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Legal Sidebar

Congressional Redistricting 2021: Legal Framework

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In August 2021, the Census Bureau released the 2020 redistricting data, and based on that data, states have begun the process of congressional redistricting. Redistricting is the drawing of district boundaries within each state from which voters elect their representatives to the U.S. House of Representatives. In addition to complying with applicable state laws, congressional redistricting must comport with the U.S. Constitution and federal law, as interpreted by the Supreme Court. Since the 1960s, the Court has issued a series of rulings that have significantly shaped how congressional districts are drawn. Integrating Court precedent, this Legal Sidebar provides an overview of the legal framework that informs congressional redistricting, focusing on the population equality standard; requirements under the Voting Rights Act (VRA); standards of equal protection; and claims of unconstitutional partisan gerrymandering. The Sidebar concludes by discussing various considerations for Congress.

Population Equality Standard: One Person, One Vote

The Supreme Court has interpreted the Constitution to require that each congressional district within a state contain an approximately equal number of persons. In a 1964 ruling, *Wesberry v. Sanders*, the Supreme Court interpreted Article I, section 2 of the U.S. Constitution, which provides that Representatives be chosen "by the People of the several States" so that "as nearly as is practicable[,] one man's vote in a congressional election is to be worth as much as another's." This requirement is sometimes called the "equality standard" or the principle of one person, one vote.

In several cases since 1964, the Supreme Court has described the extent to which deviations from precise or ideal population equality among congressional districts are permissible. Precise or ideal equality is the average population that each district would contain if a state population were evenly distributed across all districts. The total population deviation or "maximum population deviation" refers to the percentage difference from the ideal population between the most and least populated districts in a state. Notably, the Court has determined that congressional districts are permitted less deviation from precise equality than state legislative districts. For example, in the 1969 case, *Kirkpatrick v. Preisler*, the Court invalidated a congressional redistricting plan with a 5.97% maximum population deviation, where the "most populous district was 3.13 percent above the mathematical ideal, and the least populous was 2.84 percent below." The Court characterized the variance as too great to comport with the "as nearly as practicable" standard

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set forth in *Wesberry,* which requires the government to "make a good faith effort to achieve precise mathematical equality." Later, in *Karcher v. Dagett*, the Court rejected a 0.6984% maximum population deviation, holding that "absolute" population equality is the standard for congressional districts unless a deviation is necessary to achieve "some legitimate state objective." According to the Court, these objectives can include "consistently applied legislative policies" such as achieving greater compactness, respecting municipal boundaries, preserving prior districts, and avoiding contests between incumbents. The Court held that the government did not provide sufficient justification for the population deviation in this case. In *Tennant v. Jefferson County Commission* the Court further honed the population equality standard, upholding a congressional district with a 0.79% maximum population deviation. According to the Court, while precise mathematical equality among congressional districts is not required, the "as nearly as practicable" standard requires states to justify any population deviation among districts with "legitimate state objectives." Emphasizing that the state's burden here is "flexible," the Court explained that it will depend on the size of the population deviation, the importance of the state's interests, how consistently the redistricting plan matches those interests, and whether alternatives exist that might substantially serve those interests while achieving greater population equality. The Court opined that none of the alternative redistricting plans that achieved greater population equality came as close to vindicating the state's legitimate objectives and therefore, upheld the 0.79% maximum population deviation between the largest and smallest congressional districts.

Section 2 of the Voting Rights Act: Applies Nationwide

Congressional district boundaries in every state are required to comply with Section 2 of the VRA, which is codified at 52 U.S.C. § 10301. Section 2 authorizes the federal government and private citizens to challenge discriminatory voting practices or procedures, including minority vote dilution, i.e., the diminishing or weakening of minority voting power. Section 2 prohibits any voting qualification or practice applied or imposed by any state or political subdivision (e.g., a city or county) that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority. This prohibition includes congressional redistricting maps. Section 2 further provides that a violation is established if, based on the totality of circumstances, electoral processes are not equally open to participation by members of a racial or language minority group in that the group's members have less opportunity than other members of the electorate to elect representatives of their choice.

Under certain circumstances, Section 2 may require the creation of one or more "majority-minority" districts in a congressional redistricting map in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority. A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid minority vote dilution by helping ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of choice.

In its landmark 1986 decision *Thornburg v. Gingles*, the Supreme Court established a three-pronged test for proving vote dilution under Section 2 of the VRA. Under this test, (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority group must be able to demonstrate that the majority group votes sufficiently as a bloc to defeat the minority group's preferred candidates. The *Thornburg* Court also opined that a violation of Section 2 is established if, based on the "totality of the circumstances" and "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." In addition, the Court listed the following factors, which originated in the legislative history accompanying enactment of Section 2, as relevant in assessing the totality of the circumstances:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
>
> 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 or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

In 2009, in *Bartlett v. Strickland*, the Court further interpreted the *Gingles* three-pronged test. In *Bartlett*, the Court ruled that the first prong of the test—requiring a minority group to be geographically compact enough to constitute a majority in a district—can only be satisfied if the minority group would constitute more than 50% of the voting-age population in a single-member district. Therefore, in order to comply with Section 2, a congressional redistricting map may be required to create one or more majority-minority districts, but in such districts, minority voters must comprise a numerical majority.

It is unclear whether the July 2021 Supreme Court ruling in *Brnovich v. Democratic National Committee (DNC)* will affect Section 2 challenges to redistricting maps, as *Brnovich* did not involve a Section 2 vote dilution challenge. Instead, the Court in *Brnovich*—which involved a vote denial case—upheld two "generally applicable time, place, or manner voting rules" against a Section 2 challenge.

Section 5 of the Voting Rights Act: Preclearance Inoperable

For the first time since Congress passed the VRA in 1965, the current round of congressional redistricting maps will not be subject to the law's preclearance requirements. Prior to a 2013 Supreme Court ruling, *Shelby County v. Holder*, the coverage formula in Section 4(b) of the VRA applied to nine states and jurisdictions within six additional states, and these covered states and jurisdictions were subject to the preclearance requirement of Section 5 of the VRA. Thus, prior to *Shelby County*, Section 5 required the covered states and jurisdictions to obtain prior approval or "preclearance" before implementing any proposed change to a voting law, including changes to congressional redistricting maps. In order to be granted preclearance, the covered state had the burden of proving that the proposed map would have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color, or membership in a language minority group. A proposed map would not be granted preclearance if it led to a "retrogression in the position of racial minorities." Retrogression means a reduction in "the number of districts in which minority groups could 'elect their preferred candidates of choice,'" as compared with the existing map or "benchmark plan." Covered jurisdictions could seek preclearance from either the Department of Justice or the U.S. District Court for the District of Columbia.

In *Shelby County*, the Court invalidated the coverage formula in Section 4(b) of the VRA, thereby rendering the preclearance requirements in Section 5 inoperable. The Court held that applying the

coverage formula to certain states and jurisdictions departed from the "fundamental principle of equal sovereignty" among the states without justification "in light of current conditions."

Equal Protection Standard and Racial Gerrymandering Claims

Congressional redistricting maps must also conform with standards of equal protection under the Fourteenth Amendment to the Constitution. According to the Supreme Court, if race is the predominant factor in the drawing of district lines above other traditional redistricting considerations—including compactness, contiguity, and respect for political subdivision lines—then courts must apply a "strict scrutiny" standard of review. To withstand strict scrutiny in this context, the state must demonstrate that it had a compelling governmental interest in creating a majority-minority district and the redistricting plan was narrowly tailored to further that compelling interest. These cases are often referred to as "racial gerrymandering" claims because the challengers argue that race was improperly used in drawing district boundaries. Case law in this area has revealed that there can be tension between complying with the VRA, as previously discussed, and conforming with standards of equal protection.

According to the Supreme Court, the constitutional requirement of equal population among districts is not a "traditional" redistricting principle, and therefore, should not be considered in determining whether race impermissibly predominated in drawing a redistricting map. In *Alabama Legislative Black Caucus v. Alabama*, the Court explained that if a redistricting map moves additional voters into a particular district to achieve equal population, a court should ascertain the predominance of race by examining which voters were moved and whether the legislature based its decision on race, instead of traditional redistricting factors.

The Supreme Court further clarified the standard for determining racial predominance in a racial gerrymandering claim in *Bethune-Hill v. Virginia State Board of Elections*. In *Bethune-Hill*, the Court held that challengers to a redistricting map on racial gerrymandering grounds need not prove, as a threshold matter, that the plan conflicts with traditional redistricting criteria. Although acknowledging that such a conflict or inconsistency may be "persuasive circumstantial evidence" of racial predominance, the Court held that such a showing is not required. In so doing, the Court rejected the state's argument that if an identical redistricting map could have been drawn in accordance with traditional redistricting criteria, then racial predominance has not been proven. According to the Court, in determining racial predominance, courts must examine the "actual considerations" involved in crafting the redistricting map, not "post hoc justifications" that the legislature could theoretically have used in crafting the map.

Partisan Gerrymandering Claims Not Reviewable in Federal Courts

In 2019, the Supreme Court determined that claims of unconstitutional partisan gerrymandering are not subject to federal court review. Partisan gerrymandering is "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." In *Rucho v. Common Cause*, the Supreme Court ruled that claims of unconstitutional partisan gerrymandering are not subject to federal court review because they present non-justiciable political questions. The Court viewed the Elections Clause of the Constitution as solely assigning disputes about partisan gerrymandering to the state legislatures, subject to a check by Congress. Moreover, in contrast to one-person, one-vote and racial gerrymandering claims, as previously discussed, the Court determined that no test exists for adjudicating partisan gerrymandering claims that is both judicially discernible and manageable. Instead of the federal

courts, the Court suggested that Congress and the state legislatures could play a role in regulating partisan gerrymandering.

In at least two instances, challengers have successfully brought claims of unconstitutional partisan gerrymandering under relevant *state* constitutional provisions. For example, in 2015, the Florida Supreme Court invalidated a Florida congressional redistricting map as violating a state constitutional provision addressing partisan gerrymandering. Similarly, in 2018, the Pennsylvania Supreme Court struck down the state's congressional redistricting map under a Pennsylvania constitutional provision. Going forward, excessive partisan influence in congressional redistricting will be addressed by relevant state constitutional and statutory provisions, as interpreted by state courts, along with any action that Congress might decide to take, as discussed below.

Considerations for Congress

As discussed, the U.S. Constitution and the VRA, as construed by the Supreme Court, provide standards for congressional redistricting. Federal law generally does not establish additional guidance to the states as they draw new district boundaries, with the exception of laws addressing single-member districts and the timing of apportionment. Apportionment is the allocating of 435 seats in the U.S. House of Representatives among the 50 states based on state population, with each state entitled to at least one representative. During the 19th and 20th centuries, federal apportionment laws with limited duration established requirements for congressional districts such as contiguousness and compactness. With the permanent 1929 apportionment law, Congress omitted those standards.

Congressional and state authority in this area stems from article I, section 4 of the Constitution, the Elections Clause. The Elections Clause provides to states the initial and principal authority to administer elections within their jurisdictions, but provides Congress with the authority to "override" state laws in order to regulate federal elections. Any legislation proposing to regulate congressional redistricting would need to comport with the Elections Clause, as interpreted by the Supreme Court.

Over the past several Congresses, legislation has been introduced, although never enacted, that would establish additional federal statutory standards for congressional redistricting. Continuing that trend, in the 117th Congress, several bills have been introduced that take various approaches. For example, legislation addressing partisan gerrymandering, H.R. 1 (which passed the House of Representatives on March 3, 2021), H.R. 80, H.R. 3863, H.R. 4307, S. 1, S. 2093, and S. 2670, include provisions that would eliminate legislatures from the redistricting process and require each state to establish a nonpartisan, independent congressional redistricting commission, in accordance with certain criteria. The proposed bills would also establish criteria for court-ordered redistricting maps and prohibit states from carrying out more than one congressional redistricting following a decennial census, i.e., mid-decade redistricting. Similarly, H.R. 134 would prohibit states from carrying out mid-decade redistricting. At least one scholar has argued that limiting redistricting to once per decade renders it "less likely that redistricting will occur under conditions favoring partisan gerrymandering." In that same vein, H.R. 81, based on the view that public oversight of redistricting may lessen partisan influence in the process, would require state congressional redistricting entities to establish and maintain a public Internet site and conduct redistricting under procedures that provide opportunities for public participation.

Pending legislation would also address relevant Supreme Court decisions. For example, H.R. 4, which passed the House of Representatives on August 24, 2021, responds to the *Shelby County v. Holder* ruling. The bill proposes to amend Section 4(b) of the VRA to establish a new, rolling coverage formula for Section 5 preclearance based primarily on court-determined voting rights violations and would establish a new preclearance process based on specified voting practices, including changes to redistricting maps. In addition, H.R. 4 would generally codify the *Thornburg v. Gingles* ruling by establishing threshold conditions for challenges to redistricting maps based on vote dilution claims and providing a

list of factors, which originated in the legislative history of VRA Section 2, relevant to assessing the totality of circumstances.

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