

Congressional Redistricting Reform in Texas

by

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Thank you to my parents for always believing in me and being so supportive throughout my studies.

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Congressional redistricting occurs across the states after every decennial census, and is typically a fiercely partisan process marked by partisan strategizing, cries of gerrymandering, and endless court battles. Single-member districts are drawn to be contiguous, equipopulous, and compliant with the Voting Rights Act; states also attempt to make compact districts, align them with political subdivisions, and maintain communities of interest. A few states seek to create competitive districts that reduce the incumbent's advantage. Redistricting law has changed markedly in the past century, beginning with the enforcement of equal population in the 1960s; since then emphasis has shifted to racial and partisan gerrymandering. One innovative technique to reduce gerrymandering is the independent redistricting commission; these commissions are reviewed for the six states who use them for congressional districts. Based on this comparative analysis, recent attempts in Texas to reform redistricting do not appear strong enough. Public input into the redistricting process should be strengthened and the current proposal to give undue influence to rural interests should be modified. But given the difficulty of enacting redistricting reform, more conservative alternatives should also be considered: a constitutional amendment prohibiting mid-decade redistricting, federal legislation on electoral procedures, and multi-member districts with proportional representation.

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Chapter 1. Principles of Redistricting

As mandated by Article I, Section 2 of the US Constitution, a population census is conducted every ten years. These updated population data are then used to reapportion seats in the House of Representatives amongst the 50 states. The total number of representatives was fixed at 435 by the Congressional Reapportionment Act of 1929, so each state is allocated the number of representatives according to its proportion of the total US population, with a minimum of one representative per state. In 2000, this resulted in one representative per 646,952 people (US Census Bureau, 2005). Exactly how these seats are allocated *within* the state then is determined by a procedure set by the state legislature. By its nature congressional redistricting, like its state legislative counterpart, is a vast natural experiment of policy differences between states and across time periods. It is at the heart of debate on the nature of American democracy, the role of incumbency and competition in congressional elections, and political apathy among the American public.

The Texas Case

In 2002, the Republican party in Texas won control of both houses of the state legislature for the first time ever and, under the direction of Tom Delay, used the opportunity to change the congressional districting lines. In part this was an attempt to improve the effectiveness of the districts after decades of gerrymandering by Texas Democrats that had resulted in a 2002 Texas congressional delegation with a two seat Democratic majority (53% of the seats compared to 47% for the Republicans). In aggregate, Texans had voted 53% for Republican candidates and 44% for Democratic candidates, lending support to Republican claims that the districts were designed to maximize Democratic victories (through packing and cracking of districts).

After a lengthy political battle in the Texas Legislature, a new congressional districting plan was passed (Plan 1374c), designed to increase the number of districts that would elect Republican representatives. One of the highly controversial aspects was that it was the second time that redistricting had occurred after the 2000 census, which is termed *mid-decade redistricting*, and its legality was debatable.

The result of the redistricting was a Republican majority in the Texas congressional delegation of 21 seats to 11 held by the Democrats. The statewide vote for Bush in 2004 was 61% compared to Kerry's 38%, which suggests that the districts had indeed become better representative of the voting population.

But the new districts were contested in court and eventually rose to the level of the Supreme Court, which ruled in *LULAC v. Perry* (June 2006) that Congressional District (CD) 23 violated the rights of Hispanics. On August 4th, 2006 a panel of federal judges passed a new districting map, Plan 1440, which modified CDs 15, 21, 23, 25, and 28, thereby invalidating earlier party primaries held in the previous versions of the districts. ¹

In this report the issue of congressional redistricting reform is evaluated against the backdrop of the recent Texas congressional redistricting, taking best practices from other states, and, ultimately, examining the potential for independent redistricting commissions to mediate the partisan influence of redistricting when it is conducted by state legislatures.

Basic concepts

The need to change congressional district configurations at regular intervals rests on four key constructs:

1. Representative government
2. Geographic representation
3. Equal representation
4. Timely updates

Representative Government

In a representative government, or Republic, the people are tasked with choosing others to act on their behalf within the political system. Only a subset of citizens will be involved in formal votes on legislation and the overall population will develop a procedure for electing those representatives.

Direct Democracy

In a direct democracy, in which every citizen has a vote in political issues, geographic representation could be thought of either as nonexistent or, alternatively, as all-encompassing. Citizens do not elect a political representative based on where they live, as each citizen is empowered to participate in an individual level in their government.

One could also argue that in a direct democracy there is all-encompassing geographic representation. If citizen participates in their government's decision-making processes they inherently are representative of their geographic location – their individual votes on issues can

reflect the interests of where they reside. Any change in the geographic distribution of citizens would instantly be reflected in their direct participation.

Geographic Representation

Political representation on the basis of geography is at the root of redistricting. For federal elections there are two units of analysis: congressional districts and senate districts. In the former each state is guaranteed a minimum of one congressional district and a theoretical maximum of 435, but in the latter case the state's permanent boundaries constitute the single district.

Alternatives to Geographic Representation

Although we might take it to be obvious that in a representative government the voters would elect representatives based on where they live, geographic representation is not a given. In fact there are many alternatives, with the main one being at-large elections.

Multi-winner Elections

In fully at-large elections the electorate is not divided into districts. Instead it votes as a whole and the voting system used will translate the votes algorithmically into a set of representatives. In its simplest form voters would be allowed to cast the same number of votes as there are open positions and the winners would be those who received the highest number of votes. This method is known as *bloc voting* and had been used in the United States prior to the 1960s malapportionment reform movement when it became prohibited by a 1967 statute, along with all other multi-member voting systems for congressional elections. The main disadvantage of multi-member districts is that they allowed majorities in large multi-member districts to elect their

desired representatives while completely disenfranchising minorities, who with single-member districts would be able to elect at least one representative. Overcoming this historical background will be a challenge.

The main alternative to a bloc voting system of at-large elections is a class of electoral systems known as proportional representation (PR), used extensively in parliamentary democracies. In contrast to winner-take-all elections, in proportional representation systems each party is awarded a percentage of seats relative to the percentage of votes won. In general, proportional representation systems seek to minimize the difference between the percentage of seats a party wins and its percentage of votes. The ways in which PR does so depends on its implementation: more popular methods include single transferable vote (STV), open or closed party-list voting, and cumulative voting. More advanced methods have also been developed based on public choice and game theoretic models, such as the schulze method, ranked pairs, and comparison of pairs of outcomes using single transferable vote (CPO-STV).

The ultimate result of these multimember voting systems is some level of shift from geographic interests to partisan or ideological interests. The role of voting systems in congressional elections will be returned to within the recommendations.

Equal Representation

Central to the theory of republican governance is the need for equality in the value of each citizen's vote. In a geography-oriented system of representation based on districts, the power of each person's vote is inversely proportional to the population of the district. In a district with a

single voter and two candidates the election will automatically be won by whomever the voter chooses; she possess 100% of the district's voting power. If a separate district in the same state contains ten voters the election winner in a two-candidate race will be determined by the candidate who receives at least six votes, so the choice of the individual voter is less significant. So if a representative, geography-based system based on equal representation is desired, differences in population across districts must be accounted for.

Timely Updates

Lastly, redistricting is founded upon the need for timely updates. If districts initially are drawn based on the census enumeration, population movements and differential growth rates will reduce the population equality of the current districts over time. These differences accumulate over the ten-year period between each census, so the '79, '89', '99, etc. elections will tend to be the least accurate in enforcing a "one person, one vote" requirement. Even more dangerous was the pre-1960s dearth of congressional redistricting at all. Numerous states engaged in little to no redistricting during the first half of the 20th century.

Eldridge Gerry

No redistricting paper is complete without a reference to the original gerrymanderer: Eldridge Gerry (pronounced as a soft "G"). In 1812, as governor of Massachusetts, he created strangely-shaped district lines to favor the Democratic Party as much as possible². The Federalist editor of the Boston Gazette allegedly shouted after seeing the proposed districts, "Salamander! Call it a Gerrymander." The periodical printed a caricature of the map on March 26, 1812 in order to emphasize the absurd shapes of the districts.³

Gerrymandering Strategy

At the basic level there are two tactics for designing districts in a way that influences the electoral outcomes: packing and cracking. These techniques can be used regardless of the targeted dimension of gerrymandering, whether it be rural vs. urban, racial minority vs. majority, or Republican vs. Democrat.

Packing is the technique where the influence of a group of voters is minimized by merging, or packing, them into a single district that will allow them to elect one representative of their choice but will reduce their electoral power in the districts from which they were removed. That is, in the district in which they are packed they will have a very high majority of votes, much more than is necessary to win the single congressional race, and therefore a high percentage of “wasted” votes, but in the other nearby districts they will have little influence and will thus allow other groups to have a greater influence. Another implication of this technique is that the packed district will tend to be uncompetitive and thus will reduce the accountability of the elected representative to their district. Competition will typically be centered on the dominant party’s primary rather than the general election due to the likely skewed party distribution within the packed district.

The complementary gerrymandering tactic is cracking, which dilutes a previously powerful grouping of voters by splitting it into multiple districts where it will be dominated by a group with a more concentrated percentage of voters. Cracking allows a majority group to win an even greater number of seats than it would otherwise be entitled to by distributing the minority group over enough districts that it has a majority in none. However, cracking is a riskier strategy than

packing because the districts into which the minority is cracked become more competitive; if a sufficient confluence of events occurs, such as a national political shift or a regional scandal, the newly distributed minority voters may be able to capitalize on the political winds and win seats in districts that were presumed to be safe.

The most effective gerrymanders combine both packing and cracking to create safe districts that maximize the electoral chances of the dominant group and minimize those of the subservient group. First, the subservient group is packed into a small number of districts with large majorities and a significant percentage of wasted voters. This creates room for maneuvering in the remaining districts, which will tend to be configured favorably to the dominant party. In areas where political geography concentrates the subservient group, the group will be cracked among several districts safe for the dominant party, thereby rendering the subservient group inefficiently distributed and limited to the few districts in which it was packed.

As an example, consider a theoretical four-district state composed of 400 voters, 200 of which typically vote for the Democratic congressional candidate and 200 for the Republican. In a perfectly competitive district plan the lines would be drawn such that 50 Republican and 50 Democratic voters were in each district. This would force candidates to adopt median voter policies and persuade some percentage of the other party's voters to cross over and vote for the candidate. The candidate would be vulnerable in subsequent reelection campaigns and would need to walk a careful line of representing the majority interest of the district in order to resist challengers.⁶

A more likely scenario is that the districts will have been gerrymandered after several rounds of redistricting such that each of the four districts is uncompetitive for practicable purposes. In a perfect incumbent protection gerrymander two districts would be composed of 100 Democratic voters each and two districts would be composed of 100 Republican voters each. Incumbents would have no realistic possibility of being defeated in a general election by the opposition party, and would only have to fend off intra-party challengers who would be at a substantial disadvantage due to the benefits of incumbency (name recognition, funding, constituent services, etc.). Each incumbent would tend to adopt median voter policies that reflect the party dominance of the district and are contribute to party polarization at the local and federal levels.

In an efficient partisan gerrymandering of this example district, either party could likely configure the districts to allow it to elect three members and force the other party into a single uncompetitive district. In the best case, which is an exaggeration of what would be possible in a real redistricting scenario, the political geography would allow the majority party to pack 100 minority voters into one district. There would be 200 majority voters and 100 minority voters to distribute among the remaining three districts. If the minority voters were cracked evenly between these districts, three uncompetitive districts could be created for the majority party: two with 67 majority voters versus 33 minority voters, and one with 66 majority voters and 34 minority voters. Given a qualified candidate the majority party would win the election in the remaining three districts by a 2-to-1 ratio. The minority party would need to win all of its voters and an additional 20% crossover vote to win the district, a fairly impractical challenge. The likely result is that the majority party would win 50% more seats due to the gerrymandering, and the minority party would win 50% fewer – clearly a significant political outcome.

One final method of gerrymandering, termed stacking, has been used in the past but is no longer viable. Stacking is the technique in which a group of single member districts is merged into a multimember district, with the intended result being that the multi-district majority will win all of the seats using a winner-take-all voting system. However, single-member congressional districts have been required by Congress since 1967, and multimember districts that intentionally reduce minority voting strength were ruled unconstitutional by the Supreme Court, so this technique is no longer an option.⁷

Redistricting Criteria

Equal population

Known as the “one person, one vote” rule, equipopulous districts contain an equal population as determined by the decennial census. Numerous measures can be used to examine the dispersion of population across districts. Ideal population is the state’s total population divided by the number of congressional seats it is apportioned – this is the target for each individual district. Deviation is the extent to which a particular district differs from the ideal population; it can be measured in absolute terms, but it is usually specified as a percentage of the ideal population. Mean deviation then averages the percentage of population deviation across all districts in the state (taking their absolute values so that positive and negative deviations do not cancel each other out). Another commonly used statistic is the population range between the most populous and least populous district, generally expressed as a percentage of the ideal population; this measure loses information by only considering the two population extremes and does not take into account the population distribution among the other districts.⁸

Contiguity

Possibly the least contentious of the redistricting criteria, contiguity means that a district is not split into multiple, unconnected areas – that is, it is not adjacent to itself. With modern redistricting software map-makers can now connect seemingly noncontiguous areas by drawing excessively small district boundaries between the two areas. This has weakened the power of the contiguity requirement to constrain gerrymandering.

Compactness

Compactness is a difficult concept to measure but in some form it measures the geographic dispersion of the district: districts with higher compactness are less dispersed, making it easier for voters to hold shared interests and be well-represented, and also reducing the cost of electoral campaigns. In fact, the academic community has proposed about thirty different standards for computing compactness. Luckily these measures fall into three main categories: area-based, perimeter-based, and population-based. Area measures compare the area of the district to that of a reference shape, such as the smallest circumscribing (or bounding) circle for the district, the convex hull of a district, or a bounding box for a district. In Chapter 3, I evaluate the compactness of Texas congressional districts using the bounding circle area method. Perimeter-based measures of compactness for a state plan often sum the perimeters of each district, or may divide the district's perimeter by its area, or its width by its height. In the lack case, a population-based measure takes into account the population distribution within the district, most commonly by using the moment of inertia concept from physics to calculate the

net dispersion of the population across the district. Although appealing on technical groups, the population moment of inertia method is too complex to gain much political momentum.⁹

Minority Protection

The protection of minority interests has become a major criteria for redistricting plans in recent decades. Based on the equal protection clause and the Voting Rights Act, it primarily entails finding geographically compact populations of minorities and creating single-member districts around these population if they are sufficiently cohesive that they can likely elect a congressional representative. This is a form a packing and hence is called racial gerrymandering.

Political Subdivisions

Respecting political subdivisions in congressional redistricting most often refers to not splitting county boundaries if possible. It tends to be more important for state legislative redistricting, because state senate districts frequently are compromised of whole state house districts. Respect for political subdivisions makes it easier for voters to participate in elections because they are grouped into the same district at multiple hierarchies. It also facilitates interaction between the different politicians, such as when a state senator represents a geographic area that exactly matches the district boundaries of five state representatives. When political subdivisions are not respected the district lines at one level of government split the district lines at another level of government; some voters will vote in the same race for one level but will end up in separate districts at a higher level of aggregation.

Maintain communities of interest

The communities of interest criterion for redistricting has not received much attention in the literature, but one of the most common understandings of it is ensuring that major cities receive appropriate district boundaries so that they are effectively represented in Congress. The Institute for Governance Studies at UC-Berkeley developed one simple method of empirically evaluating the redistricting criterion of maintaining communities of interest. Once a district plan has been generated, Census “place” data (i.e. cities) are overlaid and the number of districts into which a given place is split is tallied. The same analysis is then conducted for counties. The resulting distribution of split-counts can then be used in raw form to compare plans or can be fed into an optimization algorithm based on a weighting scheme, which would likely take into account the population of each place.¹⁰

Competitiveness and Incumbent Protection

Framed positively as “constituent-member relations,” and negatively as “competitive” or “accountable” districts, the effect on current officeholders for a given redistricting plan, procedure, policy, or proposal is the overwhelmingly pivotal factor influencing its political existence. Paradoxically, competitiveness as a redistricting criteria seems to have a direct negative correlation with the reform’s chances of passage, despite it being the one of the primary justifications of the need for redistricting reform.

Incumbency protection typically consists of making as few changes to district maps as possible, and ideally changing partisan composition in a monotonically increasing fashion. A “pareto efficient” incumbency protection plan would be one in which voters are only swapped between

districts where they would make the current officeholders safer in their general election bids.

Redistricting in favor of incumbency protection is often the case when state legislature redistrict by 2/3 vote.

Conclusion

The need for redistricting is derived from America's republican form of government combined with a reliance on single-member congressional districts. The traditional criteria used to evaluate redistricting include equal population, contiguity, compactness, protection of minority voting power, maintenance of communities of interest, and respect for political subdivisions.

Competitiveness and incumbent protection are two other criteria that are central to an understanding of current redistricting issues. Despite their steady use in media stories, legal statutes, and court opinions, these criteria are not simple to define for specifically evaluating a given map and the nuances of a particular measure used require some level of consideration.

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Chapter 2. Redistricting Law and Precedent

For the first two hundred years of the United States the Supreme Court avoided the issue of redistricting. Redistricting was perceived to be a “political thicket” without any clear guidelines and one which was best left to the legislative and executive branches, and particularly to the states themselves. In *Colegrove v. Green*, 1946, the Supreme Court remarked, “It is hostile to a democratic system to involve the judiciary in the politics of the people.”¹

In the early 1960s, the Supreme Court reversed its long-standing posture and began to assert firm responsibility over the impact of redistricting. Led by Chief Justice Earl Warren during the period of an activist judiciary seeking to extend federal protections in the civil rights era, the new redistricting trend was marked by *Baker v. Carr*, 1962, in which the Supreme Court ruled for the first time that malapportionment was justiciable. From that first step, the three major threads have been the strict establishment of equal population between congressional districts, an early expansion and more recent contraction on strengthening minority voting power, and significant discussion, but lack of firm guidelines, regarding partisan gerrymandering.

Equal Population

The first issue to be examined in contemporary redistricting law was the issue of equal population across districts. Support for this requirement was found first in Article I of the US Constitution, next in the post-Civil War constitutional amendments (especially the equal protection clause of the Fourteenth Amendment, and finally in the Voting Rights Act of 1965.

The Constitution

The Constitution set out the broad guidelines for congressional representation and avoided any details that would restrict its flexibility. Article I, Section II specified that representatives would be apportioned amongst the states “according to their respective Numbers”, be revised “within every subsequent Term of ten Years, in such Manner as they by Law direct,” and “each State shall have at least one Representative.” Apportionment of congressional representatives would thereby be based on overall population (not citizens) as determined by the decennial Census. Article I, Section IV, termed the “Elections Clause,” gave the power to determine US House and Senate election rules to “each State by the Legislature thereof,” but also reserved for Congress the right to “at any time by Law make or alter such Regulations.”^{2,3}

Baker v. Carr (1962)

The first volley in the contemporary legal fight against malapportionment began with the Supreme Court ruling in *Baker v. Carr* in which it reversed 6-2 its earlier rulings that redistricting was the sole responsibility of state legislatures and should not be taken up by the judiciary; the plaintiffs’ suit had initially been dismissed by a district court in 1959⁴. In establishing that redistricting plans were *justiciable*, or appropriate for consideration by federal courts, the Supreme Court would at last provide an avenue for action to voters who were effectively disenfranchised due to the particular district plan enacted. The floodgates for districting reform had been opened: within six months suits alleging malapportionment were filed in at least 31 states.⁵

In *Baker v. Carr*, a group of Tennessee voters brought a class action lawsuit against the state of Tennessee arguing that the current legislative districts denied them equal protection under the

Fourteenth Amendment and asking for the court to require immediate redistricting. Between the 1870s and the 1890s Tennessee legislative districts had been regularly redistricted, and in 1901 the Tennessee General Assembly passed the Tennessee Apportionment Act, which would be the last time in sixty years that Tennessee legislative districts would be reapportioned. In declaring the Tennessee Apportionment Act unconstitutional the Supreme Court foreshadowed the growing political interests coalescing around malapportionment reform and the rapid changes that would be made over the next decade.

Wesberry v. Sanders (1964)

Two years later the Supreme Court would rule in *Wesberry v. Sanders* that not only was malapportionment of congressional redistricting plans justiciable (expanding upon *Baker v. Carr's* focus on legislative districts), but also established the “one-man one-vote” doctrine of equal population amongst congressional and legislative districts.

In this case voters in a Fulton County, Georgia congressional district sued the state, asking the courts to find invalid the 1931 statute that initially created the district plans. The Fifth Congressional District, of which they were members, had a population of 823,680 based on the 1960 census, compared to an average population of 394,312 for Georgia's ten congressional districts (less than half of CD10's population).

The Supreme Court, basing its decision on Article I, Section 2 of the Constitution, ruled that “as nearly as practicable” congressional districts must be equal in population. In the next sentence, often overlooked by legal scholars, the court noted, citing earlier research by Joel Paschal, that

such a rule would automatically be followed if Representatives were elected on a state-wide basis, which was a common practice during the initial 50 years of the United States.⁶

Reynolds v. Sims (1964)

Continuing in this direction, the Supreme Court ruled 7-1 in *Reynolds v. Sims* that the equal protection clause of the Fourteenth Amendment required state legislative districts to be apportioned by population, and that any differentiation in population must be justified by a rational state interest. It also gave states more discretion in terms of population inequality for state legislative districts versus congressional districts.

Alabama's legislative districts had not been reapportioned since 1901 despite a state constitutional requirement. The particular cause of this malapportionment was a requirement in Alabama's constitution that the Senate be composed of one member from each county, which is an example of the criteria that districts respect political subdivisions. State officials justified this choice by making an analogy to the federal Senate but this argument was not accepted by the court because counties were not comparable in nature to states. However, one implication of this line of reasoning is that the structure of federal Senate representation does indeed lead to malapportionment amongst the states, intentional though it may be, foreshadowing more recent debates regarding the political inequalities created by our national bicameral system.⁷

Kirkpatrick v. Preisler (1969)

Kirkpatrick v. Preisler formalized one-person one-vote by establishing a constitutional test for population variance: they are unconstitutional where 1) a good-faith effort would have corrected

the variances and 2) there was insufficient justification of the variances based on “such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the state, the high proportion of military personnel, college students, and other nonvoters in some districts, or the political realities of legislative interplay.” Although not often mentioned, the Court also allowed for congressional district plans that take into account projected population shifts, as long as these shifts are documented and highly predictable and the policy is applied in a systematic manner.⁸

Following *Wesberry v. Sanders* Missouri had been forced to revise its congressional district lines, but the initial plan was declared unconstitutional by a federal district court. Its second plan, passed by the Missouri Legislature in 1967, contained a population difference between the most and least populous districts of 25,802 people and an average population variation of 1.6%. Missouri claimed that these differences were justified, among other reasons, by the necessities of legislative politics and for “pleasingly shaped districts”, but the Court rejected these arguments.

Karcher v. Daggett (1983)

Enforcement of the equal population criteria continued into the 80s with *Karcher v. Daggett*, where the Supreme Court again ruled in a 5-4 decision that Article I, Section 2 of the Constitution requires that congressional districts maintain population equality to the extent practicable. One simple test used by the court to examine a “good-faith effort” is if swapping of political subdivisions between contiguous districts could improve population inequality. If this is possible then the the plan is not sufficiently equal in population. The court also found that there is no *de minimis* standard at which point districts can be considered sufficiently equal per Art I.,

Sec. 2 – any deviation from perfect equality in districts must be justified by a rational state policy, otherwise legislators would merely attain the *de minimis* equality and use the remaining “wobble room” for political purposes. In particular, even the known undercount and inaccuracy of the decennial census (estimated at 1 percent), proposed by the appellants as a rational *de minimis* standard, does not excuse population inequality amongst congressional districts.⁹

New Jersey’s initial redistricting effort following the 1980 census resulted in a district map that was criticized for reducing minority voting power within the city of Newark. New Jersey had received an apportionment reduction from 15 to 14 congressional representatives and therefore at least one incumbent would lose their district. In the next session the New Jersey Legislature passed a replacement districting plan, termed the “Feldman Plan”, this time with an average population deviation of 0.14%, or 726 people, and a population range between the smallest and largest districts of 3,674 people, or 0.70% of the average district. Following the passage of the Feldman Plan, a group of individuals, including all incumbent Republican congresspeople from New Jersey, filed suit against the state, alleging that the plan violated Art I., Sec. 2. The District Court concurred, as did the Supreme Court upon appeal, and the state was enjoined against holding future elections under the Feldman Plan.

This case marked the last major ruling on the equal population requirement, which has received sufficient judicial clarification since *Wesberry* and has become increasingly easy for states to satisfy due to improvements in technology and population data.

Minority Protection

As the equal population requirement for congressional districts became firmly established in legal rulings, the issue of minority voting rights came to the forefront of lawsuits challenging redistricting plans. Judicial power to protect the voting rights of minorities was enhanced significantly with the passage of the Voting Rights Act of 1965, although in the 1990s the courts became more concerned with reverse discrimination against whites. As a result, enhancement of minority representation through intentional racial gerrymandering has become de-emphasized in recent years. States are now forced to walk a tightrope between districting plans that rely solely on race and plans that result in the dilution of minority voting power.

Gomillion v. Lightfoot (1960)

Decided prior to both *Wesberry v. Sanders* and *Baker v. Carr*, *Gomillion v. Lightfoot* set the stage for Supreme Court protection of minority voting rights through rulings on redistricting. The Court unanimously found that municipalities could not redistrict minorities out of city boundaries due to fifteenth amendment protections from depriving a citizen of his vote due to race. This set an important precedent that would later be extended to legislative and congressional gerrymandering.

The City of Tuskegee, Alabama had its boundary lines converted by a 1957 Alabama Legislature statute from a square to a complex 28-sided figure, thereby removing 98.8% of its African-American voters (no white voters were affected). A group of African-American citizens affected by this change filed suit against the city alleging discrimination in violation of the equal protection clause of the Fourteenth Amendment and the Fifteenth Amendment. Although initially dismissed by a district court on the grounds that the judiciary had no power to overrule the

districts chosen by a “duly convened and elected legislative boundary”, the Supreme Court reversed this ruling and made it clear that the legislative branches of state governments would no longer be allowed to sanction racially discriminatory districting.

Thornberg v. Gingles (1986)

Thornberg v. Gingles established a clear test for establishing if district maps or election procedures violate minority voting rights as protected by the Voting Rights Act. The Court ruled that proof of vote dilution due to an election procedure (particularly multimember districts) requires that: “(1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group must be politically cohesive, and (3) the majority must vote sufficiently as a bloc that it will usually be able, absent special circumstances such as a minority candidate running unopposed, to defeat the minority's preferred candidate.” It also created the “totality of circumstances” test for vote dilution cases, which must examine the extent of racially polarized voting, history of voting discrimination, and appeals to prejudice in political campaigns for the individual district or area in question.

Shaw v. Reno (1993)

Shaw v. Reno marked a shift of momentum in redistricting rulings when the Supreme Court ruled in a controversial 5-4 decision that racial gerrymandering was not allowable if it resulted in highly irregular districts. This made minority vote dilution concerns much more complicated, as 1982 revisions to Section 2 of the Voting Rights Act had increased the responsibility of states to protect the voting power of minorities and to draw minority districts where possible. In *Shaw v. Reno* the Court found that a redistricting plan violated the equal protection clause of the

Fourteenth Amendment when its result was so highly irregular that it could only be interpreted as racial segregation of voters. This could be the case when a “tortured municipal boundary is drawn to exclude black voters” (referring to *Gomillion v. Lightfoot*) or merely if traditional redistricting principles were disregarded, such as compactness, contiguity, and respect for political subdivisions, despite the fact that none of these principles are constitutionally required.

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After the 1990 census, in which North Carolina was apportioned an additional congressional seat, the North Carolina legislature passed a revised congressional district map which included a single district with a majority of black voters. The U.S. Attorney General, whose consent was required for preclearance under Section 5 of the Voting Rights Act, objected to the plan on the grounds that a second majority black congressional district could be drawn without requiring convoluted lines. Although North Carolina could still have sought approval from the federal district court for the District of Columbia, despite the Attorney General’s objections, the General Assembly chose to pass a revised district plan that created a second majority black district, although its lines were highly irregular. The North Carolina Republican Party and other individuals brought suit, arguing that the revised plan constituted a political gerrymander (basing their case on *Davis v. Bandemer*, which will be discussed in the next section), but their claim was dismissed and the appeal affirmed by the Supreme Court. Concurrent with those legal actions, a separate group of individuals (five residents of Durham County) sued on the basis that the plan constituted a racial gerrymander. Although the federal district court initially dismissed their suit, the Supreme Court reversed, finding that racial gerrymandering that results in highly irregular

districts without sufficient justification or consideration of traditional redistricting principles
“...bears uncomfortable resemblance to political apartheid.”¹¹

Miller v. Johnson (1995)

Continuing in the direction of reduced emphasis on minority voting rights, the Supreme Court found in *Miller v. Johnson*, again in a 5-4 ruling, that congressional redistricting plans based predominantly on race violated the equal protection clause of the Fourteenth Amendment unless a compelling state justification was given. The effect of the ruling was an increased ability for white voters to sue states that engaged in racial gerrymandering to create irregular majority-minority districts. It also resulted in states being highly constrained when dealing with minority voting rights. On the one hand they were forced to comply with the Voting Rights Act, and could have their plans rejected by the Department of Justice under Section 5 preclearance if the maps did not contain sufficient majority-minority districts. On the other hand, these majority-minority districts essentially had a lower limit on compactness – the more meandering the district lines, the more likely that the plan could be seen to violate the equal protection clause of the Fourteenth Amendment under *Miller v. Johnson* and *Shaw v. Reno*.¹²

Much as in *Shaw v. Reno*, Georgia received an additional congressional seat after the 1990 census reapportionment and used it to create a second majority black district. The Department of Justice, under Section 5 preclearance requirements of the Voting Rights Act, rejected the proposed plan, finding that a third majority-minority district could be created. The Georgia General Assembly passed a second plan, which was again rejected for lacking a third black district; finally its third plan was approved by the Department of Justice due to the inclusion of a

third majority-minority district. White voters then brought suit, alleging that the plan violated the equal protection clause of the Fourteenth Amendment, as interpreted in *Shaw v. Reno*. A district court panel agreed and the Supreme Court affirmed, holding that race was the predominant, overriding factor in the creation of the majority-minority district and that the plan was not narrowly tailored to a compelling state interest.

Georgia v. Ashcroft (2003)

In the most recent major ruling on minority voting rights, *Georgia v. Ashcroft*, the Supreme Court ruled 5-4 that reducing the percentage of minorities in a majority-minority district in order to increase minority voting strength in other districts was acceptable and would not violate the non-retrogression requirement of Section 5 of the Voting Rights Act. That is, states could pursue non-packing strategies to increase minority voting strength in a more comprehensive fashion. This ruling would inherently make enforcement of non-retrogression much more difficult as it would be unclear where to draw the line between vote dilution, which is prohibited by Section 2 of the Voting Rights Act, and an attempt to increase minority voting power by spreading their influence.

Partisan Gerrymandering

The final frontier for redistricting law in the United States is the extent to which political parties are allowed to intentionally draw congressional district lines in ways that manipulate the likelihood of partisan election outcomes. This is an area where the courts have been hesitant to assert judicial review, preferring instead to leave the matter to the legislative branch (as was done for all judicial consideration of congressional redistricting prior to the 1960s). In fact, the lack of

a manageable standard for unconstitutional political gerrymandering has created an implicit incentive for states justify seeming racial gerrymanders as actually being partisan gerrymanders; this strategy has been accepted by the judiciary as an acceptable justification.

Davis v. Bandemer (1986)

The Supreme Court first ruled that partisan gerrymandering was a justiciable claim in *Davis v. Bandemer*, which would become an unresolved issue in redistricting law over the following decades. The Court found that political gerrymandering violated the rights of members of a political party to equal protection under the Fourteenth Amendment. However, a claim of political gerrymandering would need to show that the gerrymandering resulted in the consistent prevention of a group of voters from influencing the political process, and that this lack of influence would conceivably continue in future elections.¹³

Hunt v. Cromartie (1999)

In its next major ruling on partisan gerrymandering, the Supreme Court found in *Hunt v. Cromartie* that states could justify a seemingly racial gerrymander as in truth a partisan gerrymander, and if supported this claim would refute an allegation of racial vote dilution under the Fourteenth Amendment. Blurring the lines between racial and partisan gerrymandering, this finding would significantly weaken the ability to bring suit on racial gerrymandering claims, while at the same time sanctioning partisan gerrymandering by state legislatures.¹⁴

Vieth v. Jubelirer (2004)

Eighteen short years after *Davis v. Bandemer*, the Supreme Court found in a plurality, but not majority, ruling that partisan gerrymandering was nonjusticiable. A 5-4 majority ruled that the

case's specific claim of partisan gerrymandering should be dismissed, with four members of the majority agreeing that partisan gerrymandering claims as a whole were nonjusticiable under Article I, Sections 2 and 4 of the Constitution or the equal protection clause because no manageable standards for adjudicating such claims existed and that the original standard from *Davis v. Bandemer* was unmanageable in application. This ruling would remove almost all lingering momentum from the push for judicial intervention on partisan gerrymandering.¹⁵

LULAC v. Perry (2006)

The most recent major case on partisan gerrymandering was *League of United Latin American Citizens v. Perry*, where the Supreme Court was largely able to avoid the issue of partisan gerrymandering by finding that the racial gerrymandering was obvious enough to strike down the current map based on the equal protection clause. However, the important component of *LULAC v. Perry* was the Court's refusal to prohibit mid-decade redistricting, which would allow states across the nation to redistrict throughout the decade based on the current political majority.¹⁶

Conclusion

Over the past forty years of intense judicial review of redistricting and gerrymandering, significant progress has been made in improving pre-1960s congressional district lines. Beginning with the equal population criterion, the courts were successful in articulating exacting, but achievable, standards to enforce the "one person, one vote" standard across the United States. Next, with the assistance of the Congress through the Voting Rights Act, the courts were able to remedy past and current racial discrimination and vote dilution through the creation of majority-minority districts and by striking down electoral practices that had the effect of racial

discrimination, such as certain multimember districts and party primary processes. In the 1990s the courts have cooled to the subversion of traditional redistricting principles when creating these minority opportunity districts. Partisan gerrymandering has had significant legal hurdles since it was declared justiciable in 1986, and more recent court decisions have backed away from the initial decision of justiciability. That said, the Supreme Court has predominately lamented the lack of manageable standards for evaluating and remedying partisan gerrymandering – the opportunity remains for an aggrieved party to develop and promote such standards, thereby bringing about a new era of democratic accountability through the judicial system. Until such a time, the legislative branch is likely the most effective way for reformers to address America’s nationwide malady of partisan gerrymandering of congressional districts.

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Chapter 3. The Several States

One of the unique features of the American political system is the allowance for policy experimentation amongst the several states, which is particularly helpful when analyzing the effects of different electoral system choices on political outcomes. Federal control of election policy has historically been muted, although in the past 40 years of redistricting reform the courts have been active in ensuring a base level of accountability, as the previous chapter demonstrates. Now I examine the differences in redistricting policy between the states, focusing on states with innovative or effective commission designs.

Independent redistricting commissions have full and final authority on redistricting plans in six states: Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington State. Each of these is briefly examined for the most relevant information, as is Iowa for its unique nonpartisan process. A comprehensive examination of Texas is given in the final section.

Arizona

Arizona, though alphanumerically first in the list of states with independent commissions, is the last state to adopt an independent redistricting commission. In 2000, Arizona voters approved an initiative, Proposition 106, to form an independent redistricting commission with 56% of the vote. Like most states, Arizona's elections during the 1990s were marked by a lack of competitive elections and frequent lawsuits over redistricting plans. Seeking to remedy the situation, a coalition composed of the Arizona Democratic Party, several good government groups (notably Common Cause and the League of Women voters), and a wealthy financial

backer began, and won, a campaign to establish a citizens' redistricting commission for congressional and state legislative commissions. ¹

Membership

The commission's membership procedures are innovative and somewhat complex. First, state judges on the Commission on Appellate Court Appointments select a pool for 25 candidates for the commission. Using this pool, the House and Senate majority and minority leaders each appoint one partisan member to the commission; these four members then choose the fifth member from a second, nonpartisan, pool of nominees to chair the commission. ²

Guidelines

According to the Arizona Constitution, the guidelines for the commission in crafting district maps are: compliance with the US Constitution and the Voting Rights Act, equal population, compactness, contiguity, respect for communities of interest, use of visible geographic features, respecting boundaries of political subdivisions (city and county boundaries), use of undivided census tracts, and finally competitiveness. Party registration and voting history data are excluded from the initial phase of drawing the district lines, but can be used to evaluate the commission's compliance with its guidelines; incumbent residency cannot be considered. ³

Hawaii

Membership

Hawaii's reapportionment commission is composed of nine members and it has conducted congressional redistricting since 1978. Two are selected by the president of the senate, and

another two by the speaker of the house; the minority party in each chamber also selects two commission members. Those eight members then select the ninth member, who will chair the commission, and who must be voted in by at least six members of the commission. Hawaii also has an apportionment advisory council, consisting of four appointees from each of the four island units. ⁴

Guidelines

The commission is required to abide by requirements of equal population, contiguity, and compliance with the Voting Rights Act; it also may not draw districts “to unduly favor a person or political party.” It is also charged with additional standards to be followed if practicable: compactness, use of geographic features where possible, coincidence with census tract boundaries, and maintenance of voting power for socioeconomic groups (i.e. it will try not to submerge one socioeconomic group in a district with a vast majority in another socioeconomic group). ⁵

Idaho

Membership

Created in 1994, Idaho’s commission for reapportionment is comprised of six members, one appointed by the majority by the majority and minority leaders of each chamber of the legislature, and one appointed by the chairs of the two largest political parties (based on voting in the most recent gubernatorial election). ⁶

Guidelines

Although the commission is established by constitutional amendment, the criteria for redistricting are specified by statute, allowing for greater flexibility. The criteria currently specified are: population equality, contiguity, maintaining communities of interest, compliance with federal law (i.e. the Voting Rights Act), avoidance of “oddly shaped” districts, respect for political subdivisions. The statute also specifies that counties cannot be divided in order to protect incumbents or for partisan gerrymandering.⁷

Montana

Membership

In 1984, Montana amended its constitution to create an independent, five-member redistricting commission. The majority and minority leaders of each house appoint one member each, and those four members select a fifth member to chair the commission.⁸

Criteria

No formal criteria are specified for the redistricting of congressional districts. Since 1990, Montana has only been apportioned a single congressional representative, who has thus been elected at-large, although prior to the 1990 reapportionment Montana had two seats in the house. If it is able to pick up a second representative in the 2010 reapportionment the establishment of redistricting criteria for congressional districts may become an issue.

New Jersey

Membership

New Jersey's redistricting commission is comprised of 13 members and was amended into the state constitution in 1991. Two are appointed by the minority and majority leaders of each legislative chamber, as are two each by the chairs of the two largest political parties in the state. Seven of these initial twelve members must vote to approve the thirteenth member, who serves as the independent member and chair.⁹

Guidelines

Surprisingly there are absolutely no district guidelines specified in the New Jersey Constitution for the congressional redistricting commission, although Article IV of the Constitution does specify that state legislative districts must be compact, contiguous, and marginally equal in population.

Washington State

Membership

Established in 1983 by constitutional amendment, Washington State's redistricting commission consists of five members. The majority and minority leader of the two legislative chambers each appoint one member, and those four members vote for the fifth, non-voting, member to chair the commission.¹⁰

Guidelines

The Washington State redistricting commission's established criteria are: equal population, contiguity, compactness and "convenience", respect for political subdivisions, and consideration of natural geographic or artificial barriers (i.e. roads). Unlike most other commissions, the legislature may amend the district maps it passes, but they must do so by a two-thirds vote of each chamber.¹⁰

Iowa

Although Iowa does not technically have an independent redistricting commission, it is frequently used as an example of the benefits of such a commission. Iowa has a hybrid redistricting process, nonpartisan in nature, whereby the state legislature's Legislative Services Agency (equivalent to the Texas Legislative Council) is charged with creating district maps. It is advised by a five-member commission but only when it requests input. The Iowa Legislature must approve the map submitted by a majority vote, and if it does not do so a second is submitted; these initial two maps may not be substantively amended. However, if the first two proposals fail, the third map may be fully amended by the Iowa Legislature, effectively bringing the districting process back into a partisan environment.²

Guidelines

Iowa's Legislative Services Agency is required to use four criteria when creating district maps: population equality, respect for political subdivisions, contiguity, and compactness. Compactness is measured by examining the width-height ratio of each district, where those closest to 1 are the most compact. Iowa law prohibits districts drawn to benefit a political party or incumbent, and

data on past voting trends, incumbent residency, and party registration are all prohibited from being used when designing districts. ¹¹

Texas

Looking initially to the time prior to *Baker v. Carr* (1962), Texas, like most of America, was in a state of stark malapportionment based on 1955 districts; in the period between 1921 and 1951 it had not been redistricted at all. For the Senate, districts ranged in size from 147,454 to 1,243,158 (8.4 to 1) and only 30.3% of the state's population could control a majority of seats. House districts ranged in size from 33,987 to 105,725 (3.1 to 1) and a slightly more acceptable 38.6% of the population could control a majority. Nationally, Texas was found to be the 14th most representative state at 76.7% representativeness; Massachusetts was the most representative at 91.0% and Florida was the least at 34.9%. ¹²

Current districts

The current congressional districts, as revised by federal district court in 2006 following *LULAC v. Perry*, clearly satisfy the equal population criterion. The population range between the largest and smallest district is 15 compared to an ideal district population of 651,619, or .0023%.

Using geographic information systems, I also evaluate the compactness of the current map, Plan 1440C, and compare it to Plan 1374. The smallest circumscribing circle is found for each district, and the ratio between the district's area and the circle's area is calculated. Districts that are circular in shape will score closest to one, whereas strangely shaped districts (i.e. those likely to have been gerrymandered) will tend to have much larger bounding circles than their district area suggests and will therefore score closer to zero.

Texas Congressional Districts - Plan 1374

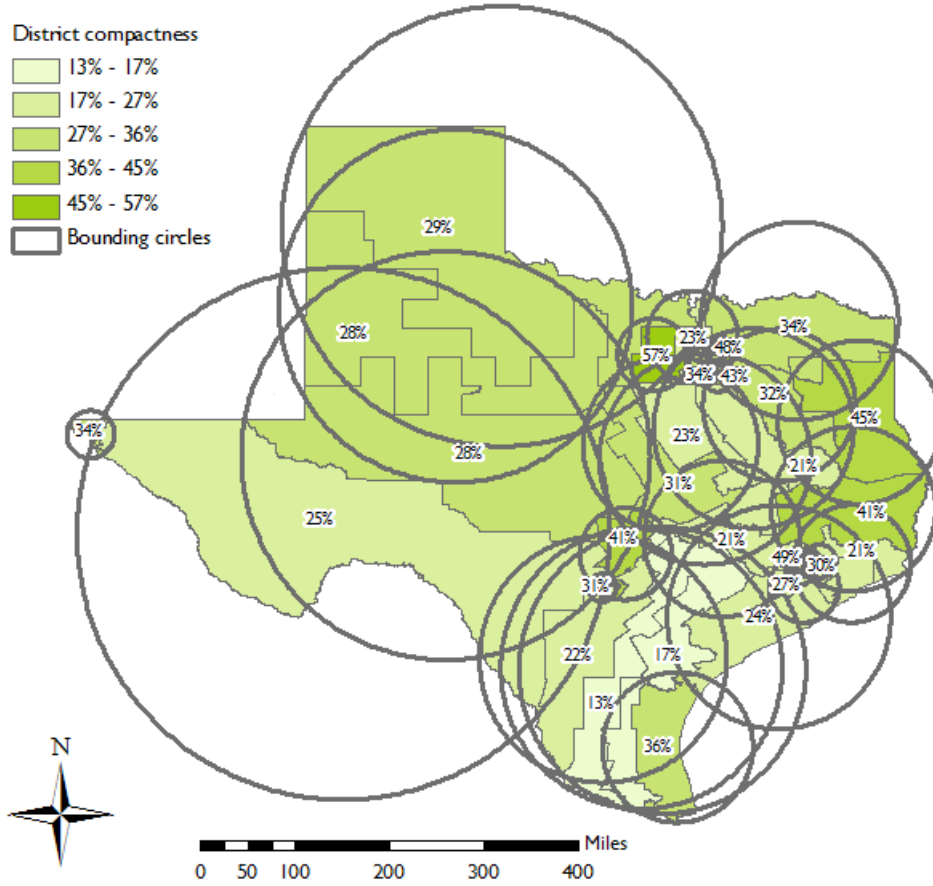


Figure 2.

Texas Congressional Districts - Plan 1440

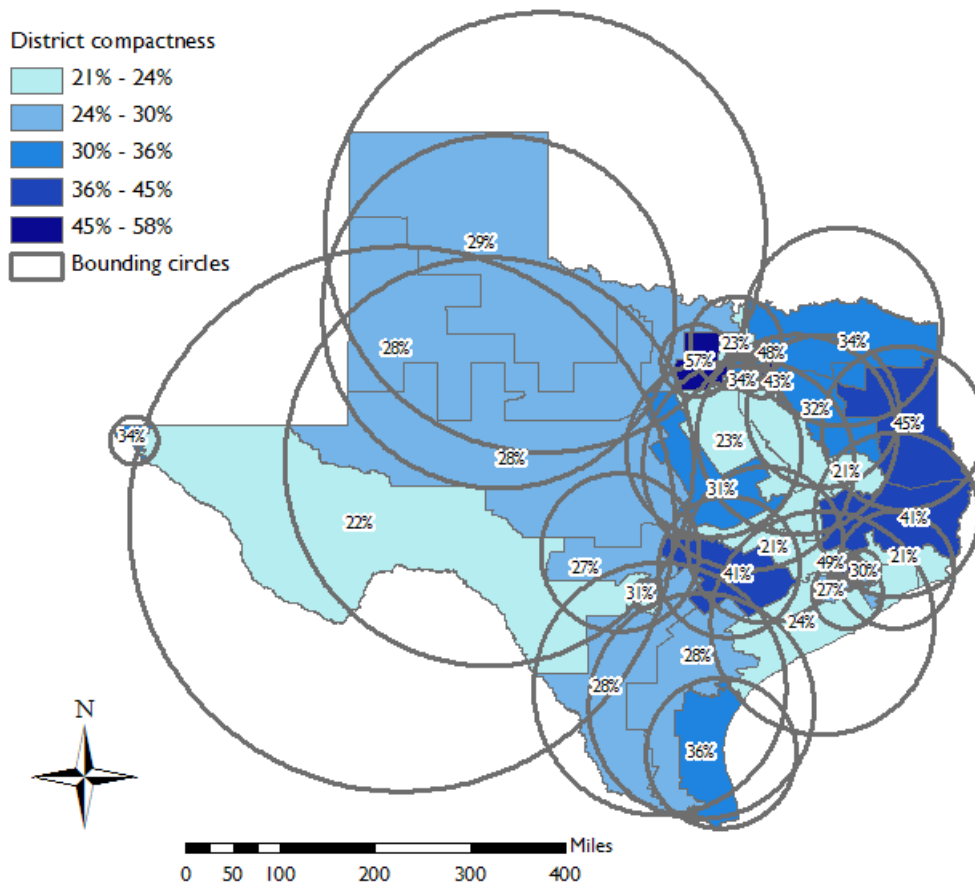


Figure 3.

Finally, I show the change in compactness for the individual districts that were modified by the courts following *LULAC v. Perry*. As can be seen in the table, the large improvement made to the compactness of CD 25, as well as the modest increase in compactness for CD 15, are responsible for the court-corrected plan increasing to a 29% average level of compactness for the changed districts, from the original 23% average compactness.

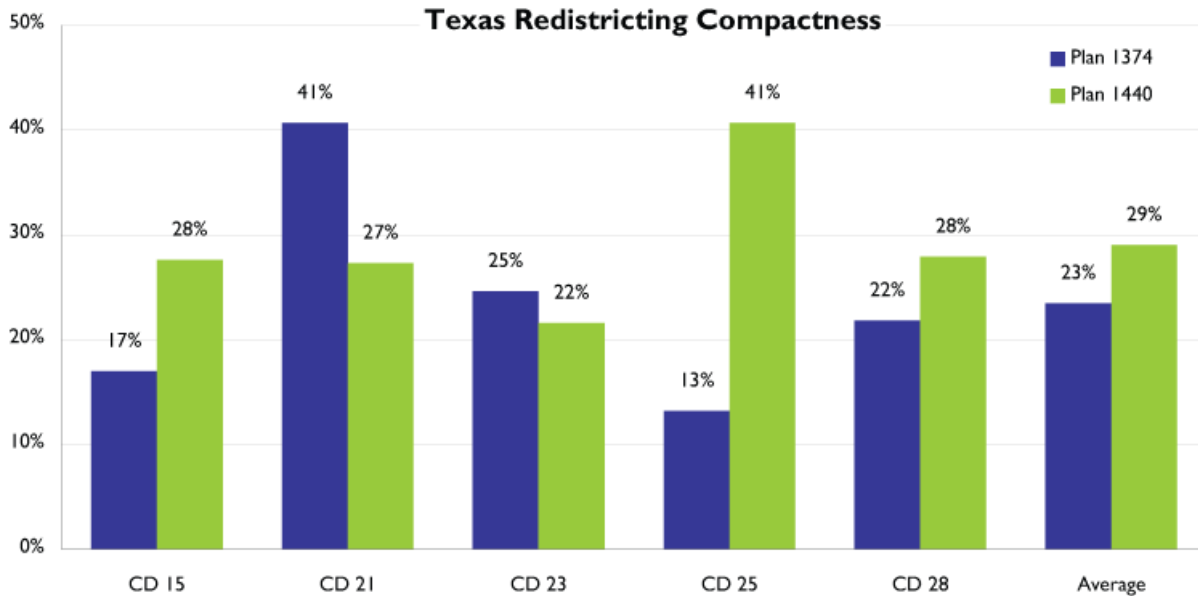


Figure 4.

Compactness is not a foolproof indicator of gerrymandering, but these results suggest that it can be used as a rule of thumb to compare similar maps for well-shaped districts. In the Texas case we can see that changes made by a federal district court to reduce racial and partisan gerrymandering were linked to an increase in compactness.

Proposed Legislation

Texas Senator Jeff Wentworth (R-San Antonio) has led the call for an independent redistricting commission for Texas. He has filed bills each session since 1993 to create an independent redistricting commission, with the results summarized in the following table.¹³

Table 1

Session	Year	Bill	Result
80th	2007	SB 1068	Passed by committee 5-4; passed by Senate 20-10.
79th	2005	SB 1404	Passed by committee 5-4; passed by Senate 18-9.
78th	2003	SB 90	Died in committee.
77th	2001	SB 147	Died in committee.
76th	1999	SB 837	Passed by committee 5-1.
75th	1997	SB 1564	Died in committee.
74th	1995	SB 1368	Died in committee.
73th	1993	SB 1024	Died in committee.

Senator Wentworth’s legislation was first passed out of committee in the 76th Session, but it was not until the 79th session that it was finally passed out of the Senate. This was clearly influenced by the redistricting conflict that occurred in the 78th session and shows the importance of timing for redistricting legislation. Also important was limiting the scope of the legislation to congressional redistricting beginning with the 79th session. Prior to that change the proposed commission also would draft state legislative and judicial district maps, which would subsume the power of the highly partisan Texas Legislative Redistricting Board, of which the lieutenant governor and speaker of the house are both members.

Senator Wentworth’s most recent legislation, SB 90 in the 80th regular session, consists of provisions similar in many respects to the redistricting commissions in other states, but the bill is noticeably more complex than the legislation used to establish commissions in other states. The proposed commission would consist of eight members, two members each appointed by a majority vote of the majority and minority parties in the House and Senate. This is a unique procedure that is similar to other states’ use of the party leaders in the state legislative bodies, but instead allows the entire party membership to vote on the appointments. Like other commissions, the ninth and final member is appointed by a majority of the initial eight members, and serves as

the non-voting chair of the commission. It specifically requires that at least one appointee each from the Texas House and Texas Senate be a rural Texan (i.e. does not reside in metropolitan statistical area) – an amendment added in the 79th session to receive the votes of rural senators.

Conclusion

The various state solutions to redistricting yield significant insight into possible implementations of independent redistricting commissions. The data from the six states with an independent congressional redistricting commission, plus Iowa, are summarized in the table below.

Table 2

	AZ	HI	ID	MT	NJ	WA	IA*
Established	2000	1978	1994	1984	1991	1983	1980
Size	5	9	6	5	13	5	n/a
Chair vote		X	X	X	X		n/a
Criteria							
Population equality	X	X	X			X	X
Contiguity	X	X	X			X	X
Compactness	X	X				X	X
Geographic features	X	X				X	
Political subdivisions	X		X			X	X
Communities of interest			X				
Competitiveness	X					X	
VRA compliance	X	X	X				
Census tracts	X	X					
Data prohibitions							
Party registration	X						X
Voting history	X						X
Incumbent residency	X						X
Gerrymandering prohibitions							
Partisan		X	X				X
Incumbent			X				X

** Iowa is included for comparison although it uses a nonpartisan agency rather than an independent commission to draw district maps.*

Although there is considerable variation in the specific policies used by these commissions, and no commission is exactly alike, certain patterns become evident. Of the commissions with

criteria specified (four of the six), population equality and contiguity are common criteria. These are largely a given due to the ease with which a contiguity requirement is implemented, and the necessity that districts be equipopulous if they are to survive legal action. Compactness is a required criterion in half of the states, plus Iowa, and as shown in the Plan 1374 v. 1440 comparison it can be used as a proxy for estimating gerrymandering. Consideration of competition, while frequently mentioned by proponents of independent redistricting commissions, is actually only used in two commissions: Arizona's and Washington's (neither of which are known for enforcing the provision). Data and gerrymandering prohibitions are also not widespread and are essentially limited only to Idaho, with Hawaii prohibiting only partisan gerrymandering.

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Chapter 4. Policy Recommendations

Several possible avenues for reform in Texas can be found from the preceding discussions on the principles of redistricting, changes to redistricting law, and examination of redistricting techniques across states. In this chapter I examine the lessons learned with particular emphasis on best practices in independent redistricting commissions, but also propose alternative reform possibilities that may be pursued. The congressional redistricting commission bill filed by Senator Wentworth in the 80th regular session, SB 1068 (Senate engrossed version), is used as the null hypothesis for a Texas independent redistricting commission.

The Independent Commission

The first major policy recommendation I consider in terms of redistricting reform is the use of independent commissions. I compare the policy choices made by Senator Wentworth's most recent independent commission proposal to the current implementations across the states.

Membership

When designing a redistricting commission the first issues to be resolved are the size, qualifications, and selection of membership. Actual independent redistricting commissions range in size from the five members for Arizona, Montana, and Washington's, to New Jersey's large thirteen member commission. Senator Wentworth's proposal has consistently recommended a nine-member commission, which is a very reasonable commission size in comparison to other states.

The use of a majority party vote to select appointees would be different from all other states, which use individual party leaders in each chamber to appoint commission members (with the exception of Arizona). Considering that no current independent commission has reported problems with appointee selection, opening the appointment to all members of a party may unnecessarily complicate and lengthen the process of establishing the commission. On the other hand, the eligibility requirements that commission members not currently, or recently, have held elective office are common in other states' commissions and are appropriate to include.

However, SB 1068's requirement that at least a quarter of the commission's members reside in a rural county is also strange when one realizes that no other state has such a provision. It prioritizes one particular constituency over all other possible constituencies and in the long run would likely prove to over represent rural interests on a Texas redistricting commission as the population continues to urbanize. Hawaii's method of establishing an advisory council to the redistricting commission is a fairer alternative. But more broadly, an effective redistricting commission should contain a provision for public hearings and input, which would eliminate the need for certain interests to receive priority on the commission membership.

Guidelines

The proposed guidelines in SB 1068 are: contiguous territory; equal population (excluding nonresident military personnel, as Washington also does); compactness and convenience; and use natural geographic barriers, artificial barriers, or political subdivision boundaries. These are the guidelines used most often in other independent redistricting commissions and uncontroversial in nature. Requiring compliance with the Voting Rights Act would likely be a

helpful addition, however, considering that Texas continues to have problems with obtaining Section 5 preclearance from the Department of Justice.

The proposal does not include any prohibitions about partisan or incumbent gerrymandering, unlike the version filed in the 79th session, which prohibited partisan gerrymandering. Nor does it contain any prohibitions against usage of data on voting history or incumbent residency. Both of these types of protections would strengthen the independence of the commission from partisan pressures and should be reconsidered for inclusion in the legislation.

Public Input

Finally, SB 1068 includes no provisions for public input, which is a mediator of partisan influences even beyond its importance as a basic principle of democracy. States often require that their redistricting commissions hold public hearings, review district proposals submitted by the public, or make their deliberations public. Senator Wentworth's proposal includes no such provisions and runs the risk of becoming a Washington State-style commission criticized for meeting "behind closed doors" and brokering "bipartisan deals." ¹

The Role of Initiatives

In general the use of state initiative procedures is an effective way to sidestep the legislative process and directly ask the state's voters to support redistricting reform. In a recent study for the American Constitution Society, Nicholas Stephanopoulos describes the circumstances and results of all twelve popular initiatives on redistricting in America, beginning with Arkansas in 1936 and ended with California and Ohio in 2005. The first six cases deal with legislative commissions,

while the second six cases include congressional redistricting commissions. The results of these initiatives are displayed in the figure below, with initiatives passed shown in bold and with their approval percentage displayed above the bar.²

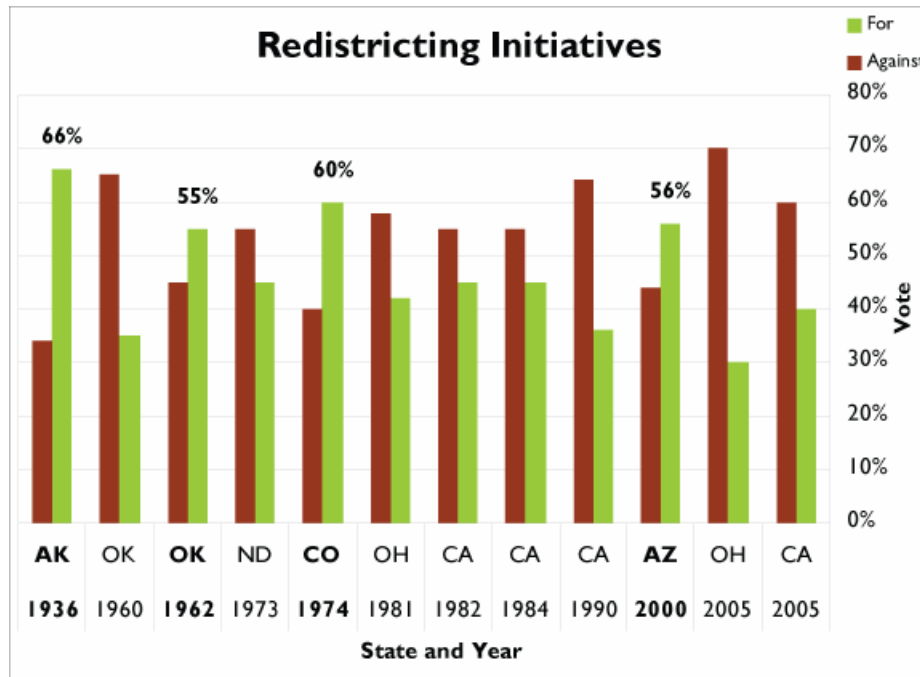


Figure 5.

Stephanopoulos concludes that the most important variable in the success or failure of a redistricting initiative is the intensity of the majority party's opposition. Given that a high percentage of the electorate voted the majority party, they will likely be influenced by an organized effort to defeat a major redistricting initiative. But if the majority party only weakly opposes the initiative, or even supports it, the initiative has a real chance of passage. Once this barrier has been overcome, priority then shifts to organizing an effective coalition, maintaining minority party cohesion, encouraging and receiving the support of major media establishments, and properly funding the initiative campaign. Currently, 24 states have an initiative process, but Texas is not one of them. If Texas continues to face major legislative barriers to an independent

redistricting commission, it may be more realistic to work towards a general initiative process for the state. Once that procedure is open to reformers in Texas, it can then be harnessed for redistricting reform.²

Experimental Redistricting Commission

The biggest problem in Texas has been the inability of any redistricting legislation to be passed out of the Texas House. This is in part due to the strong power of the majority party leadership team in the Texas Legislature, but the chances of creating an independent redistricting commission are still influenced by its popular support. One way to increase public awareness of independent redistricting commissions is for a coalition of groups to create an experimental redistricting commission, which would operate similarly to the proposed redistricting commission but would not be legally binding in any way.

For example, in 2010 after the reapportionment figures have been released a steering committee could solicit the four proposed partisan nominees from each chamber, or could devise a similar procedure from other groups (such as the state political parties) that could approximate the partisan selection procedures used in the policy proposal. These volunteers would then form a pseudo-commission that would select its non-voting chair and use readily available census and voting data, combined with standard geographic information systems software, to develop a bipartisan, efficient congressional district map just like it would if it were an official body. Hearings could be held across the state to solicit public input, or, if insufficient funds were available to finance this experimental commission, public input could be collected online for minimal cost.

Assuming that the experimental redistricting commission took its job seriously and was able to create an efficient congressional map, the fact that it is not a legally binding commission does not preclude the Texas Legislature from using its map as a neutral starting ground. Even if it chooses not to, the mere existence of a bipartisan map would create a legal incentive for the Legislature to adopt a more moderate redistricting plan, because any well-crafted redistricting plan that the Legislature reasonably had access to can be used as evidence in lawsuits challenging the validity of the official plan.

Organizing, funding, and recruiting volunteers for this experimental redistricting commission would be a Texas-sized task, but it remains a possibility, especially if a motivated coalition of reform groups were organized. It would help overcome Texas' lack of a popular referendum and the Texas House's disinterest in considering independent commissions.

Proportional Representation

As discussed in the chapter on redistricting principles, the need for redistricting is exacerbated by the use of single-member districts, which maximize the ability for the specific district lines to affect statewide election outcomes. A farther-reaching reform than independent redistricting commissions is a gradual shift from single-member congressional districts to multimember districts using a proportional representation voting system. With regards to redistricting, multimember districts have an unfortunately negative history due to their past role as a method of disenfranchising minority voters, which resulted in them being prohibited by both federal statute and court ruling. When multimember districts are combined with first-past-the-post voting

(i.e. the top X candidates win) they do indeed disenfranchise minority groups, as discussed in the section on stacking strategy. But if a proportional or semi-proportional voting system were used they would allow minority groups to receive their fair share of the congressional seats while simultaneously reducing the benefits of gerrymandering and improving upon the high percentage of wasted votes inherent to single-member districts.

Unfortunately multimember congressional districts combined with proportional representation are not well understood in America, in contrast to European democracies' extensive use of PR systems, and are more of a long-term goal than a realistic reform within the next decade. And before any state can experiment with such a reform they will require the federal statute prohibiting multimember districts to be amended to allow multimember districts when a proportional voting system is used, if not repealed entirely.

Mid-decade Redistricting

The 2003 redistricting debacle in Texas makes a constitutional prohibition against mid-decade redistricting appealing. *LULAC v. Perry* shows that the courts are not likely to stop it from occurring any time soon, and with Georgia and Texas both doing so this decade, it may become even more common following the 2010 reapportionment. Although not an completely recent phenomenon (it is known to have occurred several times in the 19th century), renewed interest in mid-decade redistricting amongst political parties has the possibility of fueling widespread redistricting conflict across states. A simple amendment to the Texas Constitution could prevent mid-decade redistricting from occurring again in Texas – HJR 31, authored by Representatives

Ritter and Naishtat in the 80th session, would do just that for congressional and legislative districts.³

Federal Legislation

An oft-overlooked avenue for redistricting reform is Congress's ability to regulate congressional elections nation-wide, due to the elections clause of the Constitution (Article I, Section 4). In conjunction with previous recommendations, federal legislation can be used to legally require states to conduct their redistricting procedures in certain ways. The general problem with such an approach is that it restricts the ability of states to adopt election practices best suited to the history, culture, population, and politics of the state, and could be seen as an encroachment upon states' rights. There simply have not been enough tests of redistricting by independent commission to know which characteristics are most effective and how to craft a national redistricting policy. Another several rounds of redistricting testing are probably needed before appropriate, high quality federal legislation can be written.

Nevertheless, the most obvious example of federal legislation is a bill requiring all states to conduct their redistricting via independent commissions if they do not already do so. A more conservative approach to federal legislation on redistricting would be a bill prohibiting redistricting more than once every decade. It is unlikely that such a bill would receive significant opposition, but at the same time it the effect on redistricting reform would be minimal as mid-decade redistricting is still extremely rare. Given the indifference of the Supreme Court to the problems with mid-decade redistricting, state and national political parties may begin to pursue

such a strategy more often, but until that happens the need for such legislation at the federal level is not clear.

Conclusion

Using the experiences and practices of other states, certain reforms to Senator Wentworth's proposed redistricting commission seem helpful. In particular, appointing members by party leaders rather than party caucuses, removing the requirement of 25% rural representation, specifying methods of public input, and adding restrictions on data and gerrymandering would all bring the proposal more in line with the independent commissions of other states. Theory and practice both suggest that these reforms would strengthen the effectiveness of a Texas congressional redistricting commission. Creating a volunteer, experimental redistricting commission that goes through the bipartisan map-making process would help persuade voters, and legislators, to work towards a true constitutional amendment.

Of course, there are other redistricting reforms other than independent commissions – because Texas has no initiative system it will be difficult to pass redistricting commission legislation. At the very least states should amend their constitutions to prevent mid-decade redistricting. Congress has power through the elections clause to pass national standards on redistricting, although it may be preferable for states to continue experimenting with election policy. But in the long-term the United States needs to consider moving from single-member congressional districts to multimember districts combined with a proportional voting system. Whatever the desired solution, current congressional redistricting methods are fundamentally broken in Texas and must be reconceived either sooner or later.

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