislatures and a ballot referendum approved by the People, amendments to the New York Constitution effected sweeping reform of the state's redistricting process by restraining the legislature's ability to enact gerrymandered maps, with the goal of ushering in a new era of bipartisanship. In 2019, however, Democrats captured a supermajority of both the state senate and the state assembly. In 2021, the new legislature sponsored a ballot initiative in which it proposed to amend the Constitution and grant itself the authority to draw maps if the IRC "for any reason" failed to carry out its constitutional duty to submit a redistricting plan to the

legislature (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). New York voters firmly rejected that proposal by a 54-45% margin, reaffirming their commitment to bipartisanship and their opposition to legislative circumvention of the constitutional map-drawing process. Undeterred, the legislature promptly passed a statute to achieve the same result (the 2021 legislation) (*see* L 2021, ch 633).

Following passage of the 2021 legislation, negotiations between the IRC members broke down. Split along party lines, the IRC was unable to garner sufficient votes to submit a single set of maps by the constitutional deadline for its first-round proposal. As a result of their disagreements, the IRC submitted a dueling pair of redistricting plans to the legislature, one from each party delegation.[1]

On January 10, 2022, the legislature rejected this first round of IRC redistricting plans, thereby triggering the IRC's constitutional obligation to proffer a second round of maps "[w]ithin fifteen days of such notification" (NY Const, art III, § 4 [b]). The Constitution therefore mandated that the IRC proffer a second redistricting plan by January 25, 2022. Fourteen days later, the IRC publicly announced a deadlock and, on January 25th, the IRC's deadline came and went without the submission of second-round maps to the legislature.

Within a week, acting under color of the 2021 legislation, the legislature's supermajority composed and enacted its own set of congressional, senate, and assembly

[1] The submission of multiple redistricting plans is constitutionally permitted if a single consensus map fails to garner sufficient votes (*see* NY Const, art III, § 5-b [g]).

redistricting maps without any consultation or participation by the minority party (*see* 2022 NY Assembly Bill A9167, 2022 NY Senate Bill S8196, 2022 NY Assembly Bill A9039-A, 2022 NY Senate Bill S8172-A, 2022 NY Assembly Bill A9168, 2022 NY Senate Bill S8197, 2022 NY Senate Bill S8185-A, 2022 NY Assembly Bill A9040-A). The congressional map, in particular, was universally derided by the press, legal experts, and good-government groups as an egregious partisan gerrymander (*see e.g.*, Nia Prater, *New York Democrats Have Gerrymandered Their Way to a Huge Advantage*, New York Magazine, Feb. 4, 2022, https://nymag.com/intelligencer/2022/02/n-y-democrats-gerrymandered-their-way-to-a-huge-advantage.html; Nicholas Fandos et al., *A 'Master Class' in Gerrymandering, This Time Led by N.Y. Democrats*, NY Times, Feb. 3, 2022, § A, page 1, https://www.nytimes.com/2022/02/02/nyregion/redistricting-gerrymandering-ny.html; Jane C. Timm, *New York Legislature Oks Gerrymander That Could Net Democrats 3 More Seats*, NBC News, Feb. 3, 2022, https://www.nbcnews.com/politics/elections/new-york-legislature-oks-gerrymander-net-democrats-3-seats-rcna14526; Aaron Navarro, *New York Democrats Advance New Congressional Map That Heavily Favors Democratic Party*, CBS News, Feb. 2, 2022, https://www.cbsnews.com/news/new-york-congressional-map-democrats/; *see also* Michael Li, *What Went Wrong with New York's Redistricting*, Brennan Center for Justice, June 7, 2022, https://www.brennancenter.org/our-work/research-reports/what-went-wrong-new-yorks-redistricting). The Governor nonetheless signed the legislation into law on February 3, 2022.

Harkenrider

The *Harkenrider* petitioners promptly commenced a proceeding to invalidate as unconstitutional the congressional and senate maps, alleging that the legislature lacked authority to enact the maps absent a second-round IRC submission. The petitioners also alleged that the maps were drawn with unconstitutional partisan intent.

The *Harkenrider* petitioners ultimately prevailed on their procedural claim, as well as on their substantive gerrymander challenge to the congressional map (38 NY3d 494 [2022]). This Court declared both the congressional and state senate maps void because "the IRC's fulfillment of its constitutional obligations" was a prerequisite to—and limitation on—the legislature's authority to draft redistricting plans (*id.* at 514). Although the 2021 legislation purported to authorize the legislature to adopt redistricting maps even if the IRC failed to submit plans, we concluded that such legislation was "unconstitutional to the extent that it permits the legislature to avoid a central requirement of the reform amendments" (*id.* at 517). This Court also upheld the factual findings of the courts below that the congressional map was drawn with an unconstitutional partisan intent to discourage competition and favor Democrats. The Court remedied these violations by "endors[ing] the procedure directed by Supreme Court to 'order the adoption of . . . a redistricting plan' (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard" (38 NY3d at 523). In doing so, we upheld the fundamental role of the courts—a role required by the Constitution—in protecting the right of the People of this State to free and fair elections untainted by partisan gerrymandering.

On May 20, 2022, the new congressional and state senate maps were promulgated by Supreme Court and, following minor revisions, that court certified the new maps on June 2, 2022.

The Instant Litigation

After the *Harkenrider* litigation had fully concluded, and five months after the IRC's January 25th deadline to submit a second-round redistricting plan to the legislature had passed, petitioners commenced this proceeding purportedly to enforce the bipartisan IRC process. Their amended petition sought a "writ of mandamus to compel" the IRC and its commissioners "to fulfill their constitutional duty . . . by submitting a second round of proposed congressional redistricting plans for consideration by the [l]egislature."

The members of the IRC aligned with the legislature's supermajority declined to oppose the petition, but the remaining IRC Commissioners moved to dismiss the proceeding as untimely and for failing to state a cognizable claim for relief under either the Constitution or this Court's decision in *Harkenrider*. Having successfully intervened, the *Harkenrider* petitioners also moved to dismiss the petition as untimely and on the basis that, in *Harkenrider*, this Court had already remedied the constitutional defect identified by petitioners by directing the enactment of new, nonpartisan maps. Supreme Court granted respondents' motions to dismiss, agreeing that the Constitution required the *Harkenrider* redistricting maps to remain in place until the next census.

On appeal, a divided Appellate Division reversed, granted the petition, and "direct[ed] the IRC to commence its duties forthwith" (217 AD3d 53, 62 [3d Dept 2023]). According to the Appellate Division, petitioners' claim against the IRC was timely because

it "accrued" on March 31, 2022, the date on which the *Harkenrider* Supreme Court ruled that the 2021 legislation purporting to allow the legislature to proceed absent a second IRC submission was unconstitutional (217 AD3d at 58). On the merits, the Appellate Division concluded that *Harkenrider* "exclusively addressed the Legislature's constitutional violations and, thus, did not remedy the IRC's failure to perform [its nondiscretionary constitutional] duty" (*id.*). The Appellate Division also reasoned that the Constitution authorized judicial intervention in redistricting only "to the extent . . . required" to remedy a violation of law and, in *Harkenrider*, "the Court was not 'required' to divert the constitutional process beyond the then-imminent issue of the 2022 elections" (217 AD3d at 60 [emphasis omitted]). Thus, in the Appellate Division's view, the congressional map adopted pursuant to *Harkenrider* was "merely an interim map for the purpose of the 2022 elections" and the IRC could be compelled to produce a second congressional map for the legislature's consideration (217 AD3d at 58).

Two Justices dissented. Initially, the dissenters would have rejected the petition as time-barred because petitioners unreasonably failed to demand the IRC perform its legal duty until five months after the IRC failed to act. Alternatively, the dissenters would have affirmed Supreme Court's denial of the petition because "the failure of the IRC to act . . . was . . . part and parcel" of our holding in *Harkenrider* that the originally enacted maps violated the Constitution's procedural requirements (217 AD3d at 68 [Pritzker, J. dissenting]). Further, this Court's remedy had already "repaired the procedural and substantive infirmities in a manner directly set forth in the NY Constitution" (*id.* at 68-69). Since a constitutionally-enacted "congressional map has been established and remains in

place" for the duration specified in the Constitution—namely, until the next federal census—the dissenters concluded that petitioners lacked any clear legal right to relief (*id.* at 70).

Respondents appealed as of right on double dissent grounds (*see* CPLR 5601 [a]). For the reasons detailed below, I would reverse and dismiss the proceeding.

II.

Petitioners seek to compel the IRC to fulfill its constitutional duty "by submitting a second round of proposed congressional districting plans for consideration by the [l]egislature" (Amended Petition at 5 [¶ 14], 20 [Prayer for Relief]). As is proper, I will begin with the timeliness of this claim for relief, which the majority chooses to ignore for the first 24 pages of its opinion.

It is well-settled that a proceeding in the nature of mandamus to compel "must be commenced within four months . . . after the respondent's refusal, upon the demand of the petitioner . . . to perform its duty" (CPLR 217 [1]; *see Matter of Waterside Assoc. v New York State Dept. of Envtl. Conservation*, 72 NY2d 1009, 1010 [1988]; *Matter of De Milio v Borghard*, 55 NY2d 216, 220 [1982]; *Austin v Board of Higher Educ. of City of N.Y.*, 5 NY2d 430, 442 [1959]). As we have cautioned, however: "This does not mean that the aggrieved party can, by delay in making [a] demand, extend indefinitely the period during which [they are] required to take action. If [they do] not proceed promptly with [the] demand [they] may be charged with laches" (*Austin*, 5 NY2d at 442, citing 22 Carmody-Wait, New York Practice, §§ 289, 297, pp. 379, 388-390; *see also Matter of Sheerin v New*

York Fire Dept. Articles 1 and 1B Pension Funds, 46 NY2d 488, 496 [1979]; *Matter of Devens v Gokey*, 12 AD2d 135, 137 [4th Dept 1961], *affd* 10 NY2d 898 [1961]).

To avoid application of laches in this context, a "demand must be made within a reasonable time after the right to make [it] occurs" (*Matter of Devens*, 12 AD2d at 136) or, at the latest, "after the petitioner knows or should know of the facts which give [them] a clear right to relief" (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017] [internal quotation marks omitted]; *Matter of Barresi v County of Suffolk*, 72 AD3d 1076, 1076 [2d Dept 2010], *lv denied* 15 NY3d 705 [2010]; 24A Carmody-Wait 2d § 145:880). In furtherance of the policies underlying CPLR 217 (1), four months has been deemed the longest possible period in which service of a demand can be considered reasonable (*see Matter of Norton v City of Hornell*, 115 AD3d 1232, 1233 [4th Dept 2014], *lv denied* 23 NY3d 907 [2014]; *Matter of Zupa v Zoning Bd. of Appeals of Town of Southold*, 64 AD3d 723, 725 [2d Dept 2009]; *Matter of Blue v Commissioner of Social Servs*, 306 AD2d 527, 528 [2d Dept 2003]; *Matter of Thomas v Stone,* 284 AD2d 627, 628 [3d Dept 2001], *lv dismissed* 96 NY2d 935 [2001], *lv denied* 97 NY2d 608 [2002], *cert denied* 536 US 960 [2002]; *Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]; *Devens*, 12 AD2d at 137; *Matter of Amsterdam City Hosp. v Hoffman*, 278 AD 292, 297 [3d Dept 1951]). Unexcused delay of more than four months requires dismissal of the proceeding, even in the absence of any prejudice (*see Matter of Sheerin*, 46 NY2d at 495-496; *Devens*, 12 AD2d at 137).

Straightforward application of these well-settled principles can lead to only one conclusion: petitioners' claim was filed far too late. Petitioners seek enforcement of the IRC's duty to submit second-round maps to the legislature, but they did not demand that the IRC fulfill its constitutional duty when the commission announced on January 24th that it was deadlocked and therefore would not comply. Nor did petitioners make any demand when the IRC's constitutional deadline for the submission of second-round maps came and went on January 25th. Petitioners remained silent as the legislature introduced its own redistricting legislation on February 1st, removing the process entirely from the IRC and signaling that the legislature would proceed with redistricting despite the IRC's abdication of its constitutional duty. Petitioners also sat idle when the infirm redistricting legislation was delivered to the Governor and signed into law on February 3rd.

Petitioners' inaction continued throughout the entire *Harkenrider* litigation. Significantly, at oral argument before this Court on April 26, 2022, both the *Harkenrider* petitioners (intervenors here) and the state respondents acknowledged that mandamus relief "could have" been sought against the IRC at an earlier point, evidencing that the availability of such relief was always well understood (oral argument tr at 33, 46). Indeed, counsel for the Speaker of the Assembly stated that "there could have been a lawsuit brought by petitioners against the . . . members of the commission *but the . . . time passed*" (*id.* at 46 [emphasis added]).

Even after our decision in *Harkenrider*, most petitioners remained idle with respect to mandamus relief or chose to pursue alternative relief. Most notably, lead petitioner Hoffmann sought an order in the United States District Court for the Southern District of

New York requiring that the gerrymandered maps enacted by the legislature be used in the impending 2022 congressional elections (Doc. No. 1, complaint at 3, 13, in *De Gaudemar v Kosinski*, No.1:22-cv-3534 [SD NY May 2, 2022]). The District Court harshly rejected that request to "hav[e] the New York primaries conducted on district lines that the State says are unconstitutional," referring to it as an attempt to "impinge[]" on "[f]ree, open, rational elections" (Doc. No. 92-2, transcript at 15, 40, in *De Gaudemar*, *supra*). Only after these efforts failed, the special master maps were certified, and several more weeks had passed did petitioners finally seek mandamus relief against the IRC.

There is no excuse for this extravagant delay. Even assuming petitioners' claim would have been deemed premature on January 24th—the day the IRC announced its stalemate—they had a clear right to mandamus relief against the IRC on January 25th, when the 15-day constitutional deadline elapsed without any second-round submission by the IRC. Further, it is unfathomable that petitioners can argue that even after the Governor signed the legislature's maps into law on February 3rd, it remained unclear whether the IRC would act to deliver a second set of maps. Because these events were unequivocal, petitioners' commencement of this proceeding on June 28th was "well beyond four months after they knew or should have known of the facts that provided them a clear right to relief" (*see Matter of Granto*, 148 AD3d at 1696). Plainly, by then the ship had sailed.

Petitioners agree that this proceeding is governed by a four-month time limit, but argue that such period should be measured from March 31, 2022, the date the *Harkenrider* trial court declared the 2021 legislation unconstitutional. However, the 2021 legislation neither relieved the IRC of its mandatory constitutional duty to submit second-round maps

nor concealed petitioners' clear right to mandamus relief arising from the breach of that duty on January 25th. The 2021 legislation provided merely that "[*i*]*f* the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," the legislature could enact its own redistricting plan (L 2021 ch 633 § 1 [emphasis added]). Nothing in that language purports to modify the IRC's underlying constitutional duty to submit maps to the legislature, which is the very action petitioners now seek to compel. Moreover, it is a bedrock legal principle that statutes are subordinate to the Constitution and are void in the event of any conflict. Thus, even if the legislature had intended to relieve the IRC of its mandatory constitutional obligation, the only way to do so was to amend the Constitution. The legislature clearly understood this: it initially submitted the 2021 legislation to the People in the form of a ballot initiative for a proposed constitutional amendment. In rejecting that proposal, the People signaled their strong preference for the constitutionally mandated process, which—as I will explain—leaves remediation of any IRC breakdown primarily to the *courts*. The legislature's response was to ignore the voters' will and circumvent the Constitution by enacting the same provisions as an ordinary statute. That unsubtle effort to subvert the IRC's role was legally ineffective for the reasons stated above.

Petitioners nonetheless argue that the 2021 legislation effectively delayed accrual of their claim against the IRC because the legislature's enactment of maps significantly ameliorated any injury arising from the IRC's abdication of its constitutional duty. In addition to confusing the accrual date for mandamus to compel with that applicable to mandamus to review, this argument willfully ignores that the 2021 legislation inflicted the

same injury petitioners claim to have suffered in this proceeding: removal of the IRC from the map-drawing process. Unsurprisingly, then, the record does not support a conclusion that petitioners actually suffered from any confusion regarding their right to relief during the brief period in which the 2021 legislation was effective. If anything, the record suggests that Hoffmann and the other petitioners commenced this action as a fallback only after it became clear that they would not get the gerrymandered maps they desired: the true injury they seek to cure here.

Nor does petitioners' alternative argument that their claim accrued on February 28th fare any better. The February 28th cut-off date operates to shorten, not lengthen, the 15-day period that may be available to the IRC following the legislature's rejection of its first-round submission. The Constitution directs that, "[w]ithin [15] days" of the legislature's notification of its rejection of the first round of redistricting maps "and in no case later than February [28th], the [IRC] shall prepare and submit to the legislature a second redistricting plan" (NY Const, art III, § 4 [b]). The purpose of the February 28th outer deadline is to ensure that the legislature has sufficient time to act on a second-round submission before candidates must begin to canvass signatures from their districts and other election preparations must begin. By comparison, the Constitution affords the IRC more flexibility with respect to the deadline for its first-round submission, directing the IRC to submit its initial redistricting plan "on or before January first *or as soon as practicable thereafter* but no later than January [15th]" (NY Const, art III, § 4 [b] [emphasis added]), language notably lacking from the provision setting forth the IRC's deadline for its second-round

maps. By January 25th—not February 28th—petitioners were fully apprised of the facts necessary to make their demand that the IRC fulfill its constitutional duty.

Recognizing that petitioners' timeliness arguments cannot carry the day, the majority devises a novel theory not advanced by any party to this litigation. The majority declares that "the IRC's constitutional obligation may be enforced *at any time*," so long as the demand is made and refused "[]sufficiently ahead of the next election cycle to permit the IRC to perform its constitutional function" (majority op at 26 [emphasis added]). In other words, the majority decrees that the normal timeliness rules governing mandamus proceedings simply do not apply to this case. Even where the IRC has unequivocally violated its constitutional duties, and all applicable deadlines set forth in the Constitution have passed, the majority encourages a petitioner to sit on their rights for months, while other parties timely commence and prevail in litigation over the same facts, candidates and voters wait in limbo regarding district lines, and new maps are painstakingly developed and put in place.

This holding makes no sense. It is based on a conclusion that the IRC's duties are automatically revived any time a court orders the adoption of judicial maps, and therefore, what is being remedied here is not the violation of the January 25th IRC deadline, but some nebulous new duty that first sprung into being after *Harkenrider*. Even ignoring the lack of support for any such theory in either the Constitution or the pleadings, the majority's reasoning logically should require it to order that the *entire* IRC process now begin anew—a two-year process that would not afford petitioners the immediate relief they seek. Yet, the majority tellingly orders only that the IRC submit a second redistricting plan,

demonstrating that it is, in fact, simply ordering a different remedy for the same violation of law that was already remedied by this Court in *Harkenrider*.[2]

Because this proceeding was commenced long after petitioners should have known of their right to relief, seemingly for strategic reasons, "the solution is not to apply a different legal standard . . . , but to reject the petition for mandamus to compel" (*see Matter of Krug v City of Buffalo*, 34 NY3d 1094, 1099 [2019] [Wilson, J. dissenting]). Dismissal on laches and timeliness grounds would strongly discourage partisan actors from engineering future breakdowns of the IRC. Had petitioners acted reasonably following the IRC's violation of its duties on January 25th, they could have *immediately* sought and obtained an emergency order in the nature of mandamus compelling the IRC to submit a second redistricting plan in accordance with the timetable set forth in the Constitution while still giving the IRC and legislature each several weeks to act. The sad irony the majority refuses to recognize is that if petitioners had simply acted reasonably and in good faith following the IRC's breach of duty, the relief we ordered in *Harkenrider* may never have been necessary, and we might not be here today. Enforcing our ordinary timeliness principles is not "a way to undo the constitutional requirement that the court-drawn maps be only what is necessary to cure the violation" (majority op at 26). It is a way to ensure

[2] Contrary to the majority's contention, our decision in *Sheerin* in no way justifies today's ill-advised timeliness ruling. In holding that the laches doctrine "owes no necessary obeisance" to the statute of limitations in mandamus proceedings, the Court was rejecting an argument that "once the right [to mandamus] is established, laches is unavailable to restrict . . . the remedy to cover a period longer or shorter than that prescribed by any available Statute of Limitations" (46 NY2d at 496). Nothing in *Sheerin* authorizes this Court to effectively abolish the statute of limitations and laches principles applicable to mandamus proceedings in this context.

that the courts are never "required" to order such maps in the first place. If the majority truly sees the remedy we ordered in *Harkenrider* as an evil to be avoided (*see* Part III, *infra*), it should encourage prompt action upon the breakdown of the IRC process, not sanction the unreasonable delay that occurred here.

III.

Even if we were to put aside, as the majority does, what is a legally insurmountable timeliness hurdle, this Court has already remedied the IRC's failure to fulfill its constitutional duty. A petitioner seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]). "The duty must be positive, not discretionary, and the right to its performance must be so clear as not to admit of reasonable doubt or controversy" (*Matter of Burr v Voorhis*, 229 NY 382, 387 [1920]). Applying these well-settled principles to the instant case, mandamus is available to petitioners only if they have demonstrated that the IRC has an "exist[ing]," "clear," and "nondiscretionary" duty to submit a second-round redistricting plan to the legislature, even after our decision in *Harkenrider* and the promulgation of the remedial maps by Supreme Court in accordance with that decision (not to mention long after the passage of the constitutional deadlines).

Petitioners do not, and cannot, make any such showing. Petitioners are not entitled to mandamus relief because the IRC's failure to fulfill its constitutional duty was remedied by this Court in *Harkenrider*. Once remedied, the IRC's duty dissipated, leaving no

performance to compel by mandamus. Absent any substantive challenge to the current redistricting plan in effect, the decennial redistricting process has concluded. Petitioners therefore have no right—let alone any clear legal right—to compel the IRC to submit a congressional redistricting plan to the legislature.

Harkenrider clearly addressed and remedied the breakdown of the constitutional map-drawing process, including the IRC's failure to submit second-round maps within the constitutionally required timeframe. We held that "*the IRC and the legislature* failed to follow the procedure commanded by the State Constitution," and we characterized the "primary questions before us" as "whether this failure to follow the prescribed constitutional procedure warrants invalidation of the legislature's congressional and state senate maps" (38 NY3d at 501-502 [emphasis added]). The *Harkenrider* petitioners "alleged that the process by which the 2022 maps were enacted was constitutionally defective *because* the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments" (*id.* at 505 [emphasis added]), and we agreed that, "in light of the lack of compliance *by the IRC and the legislature* with the procedures set forth in the Constitution, the legislature's enactment of the 2022 redistricting maps contravened the Constitution" (*id.* at 508-509 [emphasis added]).

In claiming otherwise, the majority erroneously treats the lack of an order against the IRC requiring specific performance of its constitutional duty as a failure to remedy the breakdown of the constitutional process. But that is not how stare decisis or the judicial remediation of injury works. In ordering new maps to be drafted by a neutral expert following a period of input from the public, interested stakeholders, and the legislature,

under the supervision of a Supreme Court Justice, we indisputably provided a legal substitute (i.e. a remedy) for the IRC's failure to submit bipartisan maps. That remedy was fully supported by the Constitution, specifically our duty to engage in "expedited judicial review of redistricting challenges" and " 'order the adoption of . . . a redistricting plan' in the absence of a constitutionally-viable legislative plan" so as "to guarantee the [P]eople's right to a free and fair election" (*Harkenrider*, 38 NY3d at 521-522, quoting NY Const, art III, § 4 [e]).

Nor can *Harkenrider* reasonably be understood to have ordered the adoption of "interim" maps for use solely in the 2022 elections. This Court's opinion necessarily referenced the impending 2022 election at various intervals. However, such references served only to clarify that the remedy would not be postponed until after the 2022 elections, as requested by the state respondents. Had this Court intended to limit its remedy to a single election cycle and contemplated the need for further redistricting thereafter, our failure to expressly so direct would be inexplicable and derelict, needlessly leaving New York in election limbo (*compare Honig v Board of Supervisors of Rensselaer County*, 24 NY2d 861, 862 [1969] [directing that a reapportionment plan for election of county board of supervisors proceed on maps as an "interim measure" and that the County Court of Supervisors "proceed as promptly as circumstances permit to promulgate a plan of reapportionment (for use in future elections) meeting constitutional standards"]).

Unwilling to accept our reasoning in *Harkenrider* or accept the remedy this Court put in place, the majority discards both. It proclaims the holding in *Harkenrider* "wholly irrelevant" (majority op at 22) because, in its view, the judiciary is constitutionally

prohibited from ever ordering the adoption of maps for more than a single election (*id.* at 14-15).[3] Its sole support for this startling conclusion is the first sentence of article III, section 4 (e), which provides as follows:

> "The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law" (NY Const, art III, § 4 [e]).

According to the majority, the four words "to the extent . . . required" effected a sea change in the courts' ability to adjudicate and remedy constitutional violations of the redistricting process. As the majority reads the language, a court may now order the adoption of, or changes to, a redistricting plan only to the extent *and for the minimum period of time required* to remedy a violation of law (*see* majority op at 14-19).

An obvious problem with the majority's reading is that it rewrites the constitutional text. As a grammatical matter, the phrase "to the extent . . . required" does not modify the courts' power "to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law"—it modifies the subject of the sentence, which is "[t]he process for redistricting . . . established by [§§4, 5, & 5-b] shall govern" (NY Const, art III, § 4 [e]). Thus, contrary to the majority's conclusion, the clause does not limit the circumstances

[3] The majority's eagerness to relitigate the Harkenrider remedy is not surprising given their disagreement in that case (*see Harkenrider*, 38 NY3d at 527 [Wilson, J., dissenting]; *id.* at 546 [Rivera, J., dissenting]; *id.* at 524 [Troutman, J., dissenting in part]). However, stare decisis does not permit the majority to overturn our precedent merely because they would "decide [the] case differently now than we did then" (*Dobbs*, 597 US at 388 [Breyer, Sotomayor, and Kagan, JJ., dissenting]).

under which a court can order the adoption of a redistricting plan to remedy a constitutional violation. Instead, the sentence clarifies that the IRC and legislature must comply with the deadlines, voting requirements, and other procedural rules set forth in the referenced constitutional provisions. If they fail to do so, the clause reaffirms—in the context of the new system adopted by the People—the courts' traditional power to remedy violations of law.

The "to the extent . . . required" clause does not speak to the duration of the remedy. Indeed, the only language in the Constitution explicitly referencing the duration of maps immediately follows and directs—without exception for maps adopted by a court—that "such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census . . . unless modified pursuant to court order" (NY Const, art III, § 4 [e]). Contrary to the majority's suggestion, the phrase "unless modified pursuant to court order" does not exclude new, remediated maps from the ten-year rule. Rather, the Constitution clearly commands that once a constitutional redistricting plan is put into effect—either by the legislature or, when necessary, by the courts—such plan governs until the next census absent further court-ordered modifications to remedy additional violations of law. Rearranging key phrases and changing what they modify may superficially work to achieve the majority's ends, but it cannot override the meaning of the words in their proper order, or read out provisions of the Constitution.

In *Harkenrider*, this Court determined that it was required to order the adoption of maps as a constitutional remedy for a variety of reasons, including but not limited to: the inability to maintain the 2012 maps following the 2020 census (38 NY3d at 504); the

procedural unconstitutionality of the legislature's congressional and state senate maps, which rendered them invalid in their entirety (*id.* at 514-522); the substantive unconstitutionality of the legislature's congressional map (*id.* at 519-520); the fact that "[t]he deadline in the Constitution for the IRC to submit a second set of maps ha[d] long since passed" (*id.* at 523); the exigencies created by the impending 2022 elections (*id.* at 507); and the preserved arguments of the parties who timely sought relief from the courts. Those maps, created by order of this Court, are now constitutionally required to remain in force until the next census (*see* NY Const, art III, § 4 [e]).

The restrictions our Constitution places on mid-decade legislative redistricting are consistent with traditional practice and make particular sense considering the goal of the 2014 amendments—unmentioned by the majority—to avoid partisan gerrymandering (*see* NY Const, art III, § 4 [c] [5] ["Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties"]). Mid-decade legislative redistricting is notorious for being conducted "with the sole purpose of achieving a [partisan] majority" (*League of United Latin Am. Citizens v Perry*, 548 US 399, 417 [2006] [observing the legislature appeared to redistrict solely to achieve a republican congressional majority]) or "to benefit the political party that most recently received unified control of the state government" (Patrick Marecki, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 Vand L Rev 1935, 1961 [2004]). A good example would be the 2003 redistricting in Texas, which resulted in that State's congressional delegation flipping from a 17-15 Democratic majority to a 21-11 Republican majority (*see League of United Latin Am. Citizens*, 548 US at 412-413).

Indeed, in notable contrast to the potentially limitless reapportionment cycle sanctioned by the majority, legislation introduced in congress has attempted to preclude any "State which has been redistricted in the manner provided by law" from being "redistricted again until after the next apportionment of Representatives" unless a court finds that the existing map is, in some way, substantively flawed (HR 42, 118th Cong [2023]). The parallel language of article III, section 4 (e) of our Constitution demonstrates that similar restrictions already exist in New York—or did until today.

The majority nonetheless posits that the background against which the 2014 amendments were approved supports its conclusion that the Constitution requires all court-drawn maps to be interim in duration. It observes that for more than half a century before the 2014 constitutional amendments, every legislative redistricting in New York was subject to court intervention and many resulted in decade-long judicial maps. The majority concludes from this history that judicially created maps are part of the problem the People sought to correct in approving those amendments (*see* majority op at 8, 20-21).

Nothing in the legislative history of the 2014 amendments even remotely supports that conclusion (*see* Governor's Approval Mem, Bill Jacket, L 2012, ch 17 at 5-6 [far from complaining about judicial intervention in redistricting, expressing concern that the legislative redistricting process was "*largely immune* from legal challenges to partisan gerrymandering" (emphasis added)]). If anything, the extensive history detailed by the majority establishes that it is only through judicial intervention—including, in many cases, the adoption of judicially-crafted decade-long maps—that fair elections were held in this State for much of the past century. The availability of decade-long judicial maps as a

remedy also ensured that elections were only unsettled by litigation once per decade, rather than every other year. Insofar as the Constitution should be interpreted consistent with this historical context, it defies reason to suggest that the drafters of the 2014 amendments—while endeavoring to provide more substantial checks on legislative abuse—acted to diminish the judiciary's role and power as *the* critical backstop against those very abuses. Ultimately, the majority's false narrative distracts from the critical aim of the 2014 amendments: free and fair elections through the elimination of partisan gerrymandering, a goal furthered by our decision and remedy in *Harkenrider* and substantially undermined by the majority's holding today.

The majority also ignores the practical consequences of its holding. It appears to believe that once the IRC has submitted a second set of redistricting maps to the legislature, the matter will be settled for the remainder of the decade. If, however, the process again breaks down or results in another partisan gerrymander, the courts may again be required to intervene, invalidate the legislature's map, and reimpose the special master's map for the 2024 elections. Under the majority's logic, mandamus relief against the IRC would again lie, with the potential for the process to be repeated serially until 2032 and then every two years thereafter.

Short of the complete elimination of judicial review, a legislature determined to enact gerrymandered maps could not have asked for a more favorable ruling than they have received. At the start of each decade, the majority members can enact egregious gerrymanders, secure in the knowledge that if their plan is rejected by the courts, they will have another opportunity to enact maps only slightly less infected with partisan intent—

and so on and so on—until the maps just barely pass constitutional muster. This is not what the People voted for in 2014 and 2021. Rather, it is a perversion of the constitutional amendments that increases the likelihood of partisan gamesmanship and future litigation.

Ultimately it is today's remedy, not *Harkenrider*'s, that exceeds what is "required" to cure a violation of law. In *Harkenrider* we were faced with a congressional map that was both gerrymandered and enacted without constitutional authority, and we devised an appropriate remedy that cured both the procedural and substantive unconstitutionality. Indeed, the special master's congressional map currently in effect has not been substantively challenged in this or any other proceeding. Under that map, "almost one in five seats are competitive, the highest percentage in the country for a large state," whereas "[h]ad the map passed by the Democratic-controlled legislature remained in place, no districts would have been competitive" (Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice, Aug. 11, 2022, https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction). The maps put in place after *Harkenrider*, especially the congressional map, defy the national trend of increasingly partisan districts. Neither petitioners nor the majority have articulated any legitimate interest—let alone a violation of law—that requires such maps to be replaced at this stage.

IV.

The majority's self-imposed restriction on judicial authority to remedy illegal gerrymandering is especially concerning coming as it does on the heels of the United States Supreme Court's parallel abdication of that power. Although the Supreme Court has long

had "a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions," it has in more recent years begun to disavow federal judicial review of partisan gerrymandering claims (*Rucho*, 588 US at ___, 139 S Ct at 2523 [Kagan, J. dissenting]). Instead, the Supreme Court has held that it is up to the states to curtail partisan gerrymandering through "state statutes and state constitutions" (*Rucho*, 588 US at ___, 139 S Ct at 2507) and that, while redistricting may traditionally be a legislative function, *state courts* are the appropriate tribunals to hold state legislatures to compliance with state constitution redistricting requirements (*see Moore v Harper*, 600 US 1, 34 [2023]). Throughout the country, since *Rucho*, state courts have "become a primary firewall against gerrymandering as both Democrats and Republicans try to carve out maximum advantages in the maps they control" (Nick Corasaniti & Reid J. Epstein, *As Both Parties Gerrymander Furiously, State Courts Block the Way*, NY Times, Apr. 2, 2022).

Last year, for example, the Supreme Court of North Carolina upheld that Court's "solemn duty" to review the legislature's redistricting plans for constitutional conformity to protect "the constitutional rights of the people to vote on equal terms" by striking down egregious and intentional partisan gerrymanders by the Republican party, thereby ensuring that complaints of gerrymandering were not destined to "'echo into a void'" (*Harper v Hall*, 380 NC 317, 323, 868 SE2d 499, 510 [2022], quoting *Rucho*, 588 US at ___, 139 S Ct at 2507). Earlier this year, the same Court granted rehearing upon the legislature's request that the Court "revisit" its determination that "claims of partisan gerrymandering are justiciable under the state constitution" (*Harper v Hall*, 384 NC 292, 299, 886 SE2d

393, 399 [2023]). This time, the Court held "that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution" (*id.* at 300, 886 SE2d at 401). As lamented by the dissent, "[n]othing ha[d] changed since" the Court's earlier decision: "[t]he legal issues [were] the same; the evidence [was] the same; and the controlling law [was] the same" (*id.* at 423, 886 SE2d at 476 [Earls, J. dissenting]).

So too here. Despite the majority's futile attempts to distinguish *Harkenrider*, nothing has changed since we decided that case just last year. Now, as then, the Constitution authorizes judicial intervention in the redistricting process only when circumstances require that the courts remedy a violation of law. Now, as then, we are asked to remedy a constitutional deficiency in the 2022 redistricting process that was attributable to the IRC's abdication of its constitutional duty. In *Harkenrider*, we ordered a remedy for the IRC and legislature's procedural violation that was constitutionally authorized. Now, as then, the Constitution mandates that the resulting constitutionally enacted and substantively unchallenged maps remain in force until the next federal census. This time, however, politics triumphs over free and fair elections.

Order affirmed, with costs. Opinion by Chief Judge Wilson. Judges Rivera, Troutman and Renwick concur. Judge Cannataro dissents in an opinion, in which Judges Garcia and Singas concur. Judge Halligan took no part.

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Wilson's Redistricting Fumble

By John J. Faso

January 17, 2024

Last month, the New York State Court of Appeals took a giant step backwards on the matter of congressional redistricting when in the case of *Hoffman v. New York State Independent Redistricting Commission* (— NY3d —, 2023 NY Slip Op 06344 [2023]) it returned power to the legislature over this process. In doing so, the court gives the state legislature another bite at the redistricting apple and in the process eviscerated its own landmark decision last year in *Harkenrider v. Hochul* (38 NY3d 494 [2022]).

In *Harkenrider*, the court found that the legislature violated the strict procedure governing redistricting set forth by the people in 2014 when they adopted a constitutional amendment reforming that process. The court further found that legislative Democrats had engaged in illegal partisan gerrymandering when they adopted a redistricting plan with no GOP input that would have resulted in Republicans winning only four of 26 U.S. House seats.

The *Harkenrider* court also found that the only remedy to correct this illegality was a court-ordered redistricting prepared by a neutral, outside expert. That plan contained nine competitive House districts, more than in any other state. By contrast, the partisan plan enacted by the legislature contained no competitive districts whatsoever.

Chief Judge Rowan Wilson

Caught red-handed by their initial failure, national and state Democrats launched a new legal challenge in *Hoffman* (an article 78 proceeding seeking a writ of mandamus) with the astonishing contention that the court's plan was only valid for a single congressional election. They further demanded that the Independent Redistricting Commission (IRC) should submit a second congressional map to the legislature, which it had failed to do in January 2022.

Supreme Court, Albany County (Lynch, J.) denied the *Hoffman* plaintiffs' petition in September 2022, but in June of 2023, the Appellate Division, Third Department decided by a 3-2 margin that the IRC should be ordered to produce new maps (*Matter of Hoffman v. New York State Independent Redistricting Commission*, 217

AD3d 53 [3d Dept 2023]). The Third Department found that, since *Harkenrider* didn't explicitly say that its decision was for the decade, the Court of Appeals must not have intended that result. To believe that the *Harkenrider* court would have ordered preparation of a new map only for the 2022 election without explicitly saying so is fatuous. Such a result presumes the court intended the new map to self-destruct after a single election resulting in more chaos and uncertainty over the state's House districts.

A new redistricting is also contrary to the state constitution, which clearly states that the IRC only acts after the decennial census and not mid-decade unless it is to remedy a violation of law. The IRC and legislature violated the constitution in 2022. As Associate Judge Madeline Singas stated at oral argument in *Hoffman, Harkenrider* fixed such violations, but the Appellate Division and the Court of Appeals turned a blind eye to this fact.

The majority decision, authored by Chief Judge Rowan Wilson, hinged on his conclusion that the 2014 constitutional amendment limits the ability of the judiciary to remedy constitutional violations so that any plan imposed by the courts would only be valid for a single election cycle. To reach this conclusion, Wilson engages in grammatical gymnastics in interpreting Article 3, Section 4(e) of the redistricting amendment. It is instructive to examine the provision as Judge Wilson cited it in his opinion:

"The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state *except to the extent that a court is required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law. A reapportionment plan and the districts contained in such plan *shall be in force* until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless *modified pursuant to court order*" (NY Const, art III, § 4 [e] [emphasis added]).

Wilson posits a remarkable and bizarre explanation that court-ordered remedies to redistricting violations can only last for a single election, an interpretation he never bothered to raise in his extensive *Harkenrider* dissent last year.

As Associate Judge Anthony Cannataro's dissent states, the above language is intended to ensure that the IRC and the legislature follow the explicit process for how redistricting plans are to be considered within the IRC and then voted upon in the legislature. It clearly does not limit the power of the courts to remedy constitutional or legal violations, that is until Wilson's gimmicky interpretation. In the future, regardless of how outrageously the legislature violates the Constitution, the courts may only impose a time-limited remedy affording a partisan legislature ultimate control over redistricting.

Wilson's opinion also twisted itself into a constitutional pretzel over the timeliness of the mandamus action in *Hoffman*. When the IRC announced on Jan. 25, 2022, that it would not be sending a second map as required to the legislature, the four-month statute of limitations began to run.

An Article 78 proceeding seeking to compel the IRC to complete its work would have undoubtedly been timely if brought within four months after that date. Indeed, this question was discussed at oral argument in *Harkenrider* and lawyers for Democrats acknowledged this could have been done but the time for such action had lapsed. Wilson, however, determined that the clock started to run not with the IRC's refusal to act in January, but instead, after Supreme Court, Steuben County had ruled the legislative plan unconstitutional in March.

Cannataro states it plainly: "… [T]he majority decrees that the normal timeliness rules governing

mandamus proceedings simply do not apply to this case. Even where the IRC has unequivocally violated its duties, and all applicable deadlines set forth in the Constitution have passed, the majority encourages a petitioner to sit on their rights for months, while other parties timely commence and prevail in litigation over the same facts, candidates and voters wait in limbo regarding district lines, and new maps are developed and painstakingly put in place." As Cannataro aptly concludes, "this holding makes no sense."

Apparently, the court has carved out a new accrual rule for article 78 proceedings, but only if related to a redistricting action begun by Democrats. It is worth noting that the *Hoffman* plaintiffs started their case only after the competitive districting plan ordered by Supreme Court became public. Competitive districts were greeted by wailing and gnashing of teeth by Democrats distraught that their gerrymander scheme was thwarted.

Reopening the redistricting process now is contrary to a plain reading of the amendment. However, posing as a strict constructionist, Wilson, like the Appellate Division, blithely ignores the constitutional imperative that once a redistricting plan is in place—either by legislative enactment or by judicial imposition—the plan is adopted for the decade.

Wilson's interpretation is little more than a contrivance intended to overturn the central holding in *Harkenrider* without saying so and brushing aside stare decisis. Numerous commentators responded to the decision in starkly political terms, pointing out the potential opportunity for legislative Democrats to renew their gerrymandering efforts. Indeed, the dissent authored by Cannataro is unsubtle in its charge that Wilson's majority opinion means that "politics triumphs over free and fair elections".

Another irony of the holding in *Hoffman* is that the current competitive congressional map was not challenged on either federal or state constitutional or statutory grounds. As such, the best path forward for the IRC is to simply submit the existing, legal map to the legislature, which should promptly ratify it. Changes now will result in public confusion, making it more difficult for both incumbents and challengers to mount campaigns. Moreover, partisan changes will simply invite another constitutional challenge.

The intent of the 2014 amendment was to limit the power of the legislature and to end partisan gerrymandering. New York's constitution now contains the strongest state constitutional prohibitions against partisan gerrymandering, but Wilson's decision in *Hoffman* effectively nullifies these protections as the League of Women voters warned in their amicus brief.

Wilson ignored these overarching goals and instead provided a backdoor for a return to legislative business as usual in Albany. In doing so, he satiates the partisan imperatives of Democrats while ignoring the public's interest in fair elections.

Harkenrider created a national model for how a state could place real limits on partisan gerrymandering and brought the Court of Appeals new respect for its willingness to uphold the state constitution, regardless of which party controls Albany.

With his decision in *Hoffman,* Wilson has squandered the reputation of the court and cast doubt whether it can be relied upon to fairly decide difficult cases with political implications in the future.

John J. Faso *is a former member of the U.S. Congress and a former minority leader of the New York State Assembly.*

Report of the Special Master
May 20, 2022

Jonathan Cervas
Special Master

Harkenrider v. Hochul

Jonathan Cervas Short Bio

I am a postdoctoral fellow at Carnegie Mellon Univeristy in the Institute for Politics and Strategy. I have been involved in drawing maps for three federal courts in voting rights and redistricting cases. Three cases involved questions related to the Voting Rights Act and the U.S. Constitution. In *Navajo Nation v. San Juan County, UT*, D.C. No. 2:12-CV-00039-RJS (2018), the district court ruled that the election districts for school board and county commission violated the Fourteenth Amendment to the United States Constitution. After the court rejected the county's remedial map, the court retained Prof. Bernard Grofman as special master. I was employed as assistant to the special master and helped to prepare remedial maps. The court selected the illustrative maps I helped prepare for immediate use in the next election. These maps were upheld by the Tenth Circuit Court of Appeals N*avajo Nation v. San Juan County*, No.18-4005 (10th Cir. 2019). In *Bethune-Hill v. Virginia State Bd. of Elections*, 141 F. Supp. 3d 505 (ED Va. 2015) the federal court ruled that twelve of Virginia's 100 House of Delegates districts were unconstitutional gerrymanders under precedent set in *Shaw v. Reno* 509 US 630 (1993). Eventually reaching the United States Supreme Court (SCOTUS) the first time, the court remanded *Bethune-Hill v. Virginia State Board of Elections*, 580 U.S. ___ (2017). The district court then ruled eleven of the twelve districts were unconstitutional racial gerrymanders and ordered them redrawn. *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128 (2018). The district court retained Prof. Grofman as special master. I worked with Prof. Grofman as assistant to the special master. Together we created ten map modules; three in Norfolk, two in the peninsula area, three in Petersburg, and two in Richmond. The court selected module combinations that adjusted the boundaries of twenty-five districts. The case was heard for a second time on appeal to SCOTUS, who remanded on standing. *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. ___ (2019). These districts were used in the 2019 election, and because of census delays, again used in 2021. In *Wright v. Sumter County Board of Elections and Registration* (1:14-CV-42 (WLS) U.S. District Court, Middle District of Georgia (2020)), the district court ruled that Sumter County's voting districts diluted the voting power of Blacks in violation of section 2 of the Voting Rights Act. The court retained Prof. Grofman in his capacity as special master. I again served as assistant to the special master. Working with Prof. Grofman I helped craft four seven-district illustrative plans and one five-district illustrative plan. The court choose one of the plans I helped to prepare. Defendants appealed to the eleventh circuit court, who reviewed the entire record and found the district court did not err in concluding a section 2 violation and that the special master "expressly found an easily achievable remedy available". *Wright v. Sumter County Board of Elections and Registration*, No. 15-13628 at 45 (11th Cir. 2020). In July of 2021, I entered into contract with the Pennsyvlania Legislative Reapportionment Commission to provide consulting work relating to the creation of the PA state House of Representatives and PA Senate districts to be used during elections held between 2022 and 2030. This work involved numerous aspects of the reapportionment process, not limited to map drawing. The maps drafted by the commission passed with a bi-partisan vote on February 4, 2022. The Pennsylvania Supreme Court unimously affirmed the final reapportionment plan. My work with the commission is ongoing.

1. In *Harkenrider v. Hochul* (2022), the State of New York Supreme Court ruled that the congressional and state senate plan passed by the Legislature and signed by the Governor had bypassed the Redistricting Commission and thus were not enacted through a constitutionally valid process. For the congressional plan, the Court also held that the Respondents "engaged in prohibited gerrymandering when creating the districts" (2022.03.21 [243] Harkenrider v. Hochul DECISION and ORDER at 1). The findings that there were no constitutional maps for either New York's Congressional delegation or for the New York State Senate triggered the new provision of the State Constitution that shifted the burden to state courts to specify a process for creating constitutional maps for each body. On April 18, 2022, I was asked by Judge and Acting Supreme Court Justice Patrick McAllister to serve as Special Master in preparing a remedial plan for the New York congressional delegation to be considered by the Court; after the State of New York Court of Appeals heard the case on appeal, my responsibilities were extended by Justice McAllister to include preparing a remedial plan for the state senate for the Court's consideration on April 27, 2022.

2. In proposing maps for the Court's consideration, Justice McAllister Court instructed me to fully adhere to all the provisions of the New York State Constitution, such as the strict equal population requirement for Congress and the block-on-the-border rule and town-on-the border rule for the state senate.[1] In my map making I avoided fragmenting existing political subunits such as counties and cities and I sought to draw districts that were reasonably compact. I was also instructed by the Court to draw proposed maps in a fashion that was blind to the location of incumbents and I followed that injunction. **The predominant motive of these proposed maps was to fully comply with federal and state law.** Race-based districting is strictly prohibited by the U.S. constitution, and therefore I did not use race as a preponderant criterion. Later in this Report, I discuss in more detail how I dealt with each of the many relevant provisions in the New York Constitution, including the one dealing with communities of interest.

3. The failure of the Commission to agree on lawful maps and the time consumed by subsequent litigation meant that, even after an initial postponement of the date for the primaries, the Court was operating under extremely severe time constraints. The Court provided a timetable for my work which included deadlines for submission of comments and expert witness reports to me and the Court, a deadline for the dissemination of a preliminary proposal and report, deadlines for submission of comments and expert witness reports pertaining to this preliminary proposal, and a deadline for the preparation and dissemination of a final map adopted by the Court.

4. The urgency of the tasks confronting me, the great volume of suggestions made to the Court (and previously to the Redistricting Commission), and the time pressure made it impossible for a single individual to do everything that was needful. I employed research assistants to whose work I am greatly

[1] The latter rules are found in Article III, section 4(c).

indebted (Marissa Zanfardino[2]; Jason Fierman[3], and Zachary Griggy[4]) to work under my direction. In addition, with the approval of the Court, I brought in the distinguished redistricting scholar, Bernard Grofman (University of California, Irvine), as a consultant. I had previously worked with him in other cases where Grofman had been the Special Master.[5] All decisions as to what recommendations were to be given to the Court vis-a-vis proposed remedial maps were ones made by me.

5. I did not begin my map drawing process *de novo*. There was a considerable volume of information and public comment that had been compiled by the Redistricting Commission that I was able to draw upon. In preparing my preliminary proposed maps for the Court, I (with the help of my research assistants) poured over thousands of pages of court records and testimony that was presented to the Redistricting Commission. In addition, I reviewed the several hundred submissions of testimony via email or through the court docket that came after or just before my appointment, along with several dozen complete or near complete plans directly submitted to me. While I received roughly two dozen congressional map submissions that were fully compliant with one-person, one-vote, relatively few senate maps were submitted that fully satisfied the strict block-on-border and town-on-border rules for equalizing population. Among those, several appear to build off one

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[2] Zanfardino completed her JD from New York Law School in 2022. She is currently a Legal Fellow at the New York Census and Redistricting Institute. Zanfardino graduated from Tulane University in 2019 with a bachelor's degree in Economics and Sociology. She is a lifelong New York resident, living in Massapequa, Brooklyn, and Manhattan at various stages.

[3] Fierman graduated from The George Washington University with a bachelor's degree in Political Science and Criminal Justice in 2011, and from George Mason University with an MPA in 2016. Fierman has worked as an associate at Princeton University working on issues of redistricting and as a consultant at DailyKos working on elections. Fierman grew up in Westchester, NY.

[4] Griggy is an undergraduate at the University of California, Irvine. He is expected to graduate in 2023 with a degree in Political Science and Urban Studies. He previously worked as an assistant to the Special Master and has assisted in the map-drawing process for several remedial court maps.

[5] Grofman was indispensable in drafting this report and in his consultation throughout the process of producing these maps. Grofman taught for six years at SUNY Stony Brook before he took a tenured position at the University of California, Irvine. He also spent a full academic year as a Straus Fellow at New York University Law School and two other academic quarters as a visiting scholar there. Some time ago, in two different decades, Grofman was chosen by federal courts as a senior consultant on New York redistricting (Congress and state legislature). He also once served as a consultant on New York City redistricting for a redistricting commission. Over the past seven years, Grofman's work as a Special Master or senior consultant to federal or state courts has been in southern and western states, including North Carolina (Congress), Virginia (Congress and state legislature), Georgia (local districting), and Utah (local redistricting). In the past he has been a consultant to both political parties and to minority legal groups as well as to the U.S. Department of Justice.

another. I borrowed pieces of maps as the base of both the congressional and senate map, but adopted no map in full. And I had available to me the maps enacted in 2012, along with plans proposed by the Redistricting Commission. I also benefited from hearing in person from around 30 citizens in Bath, NY on May 6, 2022. Because of these inputs, I was able to complete my task of preparing a proposed map for the Court in the time frame required. In so doing, I looked for good ideas from the many submissions by concerned citizens and groups and, to the extent feasible given the time constraints, incorporated them when they allowed for integration into a complete map drawn fully according to constitutional principles. I evaluated suggestions based on the merits of the proposal not on who (or which political party) was suggesting the change.

6. To the extent feasible given the severe time constraints, in addition to the considerable body of information previously integrated into the initial map-making process, the Court solicited further comments from the public and concerned groups on the proposed preliminary maps. After the dissemination of a map on May 16, 2022, I was pleased to receive additional extensive input from the public and concerned groups, most of which was specifically directed to the proposed maps. This feedback included over 800 e-mails and messages directed at me through social media. Additionally, I estimate that over 3,000 comments were submitted to the Court directly, pursuant to the Court's stipulation of time periods to receive suggestions for map revisions and briefs or expert witness reports.[6] My team and I read all these suggestions and they were organized and categorized by my research assistants. With respect to these comments, of necessity, the ones to which I paid the greatest attention were those which the political scientists Peter Miller and Bernard Grofman refer to as *mappable suggestions*, i.e., ones that were based on the existing map proposals and made specific suggestions for how changes could be made to improve them.[7]

7. At this stage of the map-making process my attention was focused on suggestions for changes in the proposed maps that involved the treatment of particular communities of interest. However, in a number of cases, either the submission was not sufficiently well articulated in a mappable way as to allow consideration of how its ideas it might be incorporated into the proposed maps, or submissions proposed changes that were inconsistent with changes proposed in other submissions so as to suggest a lack of public consensus on where particular communities of interest were located. Some submissions were simply infeasible to implement without ripple effects that would force dramatic changes in the maps, affect other constitutional criteria, or suggestions were infeasible in practice because of the very binding population equality constraints imposed by the New York Constitution. Also, suggestions to reconfigure the map to benefit the reelection chances of a particular party or incumbent or to unpair particular incumbents were disregarded as inappropriate in a map drawing process entirely based on the good government strictures embedded in the Redistricting Amendment to the New

[6] I want to extend a debt of gratitude to the Court staff, especially Brenda Wise, for receiving and promptly posting submissions to the court docket.

[7] Miller, Peter, and Bernard Grofman. 2018. "Public Hearings and Congressional Redistricting: Evidence from the Western United States 2011–2012." *Election Law Journal: Rules, Politics, and Policy* 17(1): 21–38. http://www.liebertpub.com/doi/10.1089/elj.2016.0425.

York State Constitution, and the requirement that maps neither favor nor disfavor any political party or incumbent. However, as before, I evaluated suggestions based on the merits of the proposal, not on who (or which political party) was suggesting the change. In particular, if a change was advocated to unify neighborhoods or for community of interest reasons and had few or no partisan consequences and it was feasible to implement, I examined it very carefully and sometimes proposed it to the Court for adoption in the final map (see discussion of changes from the preliminary map to the final map discussed at the end of the report).

8. The preliminary maps were each accompanied by a one-page report highlighting its key features. In this Report I describe the criteria used in devising a constitutional map and review the key features of the final map adopted by the Court. At the end of this Report, I also identify some issues having to do with communities of interest that were brought to the Court's attention in multiple submissions, and discuss how those suggestions for improvement were dealt with in the final revisions to the initial proposed maps.

9. Any constitutional map requires the satisfaction of the multiple criteria laid out in the New York State Constitution that are not fully consistent with one another and that necessarily require tradeoffs. Because of this fact there cannot be a "perfect" map. The New York State Constitution does not clearly rank order criteria. Here we list them in the order given in the Constitution.[8]

9A. VOTING RIGHTS.

> "(1) When drawing district lines, the commission shall consider whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights. Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice."

In map drawing I have adhered to the instructions for treatment of minority groups laid down in the New York State constitution. I have taken the groups whose rights need be paid special attention to be the same racial and linguistic minorities that are identified by the U.S. Congress in the Voting Rights Act of 1965 and in its subsequent amendments. Other groups I consider under the category of communities of interest. In New York, the largest minority groups -- African-Americans, those of Spanish heritage, and Asian-Americans -- are almost always highly geographically concentrated. Even in a completely race blind process there will be many districts (both for Congress and especially for the State Senate) that have a large minority population,

[8] Our federal system of government places criteria found in the U.S. Constitution as highest priorities, federal law next, and then provisions of the state constitution and state law.

and these demographic and geographic realities are fully reflected in the maps that I drew for the Court. I did not use race as a preponderant criterion. As indicated earlier, the standard good government criteria laid down in the New York State Constitution were the dominant considerations in my map-making.[9]

9B. EQUAL POPULATION.

> "(2) To the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants. For each district that deviates from this requirement, the commission shall provide a specific public explanation as to why such deviation exists."
>
> "(6) In drawing senate districts, towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants. The requirements that senate districts not divide counties or towns, as well as the 'block-on-border' and 'town-on-border' rules, shall remain in effect."

While the language in (2) above suggests that the New York State constitutional standard for equal population is essentially the same as that in the federal constitution (as interpreted by federal courts), that is wrong. There are other more specific requirements for population equality laid down elsewhere in the NY Constitution that make it much harder to satisfy one person, one vote standards in New York than is the case in other states.

In particular, while federal case law allows for some deviations from perfect equality for Congress when there is compelling justification (with plans with a total population deviation of less than 0.75% sometimes found acceptable)

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[9] Time did not permit a full analysis of the Section 2 VRA factors. However, (a) in order to bring a Section 2 claim it must be demonstrated that an additional compact 50%+ citizen voting age district can be created (*Bartlett v. Strickland*, 556 U.S. 1, 2009), and (b) any requirement to create a 50%+ citizen voting age district can be rebutted by a showing that the challenged district also gives minorities a realistic equal opportunity to elect candidates of choice. The Court maps contain so many districts with substantial minority populations whose candidate of choice is likely to be able to win primary victories and then go on to win general elections with non-Hispanic White crossover support in districts that are very heavily Democratic in political leaning that litigants would be unlikely to be able to satisfy the *Gingles* requirement that the candidate of choice of the minority community would be expected to regularly lose in the reconfigured district. <u>It is the rights of minority communities, not the rights to office of individual candidates that are protected</u>. This view of the potential for a successful Section 2 challenge to the Court imposed remedial maps is shared by Professor Grofman. Let me reiterate, however, that race was not a preponderant motive in my line drawing; rather, the heavily minority districts I have drawn simply reflect the population concentrations visible to citizens of the state New York or to someone who has studied demographic information about the state.

the New York standard is plus or minus one-person. This is a very demanding standard, especially in New York City where precincts (and blocks) are often rather large. As a consequence, satisfying New York's congressional one person, one vote requirement can force some irregularity in a district perimeter and may limit the potential for fully incorporating particular neighborhoods or communities of interest in a single district.

Similarly, while federal case law generally allows for a total population deviation of plus or minus five percent, and relatively few states require more restricting population constraints than those laid down in federal law, and even when they do, do not require perfect population equality, the block-on-border and town-on-border rules (see (6) above) force very strict population constraints on most of the districts. For example, in New York City all of the Senate districts within NYC must essentially be identical in population.[10]

9C. CONTIGUITY.

"(3) Each district shall consist of contiguous territory."

The mathematical definition of contiguity is straightforward: "Is it possible to proceed from any part of the district to any other party of the district without leaving the district?" I have sought, however, to avoid contiguity that is only "technical," i.e., generated only at a point or only via a

[10] The block-on-border rule requires any district that includes only part of a city to have exactly the same population as every other district in that city. The 'town-on-border' rule requires population to be balanced between districts found in the same county, by ensuring that no town or city can be moved to an adjacent district which would lower the deviation between the two. These requirements are mandated by the text of the constitution and by state case law.

narrow wedge or a thin string of connecting blocks,[11] or contiguity that is not *functional contiguity*.[12]

9D. COMPACTNESS.

"(4) Each district shall be as compact in form as practicable."

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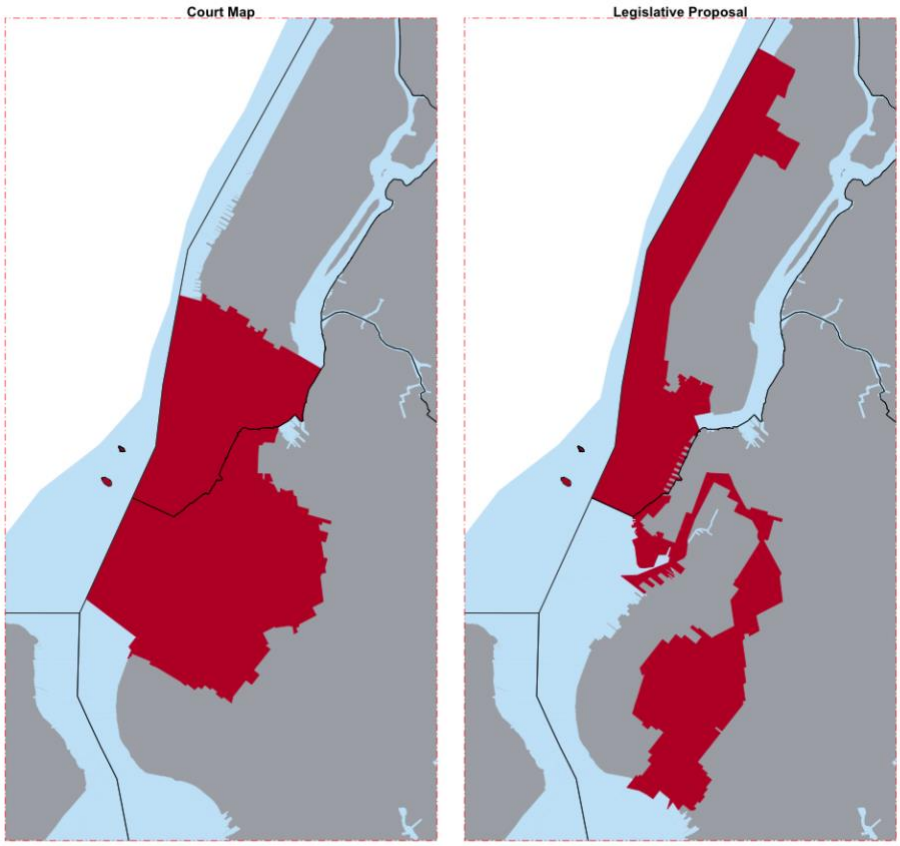
[11] For example, one of the several problems with the way in which Congressional District 10 was configured in the unconstitutional map was that it achieved contiguity only in a very ill-compact way.

District 10 in Legislative Proposal and in Court Map



[12] *Functional contiguity* is generally taken to require that there be a way to traverse the district on foot or by car that does not require using a boat (or an airplane). As I note in identifying changes in the preliminary map later in the Report, one change that the Court did make at my recommendation was to ensure functional contiguity over water in District 17. (I am indebted to Steven Dunn for calling that issue to my attention.) There are, however, some states in which contiguity by water is permitted, but I prefer to avoid that option if possible.

Standard measures of compactness are defined in terms of area or perimeter and these can be measured in various ways, but two standard measures are *Polsby-Popper* (for area) and *Reock* (for perimeter).[13] There is no dispute that the Court maps are compact on both measures, and more compact (and in the case of the congressional map, much more compact) than the maps found unconstitutional. (See summary table in section 10).

9E. COMPETITION, PARTISAN OR INCUMBENT BIAS, DISTRICT CORES, PRE-EXISTING POLITICAL SUBDIVISIONS, AND COMMUNITIES OF INTEREST

> "(5) Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. The commission shall consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest."

I discuss each of these clauses separately below.

9E1. RESPONSIVENESS AND POLITICAL COMPETITION.

Representative democracy requires elections that are free, open, and equal, with representatives ultimately accountable to the voters for their actions in office. One way in which such accountability is assured is in limiting the duration of office holding so that the will of the people is repeatedly assessed. Another way in which responsiveness is fostered is to have districts that are sufficiently competitive that they might realistically change in outcome in response to a change in voter preferences. In the U.S., since early in the Republic, elections are mediated by political parties serving as gatekeepers to organize voters for collective action. In the maps I drew for the Court's consideration, I reviewed whether those maps allowed for state-wide partisan outcomes to be responsive to changes in voter preferences by having a reasonable number of politically competitive districts.

Future election outcomes are hypothetical, and no crystal ball exists to perfectly predict elections, and political contexts change over time. Nonetheless, plausible expectations can be developed about which districts might be politically competitive in future elections by projecting past elections into the new districts. Political polarization has made outcomes more predictable and party orientation and vote choice more stable. Of course, projections can depend on which elections are incorporated into the model. I preferred data averaged from the presidential elections of 2016 and 2020. Political scientists have found that increasingly, congressional elections tend to mirror presidential ones, and even state elections are

[13] See e.g., Niemi, Richard G., Bernard Grofman, Carl Carlucci, and Thomas Hofeller. 1990. "Measuring compactness and the role of a compactness standard in a test for partisan and racial gerrymandering." Journal of Politics, 52(4):1155-1181. This essay, written from a purely academic and non-partisan point of view, has one co-author who would be regarded as a Republican expert and another who would be regarded as a Democratic expert.

increasingly affected by national forces. For comparison purposes, I also examined projections based on a composite of 6 statewide elections over the period 2016-2020(President 2016, U.S. Senate 2016, U.S. Senate 2018, Governor 2018, Attorney General 2018, President 2020). Because this set includes several rather idiosyncratic elections won overwhelmingly by the Democratic candidate, it shows projected outcomes to be more Democratic leaning that is the case for the presidential elections. Conclusions as to competition can also vary depending on exactly how a competitive district is defined. I use a definition that is standard in the political science literature: an average (of past recent elections) with a two-party vote share between 45% and 55%. Both the congressional and state senate maps have a substantial number of competitive seats (far more than in the unconstitutional maps) and are going to be responsive to the public will. Exact comparisons are provided in the Table in numbered section 10 of this Report and in the one page summary document released simultaneously with the new map and this Report.

9E2 PARTISAN OR INCUMBENT BIAS

Neither the proposed maps nor the final maps adopted by the Court were "drawn … for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." (emphasis added) This statement cannot be a matter of dispute. I served the Court as a non-partisan expert. These maps were drawn blind to the homes of incumbents, using the good government criteria set down in the New York State Constitution.

Most of the attention has been devoted to the congressional map. As far as I can judge, the issues raised vis-a-vis the Senate map almost all have to do with the configuration of particular districts in terms of communities, so I will only focus on the congressional map with respect to partisanship. The Petitioners claim that the congressional plan does not give Republicans enough districts, while Respondents complain that the map does not allow them to keep the expected gains in congressional seats given to them by the map found unconstitutional, and incumbents complain about reconfiguring of their districts or about pairings.

There are many metrics that can be used to evaluate partisan neutrality. Most of these indicators show a slight Republican bias to the Court's congressional map, although a few show a pro-Democratic bias, and some essentially no statistically significant bias at all. Since this Report is not a Ph.D. dissertation, I will not try to explicate why measures for partisan gerrymandering such as *seats bias*, *votes bias*, *declination*, the *efficiency gap*, the *mean minus median gap*, and various results based on ensembles using particular instructions to a computer using a limited set of criteria and parameters that give specific weight to each criteria and can not reach the threshold levels of population equality to be completely unbiased do not give the exact same answers. Suffice it to note that some of these metrics can be unreliable in a state like New York where one party is dominant[14]; they work best in states in evaluating gerrymandering in states that are competitive at the state-wide level.

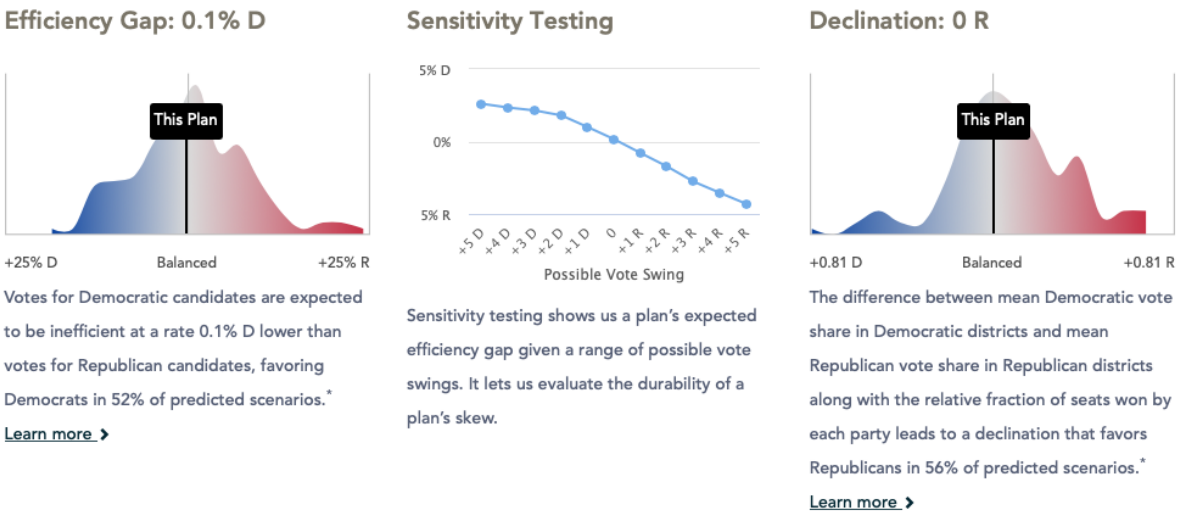
[14] Nagle, John F., and Alec Ramsay. 2021. "On Measuring Two-Party Partisan Bias in Unbalanced States." Election Law Journal: Rules, Politics, and Policy 20(1): 116–38. https://www.liebertpub.com/doi/10.1089/elj.2020.0674.

To the extent that we find pro-Republican bias in New York even in maps drawn by Democrats, Democratic voting strength is inefficiently distributed largely because of highly concentrated Democratic voting strength in almost all of New York City – that is, Democrats can be expected to win around 90% of the votes in districts centered in New York City, but the most overwhelmingly Republican districts will only reach around 60%. Common sense tells us that this lopsided difference will necessarily penalize Democrats in their translations of votes into seats.

The average Democratic congressional winner projected in the Court map (based on past presidential elections averaged in 2016 and 2020) are expected to win with 70% of the vote and the average Republican winner projected to win with only 56% of the vote. But it is equally clear that this is an overwhelmingly Democratic leaning state in terms of recent statewide elections (Democratic presidential candidates average 61.75% of the statewide Democratic vote, compared with 38.25% Republican vote); accordingly, non-dilutive treatment of the two parties argues that this fact should be reflected in the congressional and legislative maps. The second simple point I would make is that the maps I proposed have a substantial proportion of competitive seats. In a good year for Republicans, the Republicans can pick up seats; in a more typical Democratic year, it is likely that seats will remain in the hands of the incumbent party in the district, though now, because of an eliminated upstate district, there is one less congressional district being held by a Republican.

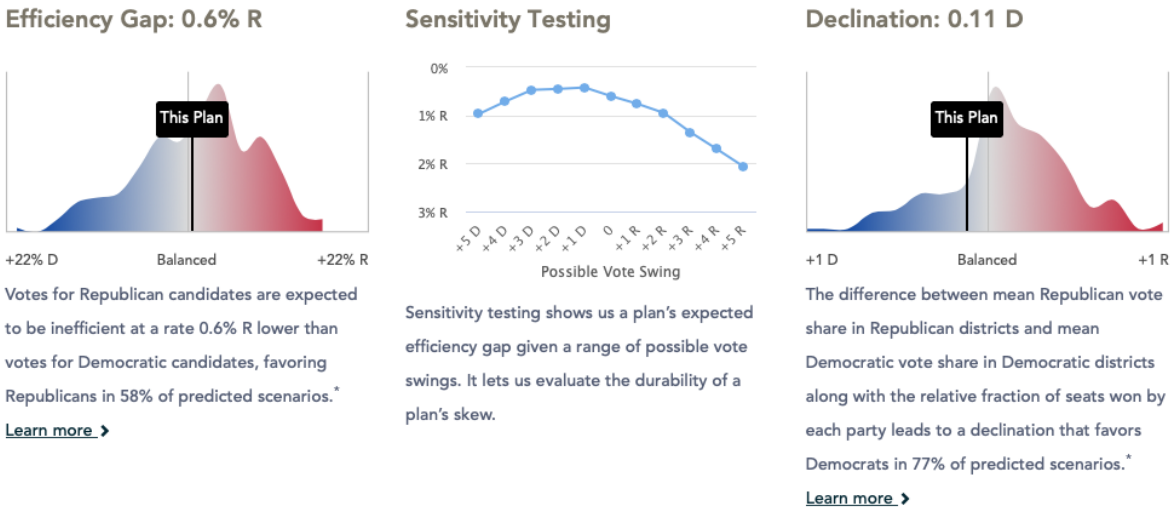
I show below the *Plan Score* evaluations of the final congressional map and the final Senate map (Results for the preliminary maps are essentially identical.) *Plan Score* is a project of the Campaign Legal Center, a nonpartisan organization, whose stated goal is to advance democracy though law.

Congress:



View PlanScore here:
https://planscore.campaignlegal.org/plan.html?20220520T183242.680480746Z

Senate:



View PlanScore here:
https://planscore.campaignlegal.org/plan.html?20220521T024453.892105205Z

The Plan Score evaluations find the final Court maps to be almost perfectly politically neutral for both the congressional and the state senate plans.

9E3 CORES OF EXISTING DISTRICTS.

After the 2020 census, state specific shifts in relative population share meant that New York lost one of its congressional districts. Moreover, the regional distribution of population within the State of New York has changed, with upstate losing population relative to downstate – requiring a shift that is roughly the equivalent of one full congressional seat. As a consequence, direct comparisons between the 2012 congressional map and any 2022 proposed congressional maps can be quite misleading.

Similarly, loss of population upstate relative to downstate led to a loss of two Senate seats upstate. As a consequence, direct comparisons between the 2012 State Senate map and any proposed 2022 State Senate maps can also be quite misleading. Moreover, the 2012 State Senate map was drawn with partisan goals as thus comparisons to a map satisfying the new constitutional requirements for State Senate maps can be misleading on that ground alone.

Nonetheless, despite population shifts, core retention was actually quite high. According to the analysis done by Sean Trende, congressional core retention in the preliminary congressional map was 70.9% and that percentage should not be expected to change drastically in the final map.[15] I take this

[15] See 2022.05.18 [646] Harkenrider v. Hochul - Moskowitz Aff Ex. 2 SUPPLEMENTAL REPORT OF SEAN P. TRENDE ON THE SPECIAL MASTER'S PROPOSED CONGRESSIONAL MAP May 18, 2022.) Professor Trende's map, which is tilted toward Republicans, has 73.3% core retention. At the level of individual districts, Professor Trende's map has a higher core retention in 11 districts; the proposed map has higher core retention in 9 districts; and 6 districts are ties.

to be clear evidence that despite all the changes made in the Court drawn congressional map to improve compactness and limit county and city cuts, the Court's Congressional map clearly takes core retention into consideration -- which is all that is required by the language of the New York State Constitution.

9E4 PRE-EXISTING POLITICAL SUBDIVISIONS

Very specific population equality provisions in the New York Constitution are completely inflexible and therefore were given the most weight. Among the factors listed in the New York constitution, I regard maintenance of pre-existing political subdivisions as an important consideration.

Some comments have objected to the apparent weight I gave to political subdivision boundaries. But there are what I believe to be six strong reasons why maintenance of these borders should be an important consideration in good government map-making.

First, there can be no disagreement that the constitutional amendment on redistricting was intended to limit the potential for partisan gerrymandering.

> "The People of the State of New York have spoken clearly. … [I]n the 2014 Constitutional Amendment not only did the People include language to prevent gerrymandering, but they also set forth a process to attain bipartisan redistricting maps." (2022.03.21 [243] Harkenrider v. Hochul DECISION and ORDER at 10)

(1) While maintaining pre-existing county and city borders is not a guarantee against gerrymandering, since what I (and Bernard Grofman) have called "stealth gerrymandering" i.e., plans that adhere closely with traditional redistricting criteria but nonetheless are carefully to still egregiously favor one party over another,[16] still remain possible, imposing a rule limiting county and city cuts makes it harder to gerrymander.

(2) If we treat jurisdictional boundaries as non-constraining and allow maps to wander, it becomes easy for mapmakers to make claims that they are simply preserving communities of interest as a mask for what is actually partisan or incumbency preservation gerrymandering. As I note in our discussion of the community of interest criterion below, there is a certain looseness to the concept, except when communities are defined in racial or linguistic terms. But thinking of communities of interest only in racial or linguistic terms brings me to another compelling reason to maintain county and municipal boundaries.

(3) Political subunits are *cognizable* to ordinary citizens, to use Professor Bernard Grofman's terminology, because they have a clear geographic location that is usually marked by signage, often including that on road or parkway exits, and a long-standing history. In thinking

[16] Cervas, Jonathan R., and Bernard Grofman. 2020. "Tools for Identifying Partisan Gerrymandering with an Application to Congressional Districting in Pennsylvania." *Political Geography* 76: 102069.

about what is where, political subunits are a natural way to demarcate space.[17]

(4) Prioritizing respect for fixed and known boundaries immediately renders highly implausible any claim that race was a preponderant motive in the way in which maps were drawn, and thus limits the potential for a constitutional challenge to a map under the *Shaw v. Reno* (509 U.S. 630, 1993) constitutionally rooted prohibition of "race serving as a preponderant motive" in the line drawing process.

(5) Units, such as cities and counties, are units of governance and thus have an inherent political relevance.

(6) Relatedly, units such as cities and counties are also cognizable communities and can readily be viewed as themselves communities of interest in that residents of such units have interests in common.

Of course, given strict 'one-person, one-vote' requirements in both the congressional and senate maps, some political subdivisions will have to be divided. Nonetheless in the congressional map I have sought to limit the number of county splits to near to N-1, where N is the number of constituencies.[18] Similarly, in the Senate map I have sought to limit the number of municipality splits to no more than one per district. But, given the geography and the size of the different cities, completely eliminating all municipality splits is simply impossible.

9E5 COMMUNITIES OF INTEREST

Communities of interests are notoriously difficult to precisely define.[19] Even within a specific minority community there may be issues of what are the boundaries of particular neighborhoods and which neighborhoods most appropriately belong together. In reading through testimony submitted to the IRC or to the special master about communities of interest, some testimony has been contradictory, and the same tends to be true in other jurisdictions with which I am familiar. Also, while there are certainly historic communities, community definitions can be constantly evolving, especially as the racial or ethnic population of neighborhoods changes. Since communities of interest are often smaller than a single Congressional district or even a State Senate district, some combining of communities of interest will be

[17] Chen, Sandra J. et al. 2022. "Turning Communities Of Interest Into A Rigorous Standard For Fair Districting." *Stanford Journal of Civil Rights and Civil Liberties* 18: 101–89, provides a brief discussion of the idea of cognizability.

[18] It can be shown mathematically that N-1 is the lowest mathematically feasible number of splits except where there are whole counties or cities or aggregates of cities and counties that exactly meet population requirements. This result has been shown by Professor Grofman and demonstrated in a mathematically elegant fashion by Professor John Nagle (personal communication).

[19] See discussion in Chen, Sandra J. et al. 2022. "Turning Communities Of Interest Into A Rigorous Standard For Fair Districting." *Stanford Journal of Civil Rights and Civil Liberties* 18: 101–89, and references therein.

necessary. Finding the appropriate communities to combine is often more art than science and there will almost never be one absolutely correct answer, especially given the other constraints that need to be satisfied for a constitutional map.

10. Below is a summary chart showing key features of the Court's final congressional map and the Court's final Senate map, with a comparison to the corresponding unconstitutional maps.

CONGRESS	Court Map	Legislative Proposal
Number of Counties Split	**16**	34
Total Number of County Splits	**26**	56
Reock Compactness	**41**	32
Polsby-Popper Compactness	**35**	25
Competitive Districts[20]	**8**	3
For splits, lower is better. For compactness and competitive districts, higher numbers are better.		

SENATE	Special Master Proposal	Legislative Proposal

[20] As measured using the 2016/2020 Presidential election PVI on DRA; districts between 45% and 55%.

Number of Counties Split	**25**	30
Total Number of County Splits	**66**	71
Reock Compactness	**39**	35
Polsby-Popper Compactness	**34**	28
Competitive District	**12**	6

For splits, lower is better. For compactness and competitive districts, higher numbers are better.

11. CHANGES TO PROPOSED MAPS

I was very pleased to see the high level of civic engagement and interest reflected in the volume of comments this Court (and the Redistricting Commission earlier) had received, and particularly pleased with the many suggestions for improvements in the preliminary maps I prepared for the Court. And I sought to be very responsive to citizen concerns in my recommendations to the Court for the shape of the final maps. But there are several realities that must be understood that made it impossible to incorporate most of the suggestions.

First, some of those suggestions were mutually contradictory.

Second, while I was quite successful in limiting the number of counties and cities that were split, some splits are simply inevitable given the geography of the state and the population constraints, and the need to take into account other of the multiple competing criteria for redistricting identified in the state constitution that I listed earlier in this Report. I can assure you that if yours was one of these units that were split it was not because of any kind of animus but was essentially due to the mathematical necessity of splitting some units, though I have tried especially hard to limit splits of smaller units.[21]

[21] Professor Bernard Grofman has joked that there are so many different criteria that a Special Master must pay attention to that it's like being asked to simultaneously juggle things as diverse as tires, tea pots, and burning torches, with some pennies to juggle (population equality constraints) thrown in for good measure.

Third, under federal law, it is unconstitutional for race to be a preponderant motive in redistricting, and I did not do so. Some of the changes that were proposed involved moving pockets of concentrated minority populations from one district to another simply to increase minority influence without a clear justification in terms of unifying long-established geographically defined neighborhoods and communities.

Fourth, changes to a proposed map needed to be geographically feasible in terms of changes to the proposed map that reflects the spirit and rules set out in the constitution.

Fifth, perhaps, most importantly, any change has a ripple effect that can force substantial redrawing of lines. In particular, even small changes in one part of the map can force more substantial changes overall due to the strict population constraints in the New York State Constitution.

Finally, and relatedly, changes which seem desirable from the standpoint of one community of interest may have fewer desirable consequences for other communities of interest.

Nonetheless, despite the important caveats in the paragraphs above about why it was simply impossible to address all the public's concerns, I am pleased to report that I was able to incorporate into the final maps a very large proportion of the most serious and most often repeated suggestions about changes needed in the preliminary maps. Below I have sought to explain my reasons for key changes I did or did not make – often involving a hard choice between two options, each of which could be supported with good reasons. There are 28 proposed changes that had some substantial support that I reference below. Of these 28 changes, I was able to adopt in whole or in part 21.

My preliminary proposed maps were informed by testimony before the Redistricting Commission, evidence in the court record, and suggestions given directly to me prior to my drafting of a preliminary map. But I find the present round of citizen submissions of particular usefulness to me as a mapmaker, since they were directly offering what they believe to be improving changes in a map whose main features were likely to be adopted by the Court. Having a map to work from allows the public to be better informed about how their recommendations might be made compatible with concerns of other citizens and groups in a lawful map.

Several changes to the Proposed Maps have been made based on the comments of citizens and interest groups. I am thankful for the time invested by those citizens in helping me to identify areas for improvement from the Proposed map I delivered to the court on May 16, 2022. I provide in the following section reasons why some suggested changes were or were not made in the revised map.

CONGRESSIONAL MAP

NEW YORK CITY

11A. BROOKLYN - BEDFORD-STUYVESANT

In the draft congressional map, I inadvertently split the community of Bedford-Stuyvesant while trying to create compact, legally compliant districts in Brooklyn. In the final version of the map, I have placed this community in full in district 8. Bedford-Stuyvesant is now the core of district 8, as has historically been the case.

11B. BROOKLYN - CROWN HEIGHTS

In the draft congressional map, I inadvertently split the community of Crown Heights while trying to create compact, legally compliant districts in Brooklyn. In the final version of the map, I have placed this community in full in district 9. Crown Heights is now the core of district 9, as has historically been the case.

11C. SUNSET PARK, MANHATTAN CHINATOWN, RED HOOK

Several changes from the proposed map were made to Congressional District 10 to reflect numerous public comments concerning preserving communities of interest. There were many comments about maintaining the community of interest between Manhattan Chinatown, the Lower East Side, Sunset Park, and Red Hook within one congressional district. More specifically, many comments cited to the language in the federal case Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y)(per curiam), aff'd, 522 U.S. 801 (1997), which recognized that Manhattan Chinatown and Brooklyn's Sunset Park were a community of interest and should be kept together within the then 12th Congressional District. This configuration has been followed in the last two redistricting cycles. The Unity Map Coalition, APA Voice Redistricting Task Force, Common Cause New York, as well as many other members of the public, provided comments concerning the maintenance of this community of interest. There were also many comments about including Red Hook, Carroll Gardens, Gowanus, and Sunset Park within one congressional district, which is also reflected in Congressional District 10. Comments also requested to keep Park Slope with Red Hook, which was also reflected in the congressional map. While many comments addressed maintaining Red Hook, Sunset Park, and Manhattan Chinatown in Congressional District 7 with Bushwick and Williamsburg, this was not possible given the population constraints.

11D. MANHATTAN

There are clearly multiple ways in which communities on Manhattan Island are conceptualized. One conceptualization is the east side and the west side, with the focus on Central Park as a divider. Others have said that they appreciate the way my proposed map creates upper, middle, and lower Manhattan districts, which is another common way to think about NYC in spatial terms. And other observations were that Central Park is an area that, rather than being seen as a barrier, can be viewed as a green space for shared activities that unite uptown Manhattan. Moreover, the proposed uptown congressional district includes more than just areas bordering on Central Park for which the East Side versus West Side distinction may be most relevant. Furthermore, looking at Manhattan as a whole, the East Side versus West Side distinction tends to break down as we move further south. Also, even the areas of the city bordering on opposite sides of Central Park do not appear to be as strongly distinguished in terms of economic and demographic differences as they once were. Thus, while this is a hard choice, I do not find a compelling

community of interest argument for changing the configurations of Manhattan congressional districts in the proposed map.

11E. NORTH BRONX/WESTCHESTER - CO-OP CITY

There is conflicting testimony as to the appropriate portion of the Bronx that would be included in district 16. All former parts of district 16 cannot be included because of population constraints. Co-Op City, which was previously in Congressional District 16, had to be moved out of the 16th because the population loss in upstate required CD 16 to take in more population to the north. Unfortunately, even though many hundreds of citizens sent me requests for Co-Op City to be placed into the 16th CD, this is not possible given the constraints imposed by the combination of population and other criteria. I am pleased to note that Co-Op City is maintained wholly within Congressional District 14, an adjacent district that is also majority-minority in character.

11F. BROOKLYN - BENSONHURST

In the proposed congressional map, Bensonhurst was inadvertently divided between two congressional districts. Bensonhurst is now united in Congressional District 11. This reflects comments about keeping Bensonhurst whole and within Congressional District 11.

11G. BROOKLYN - BENSONHURST, BATH BEACH, NEW UTRECHT

The area of south Brooklyn was unintentionally divided in the proposed congressional map. Numerous comments were made about keeping the South Brooklyn areas of Bensonhurst, Bath Beach, and New Utrecht together in one congressional district and uniting these areas with Staten Island. I made changes to reflect these comments and now unite Bay Ridge, New Utrecht, Bensonhurst, and Bath Beach in CD 11 with Staten Island.

11H. QUEENS - BAYSIDE

Several comments related to the neighborhood of Bayside being included in Congressional District 6 instead of Congressional District 3 on the proposed map. Given population constraints, including all of Bayside in CD 6 is not possible. However, I have taken the suggestion of APA Voice and added the southern portion by making population exchanges.

LONG ISLAND

11I. LONG ISLAND COMMUNITIES

Several changes were made to Long Island districts in both the Senate and Congressional maps. Testimony by the League of Women Voters Long Island chapter, and others, suggested that splitting Long Island in a way that respects the north shore and south shore communities would be more appropriate. The congressional map now reflects that change.

11J. NASSAU/QUEENS COUNTY BORDER

Common Cause reported that there was community activist sentiment for Congressional District 5 not to cross the Nassau County border. This feature is maintained in the final congressional map.

11K. WESTBURY/NEW CASSEL

Although there were numerous comments about including Westbury and New Cassel with Hempstead within a congressional district, Westbury and New Cassel were not included in Congressional District 4 in order to maintain the district within the city line.

UPSTATE

11L. DISTRICT 17 - CONTIGUITY

Rockland County was inadvertently left discontiguous in the Proposed congressional map. The city of Greenburgh is now split in such a way that the Mario M. Cuomo Bridge connects Rockland to the rest of CD 17. I thank Steve Dunn for bringing this error to my attention.

11M. CAPITAL REGION

Congressional District 20, which is centered on the capital city of Albany, initially did not include the culturally and economically connected city of Saratoga Springs. In the final Court map, all of Saratoga County is included, along with the city of Troy in Rensselaer County. I was not able to include Amsterdam given population constraints and the requirement to consider county subdivision boundaries.

11N. ERIE COUNTY THREE WAY SPLIT

Several changes have been made to Erie County. First, objections to the additional split of Erie County have been corrected in the congressional map. Erie County now consists of parts of CD 23 and 26. CD 24 now includes the more rural parts of Niagara County. This configuration better reflects the map submissions made to me and the testimony I have received since the release of the Proposed maps.

11O. KINGSTON CITY SPLIT

Some cities are necessarily split in the process of equalizing the population between districts. The Court map minimizes the impacted cities by only splitting one city in each district (in accordance with N-1 splitting criteria laid out above, and in the preservation of political sub-divisions). The residents of Kingston were clear about the particular harm splitting their community would cause, and therefore I maintained the entirety of Kingston in the final map.

SENATE

NEW YORK CITY

11P. BROOKYLN - BENSONHURST/SUNSET PARK

In the final senate map, changes were made to reflect numerous testimony about keeping the neighborhoods of Sunset Park and Bensonhurst whole and together in one Senate District. This comment was received by APA Voice Redistricting Task Force, The Unity Map Coalition, Common Cause, as well as many other individuals. This is reflected in Senate District 17.

11Q. BROOKLYN - BAY RIDGE

Bay Ridge was unintentionally split in the proposed State Senate map. Several comments were made about keeping Bay Ridge whole within a Senate District. The Senate map changes reflect these comments and keep Bay Ridge whole and with Dyker Heights within Senate District 26.

11R. BROOKLYN - PARK SLOPE

In the proposed map, I inadvertently excluded a northern triangular portion of Park Slope from other districts that contained the Park Slope neighborhood. Given the difficulties in obtaining equal population in these highly dense areas, I was unable to unite this portion of the neighborhood.

11S. QUEENS - BAYSIDE, OAKLAND GARDENS, AUBURNDALE

Several comments related to the neighborhoods of Bayside, Oakland Gardens, and Auburdale being included in Senate District 16 instead of Senate District 11. To keep neighborhoods together, comments also reflected requests to add part of the "Hillside Corridor" to Senate District 11 instead of its inclusion in proposed Senate District 16. These comments are reflected in written submissions from APA Voice Redistricting Task Force, The Unity Map Coalition, and Common Cause. I prioritized written comments to make changes to the map to include more of Bayside, Oakland Gardens, and Auburdale into senate district 16 while including areas of what is classified as the "Hillside Corridor" into Senate District 11.

11T. QUEENS - RICHMOND HILL/OZONE PARK

Numerous comments requested the inclusion of more of Richmond Hill within Senate District 15 with Ozone Park. I changed Senate District 15 to reflect these comments. I was not, however, able to get all of South Ozone Park into Senate District 15 due to population constraints. These district changes were made in an effort to preserve neighborhood boundaries as best as possible. Unfortunately, Forest Hills is slightly split in this new configuration.

11U. QUEENS - WOODSIDE/ELMHURST

Numerous statements from APA Voice Redistricting Task Force provided support for keeping Woodside and Elmhurst together in Senate District 15. Based on this testimony, I made the decision to unite these two communities and maintain Senate District 15.

11V. NORTH BRONX/WESTCHESTER - CO-OP CITY

I was able to follow the guidance of numerous testimony regarding the North Bronx/Westchester region, proposing uniting the neighborhoods of Co-Op City, Edenwald, and Williamsbridge with Mount Vernon, Eastchester, and Wakefield in one senate district. This is now achieved in Senate District 36.

LONG ISLAND

11W. SENATE DISTRICT 4

According to Article III, Section 4(c)(1) of the New York Constitution, when drawing district lines one must "...consider whether such lines would result in the denial or abridgment of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights." Here, following the injunctions of the State Constitution to respect communities of interest (NYS Const. Art. III, Section 4(c)(5)) and to not draw districts that would result in the denial or abridgement of racial or language minority voting rights, the final map includes a district similar to one suggested by Common Cause.[22]

11X. LAKEVIEW/ROCKVILLE CENTRE

In the proposed state Senate map, Lakeview was inadvertently divided. I have made a change to keep Lakeview whole in Senate District 6. Rockville Centre is also kept whole in a senate district, as requested by public feedback to the preliminary map.

11Y. WESTBURY/NEW CASSEL

There were numerous comments about including Westbury and New Cassel with Hempstead in a district. The map was changed such that it includes this community of interest in Senate District 6.

UPSTATE

11Z. SYRACUSE/AUBURN

[22] Whether failing to create this district would be a federal Voting Rights Act violation is unclear, as federal law on whether or not the Voting Rights Act applies to combined minority groups is currently unsettled. In any case, we have relied on state law, not federal law here.

There were many requests to keep Auburn and Syracuse together in one senate district. Comments highlighted the shared interests of Cayuga County and Onondaga County. I changed the Syracuse area to reflect this and keep these two cities together within Senate District 48. Cayuga County is kept whole within Senate District 48.

11AA. UTICA/ROME

There were also numerous requests to keep the cities of Utica and Rome together in one district. This change is reflected in Senate District 53 that unites these two cities.

11AB. BUFFALO

In the proposed map, I inadvertently split the city of Buffalo to join it with the more rural area of Erie County. There were comments that the previous split between a more urban district and a more rural district did not respect neighborhood interests. The configuration has been changed to provide a clearer separation between more urban and rural populations of the county.

11AC. ROCHESTER

At least one group has questioned the split in the senate map of Rochester. However, for Senate Districts 55 and 56, the maps submitted by the Petitioners and the Respondents each had identical lines and I saw no reason to not propose that same configuration to the Court for the final map.

11AD. GREENE/COLUMBIA

I received testimony that requested to join Greene and Columbia Counties in the senate map. I have made a change in the final map to reflect this.

Speaker Biographies

Mohamed Q. Amin is an Indo-Caribbean, Queer, and Muslim immigrant, an LGBTQ+ rights activist, who calls Richmond Hill, Little Guyana in Queens home. In 2015, he turned trauma into activism by creating the Caribbean Equality Project (CEP), a community-based non-profit organization that advocates for Caribbean LGBTQ+ voices in New York City. Amin is a survivor of anti-LGBTQ+ hate violence and whose intersectional and transnational organizing is grounded in the power of storytelling and advocacy. An active member of the APA VOICE Redistricting Task Force, CEP organized town halls, press conferences and a petition drive for IRC accountability; testified at multiple redistricting hearings; and participated in efforts asking LATFOR to hold public hearings after the Independent Redistricting Commission deadlocked. Due to CEP's advocacy as part of APA VOICE Redistricting Task Force, Richmond/South Ozone Park was divided into four rather than seven assembly districts.

Besides redistricting, CEP annually registers hundreds of Indo-Caribbean citizens to vote, coordinates non-partisan candidates forums, and does door-knocking and phone banking to Get Out the Vote. CEP's civic engagement work has been cited by numerous publications, including The New York Times, CBS-New York, Queens Chronicle, City and State New York, and NY1.

Brigid Bergin is an award-winning senior reporter on WNYC and Gothamist's People and Power desk. She is committed to telling stories that help people engage with and support democracy. She is also a frequent guest host of The Brian Lehrer Show and All of It on WNYC. Brigid's reporting has covered elections, election reform, campaigns, campaign finance, redistricting at all levels of government and more. She graduated from the University at Albany and the Craig Newmark Graduate School of Journalism at CUNY.

Jonathan Cervas is a political scientist, with a focus on redistricting, electoral systems, and political geography. He is an Assistant Teaching Professor at Carnegie Mellon University. Cervas's expertise lies in the analysis and design of electoral districts, which play a crucial role in the functioning of democratic systems.

His work is particularly noted for its application of rigorous, data-driven methodologies to understand and address issues related to gerrymandering and undiluted representation. His dissertation was a quantitative analysis of the Electoral College. Cervas has been actively involved in various high-profile redistricting cases, providing expert testimony and analysis that have influenced significant legal and political outcomes.

Cervas's dedication to his field is reflected in his extensive publication record and his active participation in scholarly and public discourse. His work not only advances the academic understanding of political systems but also has a tangible impact on improving democratic practices in the United States and beyond.

Anthony W. Crowell is New York Law School's 16th Dean and President. He has served in the role since May 2012 and has taught state and local government law at NYLS since 2003. As a first-generation student and a longtime New York City public servant, he proudly reintroduced NYLS as New York's law school.

His management philosophy is rooted in his experience as a senior executive in New York City government for more than a decade, where he served as Counselor to Mayor Michael R. Bloomberg. Under his leadership, NYLS has repositioned itself as a law school for the 21st century lawyer and a leader in New

York City and State government. He was previously an Assistant Corporation Counsel in the New York City Law Department's Tax & Condemnation and Legal Counsel Divisions. In 2001, he was counsel to the city's Family Assistance Center, aiding families of 9/11 victims and directing the city's World Trade Center Death Certificate Program.

He is a leader in advancing American legal education, serving as a member of the Executive Committees of the Association of American Law Schools as well as the Board of Trustees of the Commission on Independent Colleges and Universities in New York. He is also a highly visible leader in the New York City and State legal and civic communities. He is a Commissioner on the New York City Planning Commission and serves on the Executive Committee (and was Chair for five years) of the Board of Trustees of the Brooklyn Public Library. He is a member of the Board of Directors of the Citizens Union Foundation and is a member of the New York City Bar Association's New York City Affairs Committee.

John J. Faso, served in the 115th Congress from 2017-2019 representing the 19th Congressional District in upstate New York. The district included all or part of eleven counties in the mid-Hudson Valley and Catskills regions. Faso served on the House Agriculture, Budget, and Transportation & Infrastructure Committees. He was ranked by the non-partisan Lugar Center as the 13th most bi-partisan member of the House in 2018. He was a prime sponsor of legislation, signed into law in October 2018, which cracked down on the illegal shipment of fentanyl into the US from abroad through the US Postal Service. Faso served 16 years in the New York State Assembly and was Republican leader from 1998-2002. In the Assembly, Faso was the original sponsor of legislation to create charter schools in New York. In the 25 years since charter legislation was enacted, these independently operated schools have been a resounding success offering choice and opportunity to hundreds of thousands of students. He was the GOP candidate for Governor of New York in 2006.

Since leaving Congress, Faso has worked as a business consultant, while maintaining a private law practice. Faso was spokesman for plaintiffs in the landmark 2022 case which successfully challenged the congressional and legislative redistricting before the New York State Court of Appeals. The competitive congressional districts adopted because of this case were a major factor in the election of 11 Republican U.S. House members from New York State. He also regularly publishes opinion articles on topics of the day. He is a graduate of the State University of New York at Brockport and Georgetown University Law Center. He and his wife, Mary Frances, are the parents of two adult children and reside in Kinderhook, NY.

Lucia Gomez is the Political Director of the NYC Central Labor Council, AFL-CIO, and a proud union member of LiUNA Local 78. In different government, non-profit, and labor union capacities, her life's work has been around empowering workers and their communities to take action through grassroots organizing, leadership development, and civic engagement. When she isn't running the CLC Political and Electoral operations, she enjoys analyzing Census data, drawing political maps and preparing for the next decennial census and the legislative redistricting that follows.

Lucia has a BA from Rutgers University-New Brunswick and is getting her Masters in Labor Studies at the CUNY School of Labor and Urban Studies.

David Imamura is a Westchester County Legislator and an attorney at Abrams Fensterman, LLP. Prior to his election to the Westchester County Legislature, David served as Chair of the New York State Independent Redistricting Commission. David's practice focuses on voting rights and election law, including bringing the first action ever under the New York State Voting Rights Act. David represents

District 12 in Westchester, including Ardsley, Dobbs Ferry, Edgemont, Hartsdale, Hastings, and Irvington. David is a graduate of Dartmouth College and Columbia Law School.

In terms of what needs to be changed, the New York State redistricting system is broken and lends itself to stalemate. While the NYIRC was able to reach an agreement this time, it took two lawsuits and over two years to come to a consensus. We need to reform the system and create a California style system that empowers non-political actors while minimizing the odds of stalemate or dysfunction.

Ken Jenkins currently serves as Westchester Deputy County Executive, a post to which he was appointed at the beginning of County Executive George Latimer's term in 2018. Ken was appointed to this role after serving as a co-chair of the Latimer Administration Transition Team and after facing off with County Executive Latimer in an uncontentious contest. Ken's many years of public and community involvement include service on the boards of many distinguished community groups and organizations, such as the Greyston Foundation, the United Way, the Westchester County District Attorney's Community Advisory Committee, Westchester County Crime stoppers and the Community Planning Council of Yonkers. He was President for over five years of the Yonkers Branch of the NAACP. He also has served as President of the Yonkers Community Action Program. Ken was elected to his fourth full term on the Westchester County Board of Legislators in 2015. He was first elected to the Board with 81% of the vote in a special election in March 2007 and was elected to his first full term that November. From 2010-2013, Ken served as the Board's Chairman.

As a County Legislator, Ken stood up for Democratic priorities and the needs of middle-class families—from fighting to keep child care affordable, to increasing tax relief, to protecting a woman's right to choose and preserving our environment. He has earned a reputation for effectiveness and getting results. Until May 2017, when he stepped down to focus on the campaign, Ken also served as President/CEO of the Yonkers Industrial Development Association, the mandate of which is to create job growth in Yonkers. It was a position which afforded Ken the opportunity to continue the work he cares most about: economic development, jobs and affordable housing in Westchester. Ken's many years of public and community involvement include service on the boards of many distinguished community groups and organizations, such as the Greyston Foundation, the United Way, the Westchester County District Attorney's Community Advisory Committee, Westchester County Crime stoppers and the Community Planning Council of Yonkers. He was President for over five years of the Yonkers Branch of the NAACP. He also has served as President of the Yonkers Community Action Program.

A familiar face on Cablevision News since 1998, Ken appeared regularly as the Democratic political analyst on News 12 Westchester's Newsmakers and Point/Counterpoint programs. Ken has long been active in the Democratic Party in Westchester, having served as Chairman of the Yonkers Democratic Committee and Chairman of the Black Democrats of Westchester. He also served as Secretary of the Westchester County Democratic Committee, as well as on its Executive Committee. Ken, a proud former boy scout and Senior Patrol Leader of Boy Scout Troop 32, is an alumnus of Fordham Preparatory School and Iona College, where he earned a B.S. in Computer Science and Information Systems. After a 20-year career in telecommunications, Ken continued to utilize those skills by teaching at Apple prior to serving as Deputy County Executive. Ken also holds a real estate license and was previously an Associate/Broker at ERA Insite Realty. Ken and his wife, Deborah Hudson-Jenkins, have resided in Yonkers since they were married in 1982 and have three children Alana, Jamal, and Terrell.

Laura Ladd Bierman has served as Executive Director of the State League of Women Voters since 2008. In this role, she has led advocacy efforts and educational programs on a vast array of League issues such as voting rights, youth engagement, climate change, as well as provide key services to the 42 local Leagues across the state. Laura has taken her League experience and training to practical use, serving on school boards in both Illinois and New York State. Laura has a BA in political science from Colgate University and a Masters Degree in public administration from the University of Virginia.

Ben Max is the Executive Editor and Program Director for New York Law School's Center for New York City Law. A veteran journalist, he hosts the Max Politics podcast on New York politics and policy.

Elizabeth R. OuYang is the coordinator of APA VOICE Redistricting Task Force, the largest coalition of Asian Pacific American non-for profit organizations involved in the 2020 redistricting cycle in New York with MinKwon Center for Community Action as the coalition's convenor. The successes and challenges faced by the Task Force are documented in a March 2024 report authored by OuYang, 2020 Redistricting Report, This is Where We Draw the Line.

OuYang helped to create and coordinate New York Counts 2020 with the New York Immigration Coalition, the first and largest coalition of multi-racial organizations seeking a fair and complete census count in New York. OuYang also served as a census consultant to APA VOICE Complete Count Committee and the Museum of Chinese in America. As a census trainer for APIA VOTE, a national, non-partisan civic engagement organization, OuYang conducted census training for APA communities in Florida, California, Missouri, New Mexico, Arizona, and Minnesota. With MinKwon, OuYang organized a multi-racial, adhoc citywide coalition to commemorate the 50th Anniversary of the Voting Rights Act and has sponsored numerous nonpartisan candidates forums. A civil rights attorney and civic engagement expert for more than three decades, OuYang teaches adjunct at Columbia University and New York University.

Grace Pyun is the owner of GBP Law PLLC and a trusted legal advisor with extensive experience in regulatory compliance, litigation, and public service. Prior to launching her own law firm, Pyun served as General Counsel for the New York City Districting Commission, where she provided legal guidance to a fifteen-member Commission on redrawing the city council election districts and ensuring compliance with local, state, and federal laws.

Pyun has extensive experience representing government clients in both public and private sectors. She practiced civil litigation at a women-owned litigation firm, d'Arcambal Ousley & Cuyler Burk LLP, where she served as national counsel for insurance companies and government clients, managing a portfolio of multi-state claim disputes and recovery actions. Pyun also worked as a Trial Attorney with the U.S. Department of Justice Antitrust Division, where she conducted complex criminal investigations and prosecutions, as well as the Federal Deposit Insurance Corporation, advising on and drafting banking laws.

Pyun holds a Juris Doctor from DePaul University College of Law and a Bachelor of Arts (Highest Honors) in History and English from the University of Toronto.

Steven Romalewski directs the Mapping Service at the Center for Urban Research at the CUNY Graduate Center. The Mapping Service engages with foundations, agencies, businesses, nonprofits, and CUNY researchers to use spatial analysis techniques in applied research projects, specializing in online applications providing intuitive access to powerful data sets, displayed visually through interactive maps and other formats.

After providing invaluable support to census stakeholders by mapping and analyzing 2020 Census response rates and hard-to-count communities, Romalewski and his team examined and visualized congressional and state legislative district maps nationwide to help people understand the implications of redistricting (www.redistrictingandyou.org) and created more detailed "Redistricting & You" interactive maps in 10 priority states – beginning with New York – that made it easy to compare then-current (2012-2022) districts with proposed maps submitted by redistricting officials and stakeholders. The comparison maps also displayed detailed demographic and voting data and redistricting metrics for each district (for example, see https://newyork.redistrictingandyou.org). These sites remain online so voters can see what their new district looks like, and voter engagement stakeholders can use them for outreach and education.

Cesar Z. Ruiz is an associate counsel at LatinoJustice PRLDEF and works in the area of voting rights and redistricting. He was born and raised in New York, to parents who migrated from Puerto Rico. Cesar got his B.A from John Jay College in 2017. He is a first-generation Juris Doctor who graduated from CUNY School of Law in 2021 and was admitted to practice law in the state of New York in 2022. Cesar leads LatinoJustice's current voting rights litigation, advocacy and community education and engagement efforts in New York and Florida.

Cesar is LatinoJustice's lead on Fossella v. Adam, New York Communities for Change v. Nassau County and Hispanic Federation v. Byrd among other projects he manages for the organization.

Esmeralda Simmons is a civil rights and human rights attorney of Caribbean American heritage whose practice focuses on racial justice for people of African Descent in New York.

She recently retired from the Center for Law and Social Justice in Brooklyn where she was the founding executive director and organizational leader for 34 years. Located in Crown Heights, the Center is a racial justice, legal advocacy and research institution at Medgar Evers College of the City University of New York.

Esmeralda currently advocates as a private attorney on voting rights and racial justice issues. She also is an appointed board member on the NYC Civilian Complaint Review Board that serves as a watchdog to misconduct by police officers of the New York Police Department.

During her illustrious career, Esmeralda served as the First Deputy Commissioner for Human Rights for New York State, and as a Civil Rights Attorney for the US Department of Education, as a New York State Assistant Attorney General, as a New York City Assistant Corporation Counsel, and, as a law clerk to a federal district court judge, the Hon. Henry Bramwell, in the Eastern District of New York. Concurrent with her employment, she has served on several major public boards in New York City and State government, including the NYC Board of Education, and as the Vice-Chair of the NYC Districting Commission. She also was a member of the NYS Nursing Home Governance Board, and the NYS Board of Regents' Low Performing Schools Task Force, amongst others.

Esmeralda strongly believes in community service and has a history of activism in progressive political movements and electoral politics. Esmeralda volunteers her skills and currently serves on the boards of directors of UPROSE, a climate justice organization; the Council of Elders for African Cultural Heritage (Dance Africa), and Little Sun People -- an outstanding African-centered early childhood education center. In the recent past, she has served on several boards of national organizations: the Applied Research Center (now "Race Forward"); Vallecitos Mountain Retreat Center; the Child Welfare Fund; and, the Poverty and Race Research Action Council (PRRAC).

Esmeralda recently completed a year-long fellowship at the Advanced Leadership Institute of Harvard University. In 1997, she was also a Revson Fellow at Columbia University in New York City. Ms. Simmons is a graduate of Hunter College, CUNY; she earned her JD at Brooklyn Law School.

Esmeralda is a deeply spiritual woman who serves as a Yoruba Lukumi priest. She resides in Bedford Stuyvesant, Brooklyn with her husband Lesly Jean-Jacques. The mother of two adult sons, she is also the grandmother of seven young adults, and the great grandmother of two toddlers.

Jerry Vattamala is the Director of the Democracy Program at the Asian American Legal Defense and Education Fund (AALDEF). Jerry has been a leader in collecting electoral data on and protecting Asian American voters, organizing AALDEF's National Asian American Exit Poll and Voter Protection Program. Jerry has also organized the Asian American community for redistricting, serving as AALDEF's lead attorney on federal and state redistricting litigations, resulting in more Asian majority and influence districts at all legislative levels. Jerry has also testified on behalf of the Asian American community before the House Judiciary Committee and the U.S. Commission on Civil Rights, and observes elections for compliance with state and federal voting laws across the country. Jerry litigates cases concerning violations of Sections 203 and 208 of the Voting Rights Act and regularly meets with Boards of Elections across the country to ensure full compliance with federal and local language assistance provisions and the Help America Vote Act. Jerry is also an Adjunct Professor of Law at New York Law School. Prior to joining AALDEF, Jerry worked as a commercial litigator at Proskauer Rose LLP. Jerry received a Bachelor of Science degree in Computer Engineering from Binghamton University and is a graduate of Hofstra University School of Law.

Ben Weinberg is the Director of Public Policy at Citizens Union. He works to advance reforms in New York City and State's election system, campaign finance laws, redistricting process, ethics oversight, and police accountability. Citizens Union has been involved in state and city redistricting reform efforts for decades and was a strong supporter of the 2014 constitutional amendment. Ben led the organization's 2022 Council redistricting program, which provided training and public education for dozens of community groups across the five boroughs. He holds a Master's in sociology from The New School.

Jeff Wice is an Adjunct Professor and Senior Fellow at New York Law School where he directs the New York Elections, Census & Redistricting Institute and teaches classes on redistricting, election law, and the census. He is now working on his sixth redistricting cycle. In past years, he served as a redistricting counsel to New York State Legislative Leaders (including five Assembly Speakers and four State Senate Democratic Leaders) and as counsel to three New York City Districting Commissions and to numerous counties and localities across New York and the nation.

During the 2000 census cycle, Professor Wice served as counsel to President Bill Clinton's members of the U.S. Census Monitoring Board. He is the co-editor/author of the National Conference of State Legislatures' 2020 Redistricting Redbook, a comprehensive handbook on the census and redistricting.

‘'City & State NY' recognized Professor Wice as one of New York's "Top 50 Over 50" in 2022 and most recently as a "New York legal trailblazer" for his efforts promoting fair representation and the census.