

2021

## Redistricting: Pathways to Fairness and Comity

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### Recommended Citation

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## **Redistricting: Pathways to Fairness and Comity**

### **Jeffrey M. Wice**

Increasingly, the process of redrawing congressional and state legislative boundaries to achieve the “one person, one vote” goal has been marked by partisan maneuvering, lack of civility, and litigious strategies. This paper provides an overview of redistricting procedures, discusses lessons learned from the post-2010 decennial census round of redistricting, and offers recommendations for improving cooperation between the political parties during the post-2020 Census redistricting cycle. It offers pathways for promoting fair and equitable political representation.

### I. Redistricting: The Basics

#### A) Standards

“One person, one vote” represents a prime building block of American democracy.<sup>1</sup> Population equality provides the cornerstone for fair representation in the U.S. House of Representatives, state legislatures and local legislative bodies across the nation<sup>2</sup>. After each decennial census, legislative district boundaries are redrawn to take into account the new population data.

In the United States, redistricting is governed by certain constitutional and statutory provisions and is subject to judicial review. According to court rulings, Article 1 of the U.S. Constitution requires that congressional districts adhere to the “one person, one vote” principle that all districts are nearly equal in population as is practicable. Pursuant to the Equal Protection Clause of the 14<sup>th</sup> Amendment equal population standards apply to all legislative districts, but the standards for acceptable population deviation ranges are stricter for congressional districts than for other legislative districts. The federal Voting Rights Act of 1965 (as amended) prohibits vote dilution in redistricting plans when significant racially polarized voting is evident. State constitutional and state laws also apply to aspects of redistricting.

#### B. Suspect Practices

Fair and equal political representation long has been undermined by efforts to manipulate district boundaries to advantage a particular group or party. For example, in early 19<sup>th</sup> century England, “rotten boroughs” (also called “pocket boroughs”) were a common feature of electoral districts.<sup>3</sup> Such a borough, though it lost population, maintained its boundaries and thereby received a greater share of political representation than it merited.<sup>4</sup> In the United States, redistricting to provide a group with an advantage also has a

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<sup>1</sup> See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

<sup>2</sup> U.S. Constitution, Article 1, Section 2 and 14<sup>th</sup> Amendment

<sup>3</sup> See Encyclopedia Britannica Editors, “Rotten Borough,” Encyclopedia Britannica, available at <https://www.britannica.com/topic/rotten-borough>

<sup>4</sup> See *id.*

long history; it has popularly been referred to as “gerrymandering,” after a legislative district plan that Massachusetts Governor Elbridge Gerry approved.<sup>5</sup>

In recent decades with the use of computer-based tools, “gerrymandering” has become more and more sophisticated.<sup>6</sup> By manipulating minority populations or political party strength, a line drawing party disregards aggregate vote totals a party receives statewide and draws districts that maximize its share of winnable districts and improve its electoral chances to control a legislative chamber for an entire decade.

For example, under the guise of drawing “majority minority” districts to comply with the Voting Rights Act, several state legislatures have resorted to “packing” practices. “Packing” occurs when line drawers concentrate a group of voters in a district to reduce their voting strength elsewhere. Packing often leads to charges of constitutional violations, particularly of the 14<sup>th</sup> Amendment’s right to equal protection.

In contrast, “cracking,” another questionable practice, allows the line drawer to disperse voters of a particular demographic group over several districts, diluting the voting power that group could exercise in a single district. Cracking may lead to charges of violations of Section 2 of the federal Voting Rights Act of 1965 (as amended). Specifically, under certain circumstances such practice may violate Section 2’s requirement against diluting minority voting strength.

In 1985, the U.S. Supreme Court’s *Thornburg v. Gingles*<sup>7</sup> decision set the standard for determining Section 2 Voting Rights Act violations after North Carolina’s practice of using multi-member districts was rejected for diluting minority voting strength. In *Thornburg*, North Carolina’s original plan divided “politically cohesive groups of black voters” into districts where blocks of white voters would consistently defeat minority supported candidates. This violated the Voting Rights Act by preventing black voters from being able “to participate equally in the political process and to elect candidates of their choice.”<sup>8</sup>

The Supreme Court’s standard for determining Voting Rights Act violations includes a three-part test. To establish a violation of Section 2 of the Voting Rights Act, plaintiffs must prove: 1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) that the minority group is politically cohesive and usually votes for the same candidates; and 3) that, in the absence of special circumstances, bloc voting by the white majority usually defeats the minority’s preferred candidate.<sup>9</sup>

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<sup>5</sup> See Brian Duignan, “Gerrymandering,” Encyclopedia Britannica, available at <https://www.britannica.com/topic/gerrymandering>

<sup>6</sup> For information on a computerized redistricting tool, see “Maptitude for Redistricting Software,” Caliper, available at <https://www.caliper.com/mtredist.htm>

<sup>7</sup> 478 U.S. 30 (1986)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Once plaintiffs establish the three preconditions, they proceed to establish a Section 2 violation by “the totality of the circumstances.” To do so entails showing that the members of the minority group had “less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice.”<sup>10</sup> The *Thornburg* decision arguably sparked more Republican attempts to draw as many minority districts as possible, regardless of their shapes. As the Republicans drew more and more districts benefitting minority communities, neighboring white neighborhoods became less diversified and more conservative, helping to elect more Republican candidates.

The Republican National Committee capitalized on this strategy beginning the 1990s, convincing even then-Democratic majority state legislatures in states requiring Section 5 Voting Rights Act approval to create new minority districts that also leveraged new Republican opportunities elsewhere. A former Justice Department official commented, “if you can draw a majority-minority district, even if it’s bizarre in shape, you’re going to have to justify your failure not to draw that district,” adding “we were not concerned about the political ramifications. If it helped Republicans, so be it. Our job was to help blacks and Latinos get elected.”<sup>11</sup>

### C. Promoting Comity

According to New York University Law School Professor Richard Pildes, “Legislators of both parties currently think anything goes if they have enough political power to ram a plan down the throat of the party out of power.”<sup>12</sup>

A lack of comity in redistricting can be seen not only in state legislatures, but also in county-driven local redistricting. Perhaps the poster child for politics at its worst was the Madison County (IL) Board post-2000 census redistricting process.<sup>13</sup> Upon review of that board’s deliberations, a federal court wrote, “[T]he process in Madison County was characterized by threats, coercion, bullying, and a skewed view of the law.”<sup>14</sup>

Calls for procedures to ensure fairer and more transparent redistricting are not new but are gaining traction. In his 2016 State of the Union Address, President Barack Obama called for an “end [to] the practice of drawing our congressional districts so that politicians can pick their voters and not the other way around.”<sup>15</sup>

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<sup>10</sup> 52 U.S.C. 10301

<sup>11</sup> See Ari Berman, “Give Us The Ballot,” Farrar, Straus & Giroux, 189 (2015)

<sup>12</sup> Richard Pildes, “High-stakes gerrymandering cases at Supreme Court draw wide NYU Law involvement” (March 20, 2019), available at <https://www.law.nyu.edu/news/partisan-gerrymandering-supreme-court>

<sup>13</sup> *Hulme v. Madison County*, 188 F. Supp. 2d 1041 (S.D. Ill. 2001)

<sup>14</sup> *Id.* at 1041

<sup>15</sup> Office of the Press Secretary, “Remarks by the President in State of the Union Address,” The White House (January 24, 2012), available at <https://obamawhitehouse.archives.gov/the-press-office/2012/01/24/remarks-president-state-union-address>

Increasingly there are calls for the establishment of commissions to take on the task of redistricting.<sup>16</sup> In 2014, voters in New York State approved a constitutional amendment creating a new advisory commission to redraw congressional and state legislative districts for the legislature's consideration. The New York amendment was a bipartisan product, drafted by a Democratic Governor, Democratic Assembly and Republican Senate. Recently, commissions have been created in Ohio, Missouri, Colorado, Michigan and Utah. In Virginia, a commission may draw congressional and state legislative lines if that state's legislature and voters approve a plan in 2020.<sup>17</sup> The Ohio and Virginia proposals for commissions were drafted with bipartisan legislative cooperation, while the Missouri, Colorado and Utah commissions were developed through the referendum process.

A commission is not the only pathway to fairer redistricting. There also are model practices that promote comity and fairness that leave the redistricting process in the control of state legislatures.<sup>18</sup> Commission and non-commission pathways will be discussed below in sections V and VI.

## II. National Political Party Redistricting Efforts

### A. Republican Party Efforts

Both major national political parties assist states with redistricting. Since the 1980s, the Republican Party has provided legal and technical assistance through the Republican National Committee.<sup>19</sup> Most recently, Republicans provided redistricting assistance through the Redistricting Majority Party (referred to as "REDMAP") project.<sup>20</sup> The post-2010 census REDMAP plan reportedly sought to gain or retain control of as many state legislatures as possible so that Republican would control the redistricting process for congressional and state legislative district lines through the 2020 elections. Nationally Republicans spent millions of dollars for efforts related to redistricting and litigation.

Author David Daley<sup>21</sup> provides a detailed review of post-2010 census redistricting processes in several states with strong Republican state legislative majorities (Florida, Michigan, North Carolina, Ohio, Pennsylvania and Wisconsin). While Democrats also drew

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<sup>16</sup> AP, "Number of states using redistricting commissions growing," Philadelphia Inquirer (March 21, 2019), available at <https://www.inquirer.com/politics/nation/number-of-states-using-redistricting-commissions-growing-20190321.html>

<sup>17</sup> See Graham Moomaw, "General Assembly approves independent redistricting commission, despite objections from black lawmakers," Richmond Times Dispatch (February 23, 2019), available at [https://www.richmond.com/news/virginia/government-politics/general-assembly-approves-independent-redistricting-commission-despite-objections-from-black/article\\_b7c595db-503a-55d8-abb9-316c368ef9be.html](https://www.richmond.com/news/virginia/government-politics/general-assembly-approves-independent-redistricting-commission-despite-objections-from-black/article_b7c595db-503a-55d8-abb9-316c368ef9be.html)

<sup>18</sup> See Caroline Cournoyer, "Can Redistricting Ever Be Fair?," Governing (November 2011), available at <https://www.governing.com/topics/politics/can-redistricting-ever-be-fair.html>

<sup>19</sup> See Michael Wines, "Thomas Hofeller, Republican Master of Political Maps, Dies at 75," New York Times (August 18, 2018), available at <https://www.nytimes.com/2018/08/21/obituaries/thomas-hofeller-republican-master-of-political-maps-dies-at-75.html>

<sup>20</sup> See David Daley, "Ratf\*\*ked: The True Story Behind The Secret Plan to Seal America's Democracy," W.W. Norton & Company, at xiii (2016).

<sup>21</sup> See David Daley, "Ratf\*\*ked: The True Story Behind The Secret Plan to Seal America's Democracy," W.W. Norton & Company (2016)

maps to strengthen their own majorities through the post-2010 census redistricting cycle, Republicans' efforts were considered more robust than those either party had made before.

## B. Democratic Party Efforts

On the Democratic Party side, legislators have been assisted on redistricting by the Democratic Legislative Leaders Association (merged into the Democratic Legislative Campaign Committee in 1995), Democratic National Committee, IMPAC 2000 (for Members of Congress) and, for the 2010 cycle, the Foundation For The Future. After 2010, particularly compared with Republican investments, the national Democratic Party resources earmarked for redistricting were limited largely to providing mapping assistance and legal strategy to Democratic state legislative leaderships. After the 2016 elections, former U.S. Attorney General Eric Holder created the "National Democratic Redistricting Committee" in an effort to help elect more Democratic state legislative majorities and impact the post-2020 redistricting process.

Seeking advantages on redistricting were not the sole province of Republicans in the post-2010 Census round. Democrats controlled the redistricting process in Illinois after the 2010 elections and arguably "diluted" rather than "packed" opposing party voters. The Illinois plan weakened Republican-leaning districts by placing parts of Republican-leaning suburbs into Chicago's Democratic strongholds.

In Maryland, Democrats who were in the majority in the state legislature redrew one Republican-held congressional district, by extending it from far western Maryland considerably eastward into the Washington, D.C. suburbs. That made it far less likely that a Republican could win that seat. The Maryland congressional plan was challenged in federal court as a partisan gerrymander that sought to eliminate the state's only Republican member of Congress. In 2019, the Maryland case was dismissed after the U.S. Supreme Court held in a separate case<sup>22</sup> that federal courts could not decide partisan gerrymandering challenges.<sup>23</sup>

## III. Complaints About Post-2010 Decennial Census Redistricting

### A. Pennsylvania

Observers attribute the Republicans' 2012 Pennsylvania congressional delegation edge to advantages in the post 2010 Census redistricting plan. That plan arguably had been drawn by Republicans to "pack" as many Democratic voters into as few districts as possible.

Daley recounts efforts that then Pennsylvania State Senate Majority Leader Dominic Pileggi (R) made in support of separate proposals to distribute the state's electoral college votes: the first, according to the congressional districts won by presidential candidates; the

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<sup>22</sup> Lamone v. Benisek, 588 U.S. \_\_\_\_ (2019)

<sup>23</sup> Rucho v. Common Cause, 588 U.S. \_\_\_\_ (2019)

second, on the candidate's share of the popular vote. Pileggi thereafter lost his Senate leadership post, reportedly because his Republican colleagues considered him "too moderate."<sup>24</sup>

In *League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*, plaintiffs challenged Pennsylvania's 2011 congressional map as an illegal partisan gerrymander under the state's constitution. In a January 2018 decision, the Pennsylvania State Supreme Court agreed with plaintiffs and prevented the state from using the plan in the 2018 elections.<sup>25</sup> After the legislature failed to enact a new map of its own, the state court drew a redistricting plan.<sup>26</sup>

Republican Pennsylvania state legislators and Republican members of the state's congressional delegation asked a three-judge federal panel to step in to prevent the state court map from going into effect.<sup>27</sup> After the three-judge panel dismissed the Republican lawmakers' challenge, the U.S. Supreme Court subsequently rejected a motion to prevent the new map from being used.<sup>28</sup>

The State Supreme Court's map was used in the November 2018 election; in that election Democrats picked up three Pennsylvania congressional seats, resulting in an equal split between Republicans and Democrats in the state's U.S. House delegation membership.<sup>29</sup>

## B. Ohio

In Ohio, the state legislature was responsible for redrawing the state's congressional districts in 2011. Based on his review, Daley concluded that U.S. House Speaker John Boehner (R) had an indirect but powerful role in determining how the new Ohio congressional district map would be drawn. Daley cites conversations between an operative for U.S. House of Representatives Speaker John Boehner (R-OH) and Ohio legislative staff asking the Ohio state legislature to enact a new plan that would be "virtually unchanged from before" because it was important to "[s]omeone important to us all."<sup>30</sup>

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<sup>24</sup> See Daley, *supra* note 21, at 31

<sup>25</sup> Common Cause et al v. Commonwealth, No. 159 MM 2017

<sup>26</sup> *League of Women Voters et al v. Commonwealth of Pennsylvania*, Pennsylvania Supreme Court for the Middle District (February 19, 2018), available at <http://redistricting.lls.edu/files/PA%20lww%2020180219%20remedy.pdf>

<sup>27</sup> Steve Esack, "Republican lawmakers file new suit over Pennsylvania's congressional, Morning Call (June 21, 2018), available at <https://www.mcall.com/news/pennsylvania/mc-nws-pennsylvania-congress-map-lawsuit-20180621-story.html> ("Still, we believe the voters of Pennsylvania deserve an answer as to whether the state Supreme Court overstepped its authority,' [Senate Leader Joe Scarnati and House Speaker Mike Turzai] 'We believe it did.'")

<sup>28</sup> See Brennan Center for Justice, "League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania" (October 29, 2018) available at <https://www.brennancenter.org/our-work/court-cases/league-women-voters-pennsylvania-v-commonwealth-pennsylvania> (summarizing the Order entered by Justice Alito on February 5, 2018)

<sup>29</sup> See "United States House of Representatives elections in Pennsylvania, 2018," Ballotpedia, available at [https://ballotpedia.org/United\\_States\\_House\\_of\\_Representatives\\_elections\\_in\\_Pennsylvania,\\_2018](https://ballotpedia.org/United_States_House_of_Representatives_elections_in_Pennsylvania,_2018)

<sup>30</sup> See Daley, *supra* note 21, at 84

According to Ohio politics writer Steve Hoffman “all restraints went by the boards after the 2010 census” in Ohio, with Republicans creating as many partisan advantages in the state as possible. Ohio Republicans ran their redistricting process behind closed doors through the Ohio Campaign for Accountable Redistricting. There was little attempt at transparency. A room called the “Bunker” was rented at a local Columbus hotel for three months in order to draft redistricting plans far from public view. Maps were kept secret for as long as possible.<sup>31</sup>

According to Daley, Democratic Representative Kathleen Clyde made numerous, albeit unsuccessful, attempts to involve herself in a meaningful way in the redistricting process. As the representative of the House Democratic leader, she called the redistricting process a “sham.”<sup>32</sup>

By referendum in 2015, Ohio voters approved a constitutional amendment submitted by the General Assembly that added two new members of the minority party to the state’s legislative Apportionment Board that to draw the state legislature’s districts. The revised board is tasked with drawing maps that favor neither major political party and follow voter preferences.<sup>33</sup> In 2018, voters approved another amendment, this time to require sufficient bipartisan support for state legislative adoption of a ten-year congressional redistricting map, providing for commission development of a bipartisan plan if the first option failed, and setting procedures for the state legislature to create a four-year redistricting plan should the initial state legislative and commission processes fall short.<sup>34</sup> The procedures delineated in the respective constitutional amendments are to be used in drawing districts for the 2021 elections.

### C. North Carolina

North Carolina’s redistricting process has been the subject of prolonged litigation over several decades. From the post-1990 redistricting process through 2001, North Carolina’s Democratic state legislative leadership defended its plans before the U.S. Supreme Court. In the 1993, *Shaw v. Reno* decision, the U.S. Supreme Court held that several minority district

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<sup>31</sup> See Daley, *supra* note 21, at 88

<sup>32</sup> Daley, *supra* note 21, at 94 (quotes Clyde saying that she “sat in on this traveling summer committee where they took apportionment board on the road so we could show the map to the people, But we didn’t have the maps! We went on the road and we didn’t have anything to show. So we didn’t get very good attendance, and they use that as proof that people don’t care. Of course, they’re during the day, they’re not very well publicized- and we don’t have any maps. I traveled around the state and saw nothing, just frustration and discouragement from the people who had the wherewithal to find out about it and come. They do that on purpose, too. Chaos, confusion, trying to make government look incompetent. It’s a very cynical approach designed to keep people from having faith in their government and wanting to participate in the electoral process.”)

<sup>33</sup> [https://ballotpedia.org/Ohio\\_Bipartisan\\_Redistricting\\_Commission\\_Amendment\\_Issue\\_1\\_\(2015\)](https://ballotpedia.org/Ohio_Bipartisan_Redistricting_Commission_Amendment_Issue_1_(2015))

<sup>34</sup> See Laura A. Bischoff, “From guns to marijuana: How Ohio’s laws changed this year,” Dayton Daily News (December 31, 2018), available at <https://www.daytondailynews.com/news/state--regional-govt--politics/from-guns-marijuana-how-ohio-laws-changed-this-year/7Og1TVy9ne5bDXzrlvgJf/> [https://ballotpedia.org/Ohio\\_Issue\\_1\\_Congressional\\_Redistricting\\_Procedures\\_Amendment\\_\(May\\_2018\)](https://ballotpedia.org/Ohio_Issue_1_Congressional_Redistricting_Procedures_Amendment_(May_2018)) and [https://ballotpedia.org/Ohio\\_Issue\\_1\\_Congressional\\_Redistricting\\_Procedures\\_Amendment\\_\(May\\_2018\)#Measure\\_design](https://ballotpedia.org/Ohio_Issue_1_Congressional_Redistricting_Procedures_Amendment_(May_2018)#Measure_design)



shapes were so bizarre as to suggest that voters were being separated into different districts based on race and race alone in violation of the U.S. Constitution.<sup>35</sup> The Court sent the case back to the federal trial court to determine whether the state plan was justified by a compelling government interest that was not race-based<sup>36</sup>. In 2001 in *Easley v Cromartie*<sup>37</sup>, the Supreme Court upheld a redrawn map on the basis that redistricting for political reasons did not violate federal laws banning race-based line drawing.<sup>38</sup> The Court determined that African Americans tended to favor Democratic candidates and that the revised districts were based on behavioral patterns reflecting those voters' political preferences, not on their race.

In the post-2010 census redistricting cycle, partisan and race-based factors continued to be at issue in the state. According to Daley, post-2010 North Carolina congressional district lines followed a national design to “segregate African American voters in three districts and concede those districts to the Democrats.”<sup>39</sup> North Carolina’s post-2010 census district maps had been drawn by the late Republican expert Tom Hofeller, one of the most experienced redistricting technicians in the nation and an architect of the Trump Administration’s failed attempt to add a citizenship question to the 2020 decennial census questionnaires to further Republican Party purposes.<sup>40</sup>

After the 2010 redistricting round, North Carolina’s congressional and state legislative redistricting plans were challenged several times in state and federal courts.<sup>41</sup> A federal district court found that the First and Twelfth congressional districts were racially gerrymandered.<sup>42</sup> Those congressional district lines were redrawn by the legislature after a 2016 court order and used in the 2018 election cycle.<sup>43</sup>

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<sup>35</sup> 509 U.S. 630 (1993) In *Shaw*, Justice Sandra Day O'Connor wrote that one district's lines were “alleged to be so bizarre on its face that it is ‘unexplainable on grounds other than race’...We believe reapportionment is one area in which appearances do matter.” She commented that the 12<sup>th</sup> congressional district that followed an interstate highway that joined cities with heavy minority populations together to meet population requirements “bears an uncomfortable resemblance to political apartheid.” *Id.* At 647

<sup>36</sup> 34 F. Supp. 2d 1029 (E.D. N.C. 1998)

<sup>37</sup> 532 U.S. 234 (2001)

<sup>38</sup> *532 U.S. 234* (2001)

<sup>39</sup> Daley, *supra* note 21, at 50

<sup>40</sup> See Will Duran, “Who leaked the Hofeller files?,” Raleigh News & Observer (September 23, 2019). See also Michael Wines, “The Battle Over The files Of A Gerrymandering Mastermind,” New York Times (September 5, 2019), available at <https://www.nytimes.com/2019/09/04/us/gerrymander-north-carolina-hofeller.html> (in 2019, files discovered on Hofeller’s personal computer hard drive revealed his role in helping to develop the Commerce Department’s reasoning for including a citizenship question in the 2020 census.

<sup>41</sup> See Michael Wines and Richard Fausset, North Carolina Is Ordered To Redraw Its Gerrymandered Redistricting Map. Again,” New York Times (August 27, 2018), available at <https://www.nytimes.com/2018/08/27/us/north-carolina-congressional-districts.html>

<sup>42</sup> Wines, *supra* note 40

<sup>43</sup> Wines, *supra* note 40

In 2019 in *Rucho v. Common Cause*, the U.S. Supreme Court dismissed partisan gerrymandering challenges to North Carolina’s congressional map, ruling that such challenges were not subject to federal court review.<sup>44</sup>

In September 2019 in *Common Cause et al v. Lewis et al*, a North Carolina trial court found that North Carolina’s state legislative plan violated the state’s constitution by denying voters the right to fair and free elections. This was the first post-Rucho state court ruling to hold that a partisan gerrymander to state legislative districts was impermissible.<sup>45</sup>

#### IV. Promising Practices for Fair Redistricting: California and Massachusetts

##### A. California Moves to Non-Partisan Commission

Traditionally, California redistricting conducted by the state legislature was marked by partisanship.<sup>46</sup> Alleged overreaching gave rise to early calls for an outside commission to handle redistricting. After the 2000 decennial census, Democrats and Republicans successfully avoided redistricting litigation by forging legislative compromise plans. Nonetheless, the perception that redistricting was too partisan in California remained, prompting voters in November 2008 to approve Proposition 11, which created an independent commission for redistricting state legislative lines. In 2010 voters passed Proposition 20 that added congressional redistricting to that commission’s portfolio.

The California Citizens Redistricting Commission is charged with redrawing state legislative, congressional and Board of Equalization district lines. Members are chosen through a multilayered application process administered by the State Auditor. Applicants must submit essays and letters of recommendation and undergo background investigations and interviews. Over 30,000 California residents submitted applications in 2010 to serve on the redistricting commission.<sup>47</sup> The commissioner selection process limits the state’s legislative leaders’ in the commission to the opportunity to strike up to twenty-four commission candidates. From a final pool of thirty-six applicants, eight randomly selected commissioners select six additional commissioners from among the remaining applicants. Thereafter, the original eight commissioners, who are provided with training on the state’s demographics and geography and on the use of redistricting software, conduct the initial commission meetings.<sup>48</sup>

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<sup>44</sup> 588 U.S.\_\_(2019)

<sup>45</sup> *Common Cause v Lewis et al*, 18-CVS-014001 Superior Court, Wake County (September 4, 2019),

<sup>46</sup> See Wallace Turner, “California G.O.P. Seeks To Void Redistricting,” *New York Times* (September 22, 1981), available at <https://www.nytimes.com/1981/09/22/us/california-gop-seeks-to-void-redistricting.html>; see also Dan Walters, “California Democrats don’t like gerrymandering? But they were so good at it,” *Mercury News* (October 8, 2017), available at <https://www.mercurynews.com/2017/10/08/walters-california-democrats-dont-like-gerrymandering-but-they-were-so-good-at-it/>

<sup>47</sup> See California Citizens Redistricting Commission, “Background on Commission,” available at <https://wedrawthelines.ca.gov/commission/>

<sup>48</sup> See *id.* (the initial and subsequent meetings are public).

California's first commission included five Republicans, five Democrats, and four individuals not affiliated with the Democratic or Republican parties but who either were registered with another party or declined to state a party preference. The Commission was tasked with following strict, nonpartisan rules designed to create districts of equal population in order to provide fair representation.<sup>49</sup>

The California Commission provides a model other jurisdictions may choose to follow. It is tasked with holding public hearings and accepting public comment before plans can be considered. Commission decisions require nine affirmative votes from Commission members; of those affirmative votes, at least three must come from commission members registered with the state's two largest political parties and at least three must come from other commission members.<sup>50</sup>

### B. Massachusetts State Legislature Produces Plan Avoided Any Legal Challenges

The post-2010 redistricting process in Massachusetts offers lessons on how legislatures can improve the chances of enacting redistricting plans with appropriate transparency, inclusiveness and objectivity.

After the 2000 decennial census, Massachusetts' two legislative chambers worked on redistricting through separate Senate and House efforts. The Massachusetts State Senate redistricting plan became law and was never challenged in court. In contrast, a federal court rejected the Massachusetts House districting plan because it violated the federal Voting Rights Act by failing to properly create minority districts in the Boston area.<sup>51</sup>

In 2009, in preparation for the post-2010 decennial census redistricting cycle, both Massachusetts state legislative chambers partnered to create a special Joint Committee on Redistricting for congressional, state legislative and Governor's Council districts.

The post-2010 committee was chaired by Democrats Senator Stan Rosenberg (who had chaired the post-2000 process) and Representative Michael Moran. Working together with a committee of seven state senators and nineteen state representatives, the joint committee held thirteen public hearings across the state that drew more than 4,000 residents. In total, over 400 people testified at the hearings, offered testimony and/or met with legislators. A dedicated website with video recordings, maps, data and other relevant information, drew 35,000 visits. The Chairs' report summarized the entire redistricting process.<sup>52</sup>

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<sup>49</sup> About "We Draw The Lines" at <https://wedrawthelines.ca.gov/commission/>

<sup>50</sup> See *id.*

<sup>51</sup> Black Political Task Force v. Galvin, No. 02-11190 (D. Mass. Feb. 24, 2004)

<sup>52</sup> Senator Stanley Rosenberg and Representative Michael J. Moran, "Report from the Chairs of the Special Joint Committee on Redistricting," General Court of the Commonwealth of Massachusetts, 6 (December 12, 2012), available at <https://malegislature.gov/Redistricting>

The committee sought to comply with constitutional and legal requirements and to balance competing redistricting principles. The latter considerations included population equality, equal electoral opportunity, compactness, contiguity, preservation of county and municipal boundaries and communities of interest. The population size of senate and house districts had to change to accommodate population shifts and changes. In congressional reapportionment, the state lost one congressional district,<sup>53</sup>

Voting Rights Act concerns also were relevant. Compliance with Section 2 of the federal Voting Rights Act may make compactness and preservation of political subdivision lines difficult. State constitutional limits prohibiting the splitting of towns can conflict with population equality requirements. Population shifts within localities might run contrary to limits on redrawing election precincts before redistricting is completed. Nonetheless, the committee plan created twenty effective minority House districts, up from ten in the 2000 plan. In the Senate, for the first time in Massachusetts a third effective minority district was created (in Western Massachusetts). In the congressional plan, an effective minority district with a fifty-six percent minority population was created.

A movement to create an independent redistricting commission in Massachusetts failed to generate enough support by legislators to gain traction.<sup>54</sup> Nonetheless, the senate committee's post-2010 process makes a strong argument that legislative redistricting left to state legislators can result in new lines drawn fairly and without giving rise to prolonged litigation. Not a single legal challenge was filed against any of the Massachusetts' redistricting plans after they went into effect in 2011.

According to Rosenberg, "Creating legislative districts at both the federal and state levels of government have historically been a significant responsibility of state legislatures. In the face of the recent trend to take this job away from state legislators by creating so-called independent commissions, as Senate Chair of Redistricting in Massachusetts in 2002 and 2012, I believed we in the legislature had to redouble our efforts to create constitutionally defensible maps. We worked with a broadly representative process. We respected traditional and ever evolving redistricting principles and enhanced transparency. As a result, none of the maps created by the Senate in 2002 and none of those created by the House and Senate in 2012 were challenged in court. These maps were widely embraced and endorsed by the public, the media, organized interest groups and the political community, validating the ability of legislatures to fulfill this fundamental responsibility."<sup>55</sup>

Massachusetts is the only state legislature that created a permanent redistricting committee after its post-2010 plans were enacted. The Massachusetts Redistricting Committee had considered ways to improve redistricting. Going forward, such considerations will likely relate to drawing election precinct level lines and determining

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<sup>53</sup> See *id.*

<sup>54</sup> See Massachusetts Common Cause, "Fair Districts," available at <https://bit.ly/2kyqjba>

<sup>55</sup> Comments from Rosenberg provided to the author (January 25, 2019)

whether to count prisoners at their home-of-record prior to incarceration rather than in their place of incarceration.<sup>56</sup>

## V. 2018 Reform Initiatives

In November 2018, voters adopted redistricting reform initiatives in four more states: Colorado, Michigan, Missouri and Utah.

### A. Colorado (Amendment Y & Amendment Z)

By referenda in November 2018 Colorado voters approved two state constitutional amendments: Amendment Y creates a commission to redistrict congressional seats; Amendment Z creates a commission for redistricting state legislative seats.<sup>57</sup>

Under both referenda, three retired appellate judges—one from each major party and one unaffiliated—are to select commissioners from a pool of applicants. Democrats, Republicans, and independents each have four members on the commission. Two votes from each bloc are necessary to enact a map. Each of the state’s legislative leaders can select up to ten applicants for random selection.

Maps must adhere to criteria including: compliance with federal law; preserving defined communities of interest; keeping cities and counties whole; maximizing compactness; maximizing the number of politically competitive districts; banning the intentional favoring or disfavoring of a party or candidate; and preventing the dilution of the electoral strength of voters belonging to a racial or ethnic minority.

Nonpartisan legislative staff assist the commission and prepare preliminary maps; the state Supreme Court has jurisdiction to review the maps. If a commission fails to pass a map, commission staff would submit their last developed plan to the court for review.

### B. Michigan (Proposal 2)

By referendum in 2018 Michigan voters approved Proposal 2, which creates an independent redistricting commission for congressional and state legislative redistricting.<sup>58</sup> The proposal establishes a 13-member commission, to be comprised of four Democrats, four Republicans, and five non-major-party members. The secretary of state solicits and reviews applications from those seeking to serve on the commission and prepare demographically and geographically representative random samples of 30 applicants from each party and 40 from unaffiliated applicants. The four legislative leaders can remove five applicants from each pool but not select members. The secretary of state makes the final selections on a random basis.

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<sup>56</sup> Senator Stanley Rosenberg and Representative Michael J. Moran, *supra*, at 15-18

<sup>57</sup> See Ballotpedia, “Colorado Amendment Z”, available at <https://bit.ly/33tVG13>

<sup>58</sup> See Michigan Proposal 2, available at <https://bit.ly/2pHsi5E>

In order to adopt a plan at least two commissioners from each group must agree to the map. Proposals must meet select criteria, including compliance with the Voting Rights Act; geographic contiguity; preserving communities of interest; partisan fairness; not favoring or disfavoring a particular candidate or incumbent; keeping counties, cities, and townships whole; and compactness.

### C. Missouri (Amendment 1)

By referendum in 2018, Missouri voters approved the "Clean Missouri" Amendment that requires the state auditor to develop a pool of applicants from which a nonpartisan demographer is selected.<sup>59</sup> The demographer is to develop maps subject to the commission's approval, based on an "efficiency gap" to gauge partisan fairness.<sup>60</sup> The "efficiency gap" test was used in a Wisconsin case to demonstrate partisan imbalance. That case, *Gil v. Whitford*, currently is on remand in federal district court in Wisconsin.

Pursuant to Missouri's amendments, maps must attempt to treat both major political parties fairly so that the party winning the most votes statewide also wins the most legislative seats. While the current maps were drawn by a bipartisan commission after 2010, the GOP has maintained a districting advantage for the past twenty years.

### D. Utah (Proposition 4)

By referendum in 2018, Utah voters approved Proposition 4,<sup>61</sup> which creates a seven-member redistricting commission; legislative leaders from both parties each select three members and the governor appoints a seventh member to serve as chair. While the majority party effectively can appoint four members (as long as that party controls the Governor's office), redistricting maps for congressional and state legislative districts require the vote of at least one of the minority party appointees to prevail.

The proposition delineated criteria the state courts could enforce. Ranked criteria include: following federal law; minimizing the number of divided municipalities; minimizing the number of divided counties; promoting compactness; ensuring transportation connections exist within districts; preserving neighborhoods and communities of interest; following natural geography; and nesting districts so that state Senate and state House borders overlap as much as possible. The criteria also prohibit intentionally favoring or disfavoring any particular party or candidate.

The state legislature could still pass its own map if it disapproves the commission's plan, but the legislatively drawn map would be subject to the same criteria as the commission's.

## VI. Post-2018 Redistricting Activity

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<sup>59</sup> See Ballotpedia, "Missouri Amendment 1, Lobbying, Campaign Finance and Redistricting Initiative (2018)," available at <https://bit.ly/2M9hdY7>

<sup>60</sup> id

<sup>61</sup> Ballotpedia, "Utah Proposition 4, Independent Advisory Commission on Redistricting Initiative (2018)," available at <https://bit.ly/35EdZTp>

## A. Powers and Authority

As a result of electoral changes in November 2018, several state legislatures considered making legislative changes to redistricting procedures before partisan power was to shift in January 2019.

In the wake of the November 2018 elections, Republican state lawmakers in Wisconsin and Michigan sought to expand their own powers and curtail new Democratic governors from powers enjoyed by prior governors.<sup>62</sup> While Wisconsin Democrats reportedly were concerned that the GOP leadership might try to tinker with redistricting rules,<sup>63</sup> redistricting rules change legislation did not emerge.

The Michigan House passed a bill in late 2018 that makes it more difficult for people to advance voter initiatives. That action came after voters had approved ballot questions that created a redistricting commission as well as automatic and election day voter registration.<sup>64</sup>

New Jersey Democrats attempted to move on a constitutional amendment to change the state's redistricting commission appointment process and rules. The proposed amendment would have required that new districts be drawn to favor a political party if the party won a higher percentage of votes in recent presidential, governor and U.S. Senate elections as well as change the commission membership selection process, reducing the number of commission members who would be appointed by the two major party state chairs. Instead, state legislative leaders would get the majority of appointments.<sup>65</sup> After public criticism, the effort was pulled from consideration.<sup>66</sup>

## B. Roles in Litigation

In most states, attorneys general have the power to defend state laws in court. Generally, attorneys general also defend against redistricting plan challenges (unless state law permits and one or more legislative leaders are named parties to the challenge).

In 2019, in *Virginia House of Delegates v. Bethune-Hill*, the Supreme Court held that the Virginia House of Delegates lacked standing to challenge a remedial redistricting plan

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<sup>62</sup> See Russell Berman, "The Republicans' Midwest 'Power Grab,'" *The Atlantic* (December 4, 2018), available at <https://www.theatlantic.com/politics/archive/2018/12/gop-power-grab-wisconsin-and-michigan/577246/>

<sup>63</sup> See Todd Richmond, "Wisconsin Democrats fear GOP redistricting end-around," AP (November 28, 2018), available at <https://apnews.com/2f28ee1f0c5249e3bbf3515f58c8b299>

<sup>64</sup> See Ari Berman, "After Voters Passed Progressive Ballot Initiatives, GOP Legislatures Are Trying to Kill Future Ones," *Mother Jones* (December 20, 2018), available at <https://www.motherjones.com/politics/2018/12/after-voters-passed-progressive-ballot-initiatives-gop-legislatures-are-trying-to-kill-future-ones/>

<sup>65</sup> See Joseph De Avila, "New Jersey Democratic Leaders Split on Redistricting," *Wall Street Journal* (November 26, 2018), available at <https://www.wsj.com/articles/new-jersey-democratic-leaders-split-on-redistricting-1543276211>

<sup>66</sup> See Joseph De Avila, "New Jersey Democratic Leaders Pull Redistricting Bill After Criticism," *Wall Street Journal* (December 15, 2018), available at <https://www.wsj.com/articles/new-jersey-democratic-leaders-pull-redistricting-bill-after-criticism-11544928251>

developed by a lower federal court<sup>67</sup> Experts explain, “The Court found that the House lacked standing because Virginia had not designated that chamber to represent the state’s interests, and the House could not appeal in its own right.”<sup>68</sup> The Court pointed out that Virginia law gives the authority for representing the state in civil litigation to the state attorney general.<sup>69</sup> The Court’s ruling in *Board of Elections v. Bethune Hill* may have wide ranging implications for legislative leaders in future litigation.

### C. Transparency and Discovery

Fairness and transparency in redistricting not can only help avert litigation, but also provide a stronger record on which to defend a plan. Conversely, line drawing practices that overreach may later be subject of discovery if the plan is challenged in court. While courts have accorded state legislators (and by extension their staff) with limited privileges and immunities regarding their legislative work<sup>70</sup>, in redistricting cases, assertions of such privileges are not always successful in averting discovery.<sup>71</sup>

## VII. Outlook and Recommendations

### A. Post-2020 Census Outlook

As the 2021 redistricting round approaches, states still have time to develop and adopt new standards and procedures for redistricting, often without amending state constitutions.

Legislators and voters may attempt to create either advisory or independent commissions. As referenced above, in 2015 alone five states created redistricting commissions; in 2014 New York voters approved a new advisory commission and during the 2019 session, the Virginia General Assembly provided initial approval for a new commission.

Nonetheless, most post-2020 Census redistricting will be completed by state legislatures. Especially if they want to retain redistricting responsibility, legislators from both parties should begin working together to avoid highly partisan legislative debates and the costly litigation that results from overreach and unfair procedures.

### B. Procedural Recommendations

Below is a checklist of procedural steps that states and other redistricting authorities should consider taking for the post-2020 Census redistricting.

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<sup>67</sup> *Va. House of Delegates v. Bethune-Hill*, 587 U.S. \_\_ (2019), 139 S. Ct. 1945 (2019)

<sup>68</sup> “Redistricting Law 2020,” National Conference of State Legislatures, *supra* note [] at 47 (2019)

<sup>69</sup> *Va. House of Delegates*, *supra*, at 1952 (“Authority and responsibility for representing the State’s interests in civil litigation, Virginia law prescribes, rest exclusively with the State’s Attorney General”)

<sup>70</sup> For background on legislative privileges, see National Conference of State Legislatures, “Legislative Privilege & Immunity,” available at <http://www.ncsl.org/research/civil-and-criminal-justice/legislative-privilege-and-immunity-cl.aspx>

<sup>71</sup> See “Redistricting Law 2020, *supra* note [], at 126



### Election district transparency:

Create a statewide web-based resource for election district, county district, and municipal ward boundary data along with a single file, table or database containing demographic data, election results at the election districts level, in a manner that matches the election districts boundary data. This would provide the public with electoral district boundary information, demographic and population data included in the Census Bureau's redistricting data files and election data.

### Prioritized criteria:

One of the best ways to achieve a fair and legally justifiable redistricting effort is to use prioritized and ranked criteria. The federal standards mandating equal population and compliance with the federal voting rights act should always be prioritized first. Important, but secondary standards are compactness, contiguity, minimizing splits at the county, city, town and village level, keeping communities of interest intact, and minimizing matchups by two or more incumbents. While there is no "one size fits all" sequence, it is important that criteria be met and not violated unless a more highly ranked criterion conflicts with it.

### Convenient statewide hearings to permit the public to provide meaningful comment throughout the process:

The first round of hearings should consider how existing districts compare to new population data after the census data is provided to the states (a "malapportionment" review) and whether the existing districts must be altered to meet "one person, one vote" population equality standards. A second round of hearings should be held to solicit public comment after an initial draft plan is developed by the redistricting authority. A final round of hearings should consider public comment after changes to the first draft map are made.

### Accessible websites to provide as much information to the public as possible:

Information on accessible websites should include: 1) complete maps of existing, proposed and final maps accompanied with population and racial data as reported to the states by the Census Bureau and 2) complete election results for the districts over the last ten years. Computer shape files also should be posted to enable redistricting software users to replicate the maps on offsite computers.

### Transparent process:

All meetings should be open to the public. The California Citizens Redistricting Commission website could serve as a model for transparency. All maps, data, hearing transcripts, agendas, memoranda, correspondence, litigation documents and other materials are available for public review.<sup>72</sup>

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<sup>72</sup> available at <https://wedrawthelines.ca.gov/>

### C. Where Do We Go From Here?

Whether states redistrict by legislature or commission, unless new legislative maps are drawn in a more fair, transparent and participatory process, the courts may find themselves dealing with as many challenges as they have in the last decade. Federal and state courts will continue to hear challenges dealing with equal population, statutory violations and racial gerrymandering. While federal courts may no longer hear cases alleging partisan gerrymanders, state constitutions may provide an opening for state challenges to partisan gerrymanders.

By the end of 2019, seven states were still in court fighting over post-2010 redistricting plans, most of which were first redrawn several years earlier.<sup>73</sup> A myriad of cases challenging how the 2020 census will be taken are also being considered by federal courts.<sup>74</sup>

Unless legislators and commissions learn from the myriad number of cases in the last decade dealing with plans that violated equal protection standards, minority voting rights and fair redistricting for all voters, the same mistakes that happened in the last 10 years are bound to repeat themselves. But if redistricters are more inclusive, open and communicative with people who are from varying partisan and voting rights perspectives and follow the rule of law without being secretive or manipulative, litigation will be minimized the the public's trust in the political system will be strengthened.

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#### Appendix A

##### Model Criteria for An Independent Redistricting Commission

1.(a) The commission shall develop and approve a plan for dividing the legislative body into legislative districts for the election of legislators that complies with applicable law and provisions of this charter as follows:

(b) All districts shall be as nearly equal in population as is practical except as necessary to satisfy the requirements of subdivisions c, e and f of this section, but the difference in population between the most and least populous district shall not exceed ten percent of the mean population of all districts,

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<sup>73</sup> See Brennan Center, "The State of Redistricting," available at <https://www.brennancenter.org/blog/state-redistricting-litigation>

<sup>74</sup> See Brennan Center, "2020 Census Litigation," available at <https://www.brennancenter.org/issues/gerrymandering-fair-representation/fair-accurate-census/2020-census-litigation>

(c) Each district shall consist of contiguous territory; no district shall consist of parts entirely separated by the territory of another district of the same body, whether such territory be land or water, populated or unpopulated. A populated census block shall not be divided by a district boundary, unless it can be determined that the populated part of such block is within a single district.

(d) The whole number of persons reported in the federal decennial census shall be the basis for determining district populations except that no person shall be deemed to have gained or lost a residence by reason of conviction and incarceration in a federal or state correctional facility.

(e) No district shall be established that results in a denial to members of racial and linguistic minority groups (as recognized by the federal Voting Rights Act of 1965 (as amended)) of an equal opportunity with other citizens to participate in the political process and to elect the representatives of their choice. The principles stated in subdivision [f?] of this section shall be used to create districts that will afford fair representation to the members of those racial and linguistic minority groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be able to elect representatives of their choice.

(f) Subject and subsidiary to the requirements of subdivisions a, b, c, d and e of this section, the following principles shall be followed in the creation districts. A principle with a lower number shall have precedence over a principle with a higher number.

(1) Cities shall not be divided in the formation of districts;

(2) To the extent possible, towns shall not be divided in the formation of districts,

(3) Where possible, village subdivisions shall not be divided in the formation of districts

(4) If a town must be divided, where possible, incorporated villages shall not be divided.

(5) Districts shall be as compact in form as possible. Districts shall be compared, using average numerical measures, for (a) geographic dispersion, the degree to which the territory of districts is either tightly packed or widely spread out; (b) the relation of the perimeter lengths to the areas of districts; and (c) the dispersion of the populations of districts;

(6) To the extent possible, a district shall unite communities defined by actual shared interests, taking account of geographic, social, economic, and other factors that indicate commonality of interest, and districts shall be formed so as to promote the orderly and efficient administration of elections.

(7) To the extent possible, the residences of two or more incumbent legislators shall not be placed in the same district.

