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Congressional Redistricting: Key Legal and Policy Issues

Following each decennial census, the 435 seats in the House are apportioned—or divided up—among the 50 states (U.S. Const. amend. XIV, § 2, cl. 1; 2 U.S.C. § 2a(a)). Accordingly, to comport with the constitutional standard of population equality among districts, discussed below, at least once every 10 years, most states are required to draw new congressional district boundaries in response to changes in the number of Representatives apportioned to the state or shifts in population within the state. This process is known as *congressional redistricting*.

Federal Requirements for Congressional Districts

Most federal standards for congressional redistricting derive from the Constitution and federal law, as interpreted by the Supreme Court, as discussed below. Under Article I, § 2, cl. 3 of the Constitution, as amended by the Fourteenth Amendment, representation in the House of Representatives is based on state population size. Article I, § 2, cl. 3 also requires that each state has at least one Representative and that districts have at least 30,000 persons. 2 U.S.C. § 2c requires that one Representative be elected from each district.

Population Equality Standard

The Supreme Court has interpreted the Constitution to require that each congressional district within a state contain an approximately equal number of persons. In *Wesberry v. Sanders* (376 U.S. 1 (1964)), the Court interpreted Article I, § 2, cl. 1 of the Constitution (that Representatives be chosen "by the People of the several States") to mean that, "as nearly as is practicable[,] one man's vote in a congressional election is to be worth as much as another's." Later that year, in *Reynolds v. Sims* (377 U.S. 533 (1964)), the Court held that this requirement, or the *population equality standard* of one person, one vote, also applies in the context of state legislative redistricting and that the Fourteenth Amendment's Equal Protection Clause requires all who participate in an election "to have an equal vote." The population equality standard applies only to districts within a state and not to districts across various states.

Since 1964, the Court has described the extent to which a redistricting plan, in complying with the population equality standard, may deviate from precise or ideal population equality among congressional districts within a state. Precise or ideal equality is the average population that each district would contain if a state's 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. The Court has determined that congressional districts are permitted less deviation from precise equality than state legislative districts are. For example, in *Kirkpatrick v. Preisler* (394 U.S. 526 (1969)), the Court invalidated a congressional redistricting plan with a 5.97% maximum population deviation, where the "most populous district was 3.13% above the mathematical ideal, and the least populous was 2.84% below." The Court characterized the variance as too great to comport with the "as nearly as practicable" standard set forth in *Wesberry*, requiring the government to "make a good faith effort to achieve precise mathematical equality."

Section 2 of the Voting Rights Act (VRA) Standard

Congressional district boundaries in every state are required to comply with Section 2 of the VRA (52 U.S.C. § 10301). 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 the VRA is violated 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 to ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of choice.

On October 4, 2022, the Supreme Court heard oral arguments in a case that could affect standards that reviewing courts apply in determining when the creation of a majority-minority district in a congressional redistricting map is required under Section 2 of the VRA. In *Merrill v. Milligan*, the Court is evaluating a challenge to an Alabama congressional redistricting map where the lower court determined that compliance with Section 2 required the creation of two majority-minority districts instead of one.

Equal Protection Standard

Congressional redistricting maps must also conform with standards of equal protection under the Fourteenth Amendment. 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 (*Cooper v. Harris*, 581 U.S. 285 (2017)). Cases challenging redistricting plans on such grounds are often referred to as *racial gerrymandering* cases 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 and conforming with standards of equal protection.

Claims of Partisan Gerrymandering 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* (139 S. Ct. 2484 (2019)), 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 (Article I, § 4) as solely assigning disputes about partisan gerrymandering to the state legislatures, subject to a check by Congress. In contrast to population equality and racial gerrymandering claims, the Court also determined that no test that is both judicially discernible and manageable exists for adjudicating partisan gerrymandering claims. Instead of the federal courts, the Court suggested that Congress and the state legislatures could play a role in regulating partisan gerrymandering.

State Requirements for Congressional Districts

In addition to compliance with federal standards described above, states often require districts to meet certain other congressional redistricting criteria, many of which are related to geography. Often, decisionmakers weigh trade-offs between criteria, and some states specify a priority order in which factors are considered.

Criteria such as *compactness*, required by 31 states, and *contiguity*, required by 34 states, relate to a district's shape. A compact district is a geographically consolidated area, though state laws often do not specify precise measures of compactness. A district is generally considered contiguous if one can travel between any two points without crossing into another district. Thirty-one states require consideration of existing *political subdivisions* (e.g., towns, cities, or counties). Twenty-one states require preserving *communities of interest*, which are generally groups of people who share a background or characteristics (e.g., a social, cultural, historical, racial, ethnic, partisan, or economic identity). Five states require preserving the "core" of an existing district, and two states allow this as a consideration.

Some states also address political competition through their redistricting criteria. For example, 13 states prohibit districts intended to unduly favor or disfavor an incumbent. Other criteria related to political parties may be considered relevant to discussions about partisan gerrymandering. Thirteen states, for example, prohibit districts intended to unduly favor or disfavor a political party, and five states prohibit use of partisan data in the redistricting process. In other states, use or consideration of party identification in the redistricting process may be allowed.

During its October 2022 term, in *Moore v. Harper*, the Supreme Court is scheduled to consider the scope of a state court's authority under the Elections Clause to overturn laws enacted by a state legislature that regulate congressional elections based on state constitutional provisions. Depending on how the Court rules, the decision could clarify under what circumstances state legislatures have the authority to establish congressional redistricting maps without review by state courts. For more information, see CRS Legal Sidebar LSB10838, *State Legislatures, State Courts, and Federal Elections: U.S. Supreme Court to Consider Moore v. Harper*, by L. Paige Whitaker.

Considerations for Congress

Although redistricting processes today are largely governed by state law in practice, Congress has, at times, considered an expanded federal government role, which could serve to standardize certain redistricting criteria or elements of the district drawing process across states. Given the historically limited role Congress has played in the redistricting process, concerns about federalism may arise in the context of certain congressional efforts related to redistricting.

Some bills in the 117th Congress would establish criteria for districts, such as population equality, compactness, contiguity, or preservation of existing political subdivisions (e.g., H.R. 1, S. 1, H.R. 80, H.R. 3863, H.R. 4307, H.R. 5746, S. 2093, S. 2670, and S. 2747). Bills have also been introduced that would require states to use independent redistricting commissions (e.g., H.R. 1, S. 1, H.R. 80, H.R. 100, H.R. 3863, H.R. 4307, S. 2093, and S. 2670) and/or maintain certain standards of public input and transparency regarding the redistricting process (e.g., H.R. 4, H.R. 81, and H.R. 7948). Some bills include provisions to prevent states from redistricting more than once following an apportionment, a practice sometimes referred to as *mid-decade redistricting* (e.g., H.R. 1, H.R. 80, H.R. 134, H.R. 4307, H.R. 5746, S. 1, S. 2093, S. 2670, and S. 2747). Chamber actions were taken on H.R. 1 (passed the House); H.R. 5746 (House agreed to the text as an amendment to a Senate amendment to an unrelated bill; in the Senate, cloture was not invoked on the question of agreeing to the House amendment); S. 2093 (cloture not invoked on the motion to proceed); and S. 2747 (cloture not invoked on the motion to proceed).

For additional discussion, see CRS Report R45951, *Apportionment and Redistricting Process for the U.S. House of Representatives*, by Sarah J. Eckman.

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