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ELECTORAL DISTRICTING, I

The number of members to be elected to a given legislative body and the voting rule by which that body will be chosen are laid down in statute. The United States, like most democratic nations of the world, elects representatives from geographically defined election districts. At issue are the election method, the criteria for drawing district lines (or GERRYMANDERING [2]), specifying who will actually do the redistricting, and the nature of legal and/or administrative review of redistricting choices.

commonly

In the United States most elections are conducted under the rule that the candidate receiving the greatest number of votes will be chosen. Congressional elections now take place in single-member districts, but this practice has not always been uniform. Prior to 1842, the smaller states commonly elected members to Congress in at-large elections with entire states as the electorate. At both the state and local level, at-large and multimember district elections in areas of high minority concentration have come under increasing challenge as dilutive of minority voting rights as a result of litigation brought under the VOTING RIGHTS ACT OF 1965 [4,II] (as Amended in 1982) or directly under the EQUAL PROTECTION [2,I,II] clause of the FOURTEENTH AMENDMENT [2,I,II] to the Constitution. Both the proportion of states using multimember districts for state legislative elections and the proportion of cities using at-large elections have declined over the past several decades.

In the overwhelming majority of states the legislative body itself is responsible for drawing new plans (usually after the decennial CENSUS [II]). In most states the governor has VETO POWER [4] over state and congressional plans. In some states, legislative or congressional districting is entrusted to nonpartisan or bipartisan commissions.

Many criteria have been proposed to guide districting in the United States and multiple and potentially conflicting "reasonable" goals can be advocated for redistricting decisionmaking. The exercise of state redistricting authority is subject to JUDICIAL REVIEW [3] under federal standards involving Article I, section 2; the equal protection clause of the Fourteenth Amendment; the FIFTEENTH AMENDMENT [2]; and the Voting Rights Act of 1965 (as amended); as well as by state courts acting exclusively in terms of state law issues. Until 1993, redistricting case law

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appeared to be a largely settled area, with no real changes from the 1980s to the 1990s apparent in terms of "ONE PERSON, ONE VOTE" [3] or vote dilution standards. That situation changed dramatically when the Supreme Court decided SHAW V. RENO (1993) AND ITS PROGENY [II] and brought turmoil into the area of race-related districting.

It is convenient to divide proposed districting criteria into three categories: (1) formal (e.g., one person, one vote; compactness; contiguity), (2) racial, and (3) political. In the racial and political categories, we can usefully further distinguish between criteria that focus on intent and those that focus on the outcomes (or anticipated outcomes) of the redistricting process. It is also useful to differentiate different criteria for districting according to their legal derivations and legal force. In this analysis, "primary" criteria are mandated by the Constitution. "Secondary" criteria are those that derive explicitly from state constitutional provisions or from federal statutes. "Tertiary" criteria are those that, in a particular instance, derive their force from being implicitly embedded in state or local statute. "Supplementary" criteria, finally, are those that have no legal sanction in constitution or statute, whatever may be their moral force or the normative arguments in their favor.

Primary criteria must be satisfied by any redistricting plan. Lower-order criteria cannot, of course, override the primary criteria of the federal Constitution. It is important, however, to recognize that the status of any particular criterion as secondary, tertiary, or supplemental will vary with the particular legal context (e.g., from state to state, locality to locality). Moreover, the binding force of any particular criterion will vary with the nature of the constitutional or statutory language concerning its use. Some criteria may be lexicographically ordered. Some may be specified to apply only to the extent that they do not come into conflict with other criteria of higher or coordinate status.

The most important of the primary districting criteria is the one person, one vote standard derived from the Fourteenth Amendment (for state and local legislative bodies) and from Article I (for the U. S. House of Representatives). The Court has taken a two-pronged approach to operationalizing the one person, one vote standard. For state and local bodies, plans where the maximum deviation from strict population equality is less than 10 percent are generally considered to be prima facie valid and some plans with even higher deviations have been approved. In contrast, for the U. S. House, one person, one vote has been interpreted to require that deviations be reduced to the greatest extent feasible, and this has led the Court to reject congressional plans with even minuscule population deviations.

Almost all academic commentators on the one person, one vote cases have expressed the view that a zero-deviation-tolerance standard for congressional districting makes no sense, given measurement errors in the underlying census data and the reality that the decennial U.S. census provides only a snapshot of a constantly changing population. Moreover, an undue insistence on numerical

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equality substantially interferes with the implementation of other districting criteria.

The next most important primary districting criterion is the equal protection standard for the representation of various types of minority groupings. This standard has been instantiated in different ways for different types of groups.

For POLITICAL PARTY [3,II] supporters, the test laid down in *Davis v. Bandemer* (1986) seems to invalidate only virtual exclusion of a group from the political process and/or electoral success. However, there is considerable dispute as to how to interpret the *Bandemer* test. What can be said is that only one of the post-*Bandemer* challenges to plans as being unconstitutional partisan gerrymanders has proved successful, and the facts of that successful challenge are so unusual that it is hard to extrapolate from that case to others. Thus, for all intents and purposes, *Bandemer* appears not to be influential.

For racial groups (and certain other ethnic groups designated for special protection by the Voting Rights Act), at minimum, the equal protection standard requires that there be no "retrogression" in racial representation other than what would occur on the basis of demographic shifts in underlying populations.

In 1993, in *Shaw*, with further clarifications in subsequent cases such as MILLER V. JOHNSON (1995) [II], the Court laid down a new constitutional test: plans may not use race as their predominant or exclusive criterion. We will need to wait until the post-2000 districting cases to see how the *Shaw* test is to be reconciled with the nonretrogression test and with the most important of the secondary redistricting criteria—the need to avoid "minimizing or canceling out the vote" of the racial and ethnic groups protected under the Voting Rights Act.

cases

In states covered in whole or in part by section 5 of the Voting Rights Act, the Voting Rights Section of the Civil Rights Division of the U. S. Department of Justice (DOJ) must verify that proposed plans "do not have the purpose and will not have the effect of denying or abridging the right to vote." If DOJ is not convinced, it can deny preclearance, which voids the plan unless the DOJ decision be reversed by the U. S. District Court for the District of Columbia—something that in the 1980s and 1990s almost never happened. In any districting situation, litigation can be brought to challenge a plan as a "dilution" under the standards laid down in the 1982 amendments to section 2 of the Voting Rights Act as interpreted in *Thornburg v. Gingles* (1986).

also

Other secondary criteria may be embedded in state constitutions, such as language about contiguity and/or compactness of districts. Tertiary criteria may be found in a bill enacting a districting plan and stating the criteria that the proposed plan is supposed to have followed, such as respecting political subunit boundaries to the extent feasible or nonfragmentation of "communities of interest." Even when such criteria are not explicitly mentioned they may serve as a test for whether a plan is one in which race was not the sole or preponderant criterion. Other criteria, such as minimizing change from previous district

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lines, although not in any way mandated, have been held to be permissible by courts.

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(SEE ALSO: *Electoral Districting, II* [II]; *Voting Rights* [4,II].)

Bibliography

DAVIDSON, CHANDLER and GROFMAN, BERNARD 1994 *The Quiet Revolution in the South: The Impact of the Voting Right Act, 1965–1990.* Princeton, N.J.: Princeton University Press.

GROFMAN, BERNARD 1983 "Criteria for Districting: A Social Science Perspective." *UCLA Law Review* 33:77–184.

GROFMAN, BERNARD, ed. 1990 *Political Gerrymandering and the Courts.* New York: Agathon Press.

GROFMAN, BERNARD; HANDLEY, LISA; and NIEMI, RICHARD 1992 *Minority Representation and the Quest for Voting Equality.* New York and London: Cambridge University Press.