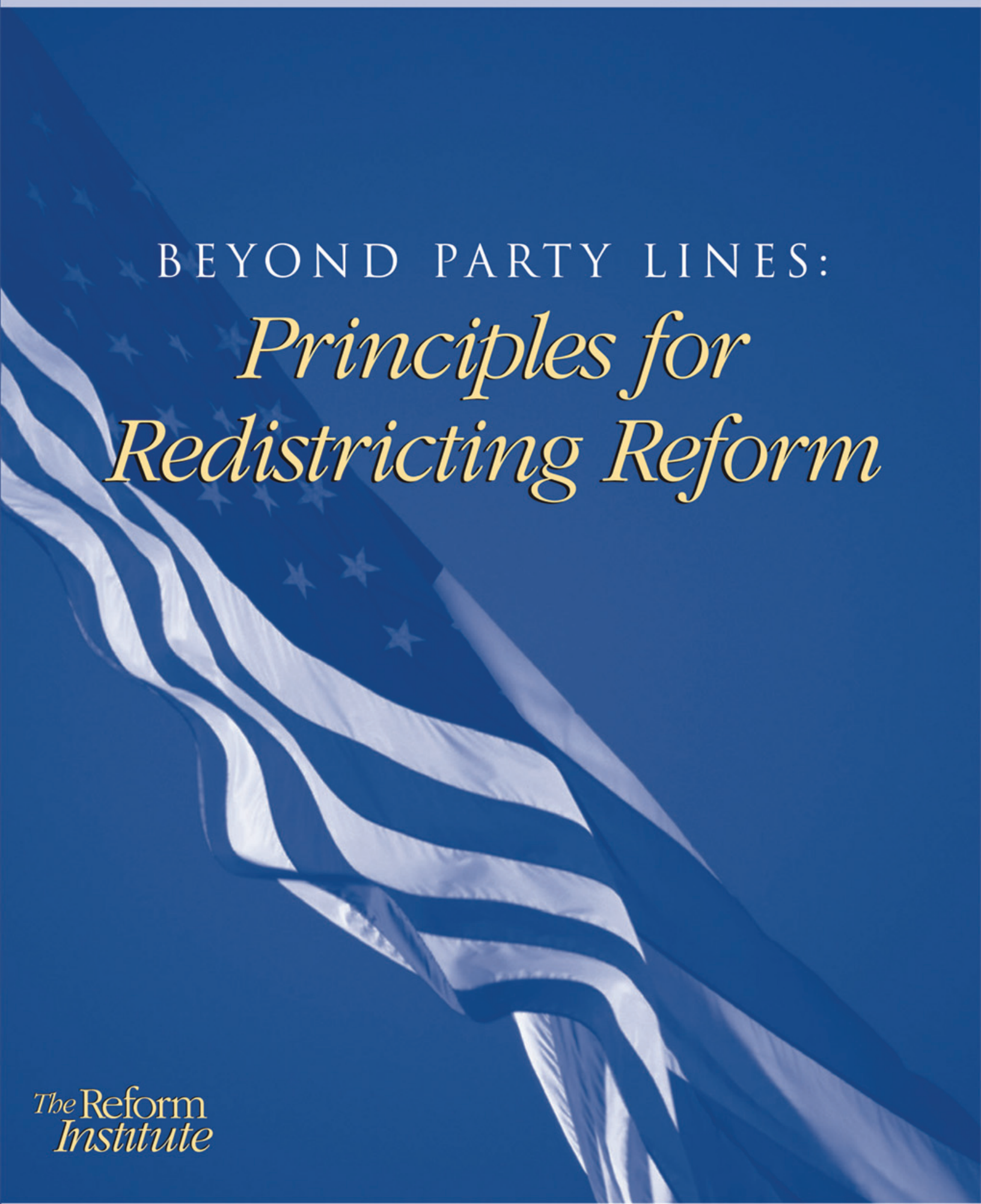


BEYOND PARTY LINES:
Principles for Redistricting Reform

The Reform Institute

BEYOND PARTY LINES: PRINCIPLES FOR REDISTRICTING REFORM

PROJECT DIRECTORS

SAM HIRSCH
Partner
Jenner and Block

DANIEL ORTIZ
Professor of Law
University of Virginia
School of Law

The Reform Institute
211 North Union Street, Suite 205
Alexandria, VA 22314

Tel (703) 535-6897
Fax (703) 683-6891

www.reforminstitute.org

INTRODUCTION

ADVANCING THE REFORM AGENDA

The Reform Institute has grown increasingly concerned with the continuous decline in competitiveness of federal elections in the United States. The high level of partisan and incumbent gerrymandering in the redistricting process at both the national and state levels is a driving force behind this problem. The Institute believes it is important for reform-minded organizations to focus public attention on increasing competitiveness, transparency and public participation in elections, and for these reasons, we believe we must take a critical look at the redistricting process.

The Institute has put together this important discussion guide on principles for redistricting reform, in the hopes that it will encourage an open dialogue on reforming the redistricting process and our democracy. Each general principle includes background, analysis, and discussion questions. This document should be read as part of a comprehensive approach to consensus-building. The debate over these redistricting principles is the foundation for a broader, long-term strategy for redistricting reform.

Gerrymandering and Incumbent Protection

The current redistricting practices have defeated much of our nation's framers' vision. Astonishing rates of incumbent reelection, declining competitiveness in congressional districts, and long periods of one-party control of the House have eroded the accountability and legitimacy of the people's chamber. The House of Representatives was established as the direct link between the people and their federal government. Unlike the Senate, the President, or the courts, according to the Federalists Papers, the House was to have "an immediate dependence on, and an intimate sympathy with, the people." Unfortunately, partisan gerrymandering weakens congressional responsiveness and accountability, and has reshaped the House of Representatives into a body that is largely unrepresentative of the people — both demographically and politically.

For example, competition in U.S. House elections has been declining since the 1950s, the 2002 and 2004 House elections were the least competitive in the postwar era. Among incumbents running for reelection in 2004 general elections, only five were defeated. In 2002, only four

challengers defeated House incumbents — the lowest number in modern American history.

In August 2003, in Vieth v. Jubelirer, a case challenging Pennsylvania's congressional redistricting, the Reform Institute filed a friend-of-the-court brief urging the U.S. Supreme Court to end gerrymandering and restore competitive elections. The outcome of that case was inconclusive, signaling that this issue will continue to be at the forefront of political debate as the courts struggle to define a consistent, balanced, and constitutional standard that applies to both the review and oversight of federal, state, and local redistricting plans.

Redistricting Reform

Because the next census is nearing, now is the opportune time for close scrutiny of the problems with the existing redistricting process and a thoughtful examination of the most promising solutions. The stakes in this debate are high, for competitive elections offer citizens meaningful options in choosing their representation and are among the greatest strengths of democratically elected leadership. The current redistricting process throughout this country works to the detriment of these core interests. This problem needs a thoughtful and workable public policy solution, in accord with constitutional values.

We hope that redistricting conferences, particularly the 2005 Airlie Redistricting Conference, serve as interactive, thought-provoking benchmarks in this important process. The following principles are meant as discussion-starters and we hope, will serve as a catalyst to creative thinking. They do not necessarily represent the views of any particular organization or the personal views of the project managers, Sam Hirsch and Daniel Ortiz. Please use the wide margins and note pages to take down your thoughts as you read through the principles.

TABLE OF CONTENTS

Introduction..... i

Acknowledgements 1

PRINCIPLE 1. Adhere to all Constitutional and Voting Rights Act requirements. 2

PRINCIPLE 2. Ensure transparency of the process and a meaningful opportunity for interested parties and for the public to be heard and participate. 6

PRINCIPLE 3. Promote partisan fairness and competitiveness. 10

PRINCIPLE 4. Respect existing political subdivisions and communities of interest.....15

PRINCIPLE 5. Encourage geographical compactness and respect for natural geographical features and barriers. 19

PRINCIPLE 6. Exclude consideration of the residence of incumbents and candidates. 22

PRINCIPLE 7. Minimize partisan political control by assigning the redistricting power to an independent commission. 25

PRINCIPLE 8. Limit redistricting to once following each decennial census.....30

PRINCIPLE 9. Recognize the limited precision and transitory nature of decennial census data to justify appropriate flexibility on population variance. 35

Suggested Further Reading 37

ACKNOWLEDGEMENTS

Sam Hirsch

Daniel Ortiz

Carnegie Corporation of New York

Gerry Hebert

Trevor Potter

Rick Davis

Thomas Mann

Peter Loge

David Skaggs

Suzanne Luft

Marianne Viray

Megan Brimhall

Crystal Benton

Winnie Strzelecki

Cecilia Martinez

PRINCIPLE 1

ADHERE TO ALL CONSTITUTIONAL AND VOTING RIGHTS ACT REQUIREMENTS

Any redistricting — congressional, state legislative, or local — must satisfy all applicable requirements of federal law. One requirement, embodied in the "one person, one vote" rule, regulates how much districts in the same plan can differ in population. The other, embodied in the Voting Rights Act and the Equal Protection Clause, regulates how much representation particular minority groups should receive. Surprisingly to some, partisan gerrymandering currently escapes any direct federal control. Plaintiffs unhappy with gerrymandering, however, often try to attack a redistricting plan obliquely as violating one of these other, better-established requirements. What follows is a brief description of how these federal requirements apply to redistricting. Because the law is so complex, the description necessarily simplifies and leaves out many issues of practical importance to litigators.

One Person, One Vote

In the early 1960s, when many state legislative and congressional districts were grossly malapportioned, the Supreme Court imposed a rule of "one person, one vote" on nearly all districting. In general, it requires that equal or roughly equal numbers of people receive equal numbers of representatives. The rule applies differently, however, to federal congressional districting, and to state and local districting. To the first, it applies quite strictly. The Court asks first whether any population differences could have been avoided. The answer here is nearly always "yes," unless the differences are vanishingly small. Those redistricting could nearly always have readjusted boundaries slightly to make the districts' populations more equal and plaintiffs can easily show how this could have been done. A federal court, in fact, struck down Pennsylvania's post-2000 census congressional plan in which the largest district contained only nineteen more people than the smallest.

The federal court then asks whether the population disparities were necessary to achieve some legitimate goal. It will consider goals like compactness, respecting the boundaries of political subdivisions and precincts, preserving intact communities of interest, preserving the cores of

prior districts, and avoiding contests between incumbents. In each case, the Court will seek to relate specific discrepancies to specific goals and will weigh the size of the deviation, the importance of the asserted policies (both in general and to the particular jurisdiction), how consistently the plan reflects those policies, and how well the jurisdiction could carry them out without varying so much from perfect equality. Under this approach, courts have allowed only minor deviations in congressional plans. They have, for example, approved plans with population deviations of 0.82 and 0.73 percent but invalidated one with a variation only slightly higher: 0.94 per cent.[1]

The "one person, one vote" rule applies much less strictly to state and local redistricting plans. In general, total population deviations of 10 percent or less between the largest and smallest districts do not require justification. (This is not necessarily true, if such discrepancies reflect questionable aims, like maximizing partisan advantage.) Only when the deviation exceeds that threshold must the jurisdiction justify its plan, which it would justify in the same way it would justify a federal plan — by tying each discrepancy to a legitimate state policy. Although this approach allows for greater deviations in state and local plans, the courts still worry over their size. Because in an early case applying this approach the Supreme Court said that 16.4 percent "may well approach tolerable limits," many lower courts have viewed this figure as a presumptive upper-limit on how much population deviation a state or local redistricting plan may contain.

The Voting Rights Act

Congress enacted the Voting Rights Act in 1965 primarily to protect the voting rights of racial minorities and expanded it later to cover certain language minorities. Two sections are primarily relevant to redistricting: section 2 and section 5. Section 2 applies to all jurisdictions in the country. It bars any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen … to vote on account of race or color [or membership in a language minority group]." Such denial occurs when,

> based on the totality of the circumstances, it is shown that the political processes leading up to nomination or election … are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

The statute also provides that the extent to which members of a protected group have been elected to office in the relevant jurisdiction is relevant, but that there is no right to proportional representation.

Applying the "totality of circumstances" test can be difficult and uncertain. But the Supreme Court has provid-

[1] To calculate the percentage of total population deviations courts subtract the population of the smallest district from that of the largest and divide that number by the population of the ideal district. Thus, in a plan of ten single-member districts covering a jurisdiction of 1,000 people where the largest district contains 110 people and the smallest 85, the population deviation would be (110-85)/100, which equals 25 percent.

ed some specific guidance for redistricting. In determining whether a plan giving a particular minority group a voting majority in a certain number of districts abridges their right to representation, a court is to ask four questions. First, how many separate geographically compact single-member districts could be drawn in which the minority group constitutes an effective voting majority? If the answer is no more than the plan already contains, then the redistricting itself is likely not responsible for any minority vote dilution. The minority's geographical dispersion would be responsible instead. Second, is the minority group politically cohesive? If it is not, then the group has little potential to elect its own representatives and there is no Section 2 violation. Third, does the majority vote sufficiently as a bloc to enable it — in the absence of special circumstances — usually to defeat the minority's preferred candidate? If the majority does not vote sufficiently together, there is again no Section 2 violation because it is not the plan's particular combination of majority and minority populations that is responsible for thwarting the minority vote. Finally, would the minority receive at least its roughly proportional share of seats under the challenged plan? If it would, then Section 2 generally is satisfied because it does not require more than proportional representation.

Section 5 works very differently. For one thing, it does not apply nationwide but only to certain jurisdictions, which now include nine whole states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and political subdivisions in seven others (California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota). Section 5 requires any of these jurisdictions to obtain "preclearance" before they can implement a redistricting plan. A jurisdiction may meet this obligation in two ways. The most common means of compliance with Section 5 is to submit a proposed redistricting to the United States Attorney General, who has sixty days to object and thereby block the redistricting plan from taking effect. Alternatively, a state or political subdivision may institute a declaratory judgment action in the United States District Court for the District of Columbia. In either case, the jurisdiction bears the burden of demonstrating that the proposed redistricting does not have the purpose, and will not have the effect, of denying or abridging the right to vote of racial, ethnic, and certain language minorities. Unless renewed, Section 5 will expire in 2007.

Unlike Section 2, which creates a cause of action to challenge existing districting plans as discriminatory, Section 5's substantive standard is comparative — a standard of "nonretrogression." In other words, Section 5 forbids only changes that: (1) are intended to reduce minority participation in the electoral process or minority political power below that prevailing under the existing regime, or (2) have that effect. Under the nonretrogression principle, for example, a legislative districting plan will pass muster so long as it provides for no less minority representation than the existing plan does. A plan that reduces minority representation will not. In simple terms, any redistricting that improves or maintains protected minorities' existing level of representation should be approved pursuant to Section 5. How to measure the overall level of

representation, however, is somewhat unclear and jurisdictions are given some flexibility.

Even as Sections 2 and 5 require a jurisdiction to take race into account when redistricting, the Supreme Court has held that the Equal Protection Clause limits how much a jurisdiction may take it into account. Although the Court has never developed clean standards for constraining "racial gerrymandering," it has largely adopted Justice O'Connor's formulation:

> [S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy [e.g., as a proxy for party affiliation], States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny …. Only if traditional districting criteria are neglected and that neglect is predominantly due to the misuse of race [is the district presumptively unconstitutional].

The interaction of this constraint and the Voting Rights Act is one of the most confusing and hotly contested issues in redistricting, perhaps in election law generally. It puts jurisdictions in a difficult bind and frustrates many minority groups seeking representation. A plan can be invalidated either because it fails to take race sufficiently into account or because it takes race too much into account.

Discussion Questions

1. To what extent, if at all, do the legal requirements of the Voting Rights Act and the "one person, one vote" rule restrict partisan gerrymandering?

2. How can one unhappy with partisan gerrymandering seek to attack it indirectly under the Voting Rights Act and the "one person, one vote" rule?

3. How can redistricters working within these federal constraints best ensure full and fair representation for all racial and ethnic groups in an increasingly diverse society?

4. Should states create stricter population-equality rules for state and local redistricting or should they merely abide by the federal-constitutional "10 percent rule"?

PRINCIPLE 2

ENSURE TRANSPARENCY OF THE PROCESS AND A MEANINGFUL OPPORTUNITY FOR INTERESTED PARTIES AND FOR THE PUBLIC TO BE HEARD AND PARTICIPATE

The legitimacy of democratic institutions rests largely on transparency and participation. When citizens cannot see how their government operates and cannot affect its decision-making, popular control is lost and those governed come to mistrust those who govern in their name. Such loss of confidence is particularly dangerous in the design of basic electoral structures, like districts. Mistrust of those structures can taint all subsequent political outcomes.

Many feel that traditional redistricting processes ignore these two fundamental values. One of the common complaints about traditional redistricting is that it is largely conducted in secret without any meaningful opportunities for the public to participate. When redistricting is controlled by a single party, it often excludes even the minority party from participation. Often the only thing transparent in the process to the public is that they cannot participate. This leaves the public to see a process that, reflects the interests of a small (and often one-sidedly partisan) group of insiders. Although transparency and participation are important to any type of redistricting process, this principle will primarily discuss how an independent redistricting process might further them. Much of its discussion, however, could apply with appropriate modification to traditional redistricting processes in which a legislative body draws the lines.

The public and any interested parties should be allowed to participate in the redistricting process at two points. First, the redistricting body should allow participation up-front when it considers how to conduct the process. Early on, it should invite public input on such questions as what principles to follow (to the extent they are not clearly specified by law), how to operationalize those principles and balance them against one another, how to comply with applicable requirements of federal law, and what plan to use as a starting point. Not only does such participation allow everyone interested a say in framing the plan, which is likely to bolster the resulting plan's legitimacy, but it also can alert the redistricting body to potential legal and political pitfalls. In addition, early public input can produce much information necessary to

construct a plan. If a plan needs to respect communities of interest, for example, public participation can help the redistricting body identify those communities and where they lie.

The biggest substantive issue is whether participants should be able to propose plans or parts of plans. On the one hand, encouraging the public to submit actual plans may restrict the redistricting body's freedom and flexibility, particularly if it must explain why it did or did not accept them. On the other hand, accepting plans from the public can make the redistricting body's job much easier. Not only will it have more plans to choose among when it picks one to start from, but it will also be able to see how different groups believe a plan may respect their various interests. If nothing else, encouraging groups to submit concrete plans may discourage them from making requests that redistricting could not possibly fulfill. If they themselves cannot propose an actual plan that meets their goals, they are unlikely to press hard for those goals in the first place.

The redistricting body might possibly structure up-front public participation in a way to moderate different groups' demands. If the redistricters, for instance, announce that they will use as a starting point whichever submitted plan best meets all applicable legal requirements and policy goals, groups might well submit plans better fitting the public aims of the process than their own private interests. In this way, political parties would not likely submit plans that best advantaged them relative to others. Fearing that such plans would be easily trumped by others' submissions, they would instead submit plans that fit the public goals — even if the plans did edge in particular partisan directions.

The largest procedural issue is what form public participation should take. Should the redistricting body conduct public hearings and perhaps allow a right of oral response or should it limit participation to written submissions? Although oral hearings may promote legitimacy by allowing participants to feel that they had a full-dress opportunity to present and argue their points of view, it is likely to draw out the redistricting itself and may add little real value. Limiting participation to written submissions, is much more efficient, allowing a significant degree of public input and improving the overall quality of the comments.

The redistricting body could run the initial public comment period much as federal administrative agencies do. It could announce what it was thinking of doing and what particular questions it had in mind, provide a deadline for submissions, and make all comments publicly available — preferably in real time on a database easily accessible through the Internet. It also could specify that certain information should accompany certain types of comments to enable it and members of the public to better evaluate and respond to them. It could ask, for example, that groups requesting that the plan respect particular communities of interest provide data about those communities — how are they identifiably different from others, do they vote differently than others, and precisely where they are located? Such real-time electronic submissions would ease continuing comment. If one group submitted a plan, another could comment on it, and then the first group or still another could respond to that com-

ment in turn. Such a dynamic comment process would be largely transparent and would greatly promote public participation.

One large procedural issue turns on the nature of the process. If an independent non-partisan body is drawing the lines, the redistricting body should prohibit all other forms of substantive contact, especially informal ones like phone calls and conversations with members and staff. Should such contact occur, the body should require that its content and the identity of the person initiating it be docketed. That way the public would fear no secret, private submissions and political actors would keep their participation aboveboard and limited. If, on the other hand, the process is political, such contacts are more appropriate.

After this initial round of public participation, those redistricting will need to roll up their sleeves and get down to work. During this phase, public participation is inappropriate — at least if the process is non-partisan — but transparency of a kind can play an important role. To allow their work to proceed expeditiously, non-partisan redistricters will need to keep all their work and deliberations secret — at least until they propose a plan. The law could require them to keep copies of all drafts of plans, minutes of deliberations, and copies of internal correspondence, which they could make public — perhaps again electronically — when they released their proposed plan or later. Access to such records would facilitate review by both the public and the courts and encourage the redistricters to be honest from the beginning.

Once they have produced a redistricting plan, the redistricters should present it to the public for another round of comment. At this stage, any interested party should be able to submit legal arguments challenging the scheme and make policy arguments about why it should be modified. And the public could respond not only to the plan itself but also to others' comments on it. Again, if the process is non-partisan, all comments should be public and docketed; private *ex parte* contacts should be strictly prohibited. After this second round of comment, the body would go back to work and make appropriate changes to the plan in light of the public's input. This second round of decisionmaking, like the first, should be private, at least if it is non-partisan, but the law could again require disclosure later of all drafts of changes, minutes of deliberation, and records of internal correspondence when the body released its final plan.

Two important questions remain. First, what duty should the redistricting body have to respond to comments and proposals? Should it be required to explain, if only briefly, why it did not adopt proposed plans? Why it did not respect a particular community of interest? Why it divided one county and not another or why it divided one city twice while another not at all? Requiring explanation would highlight these concerns in the design process and would better enable the public to see how fully the body took public comment into account, but also it would significantly slow the process down. Having to explain choices, especially where there are so many of them, will greatly burden the redistricting body.

Second, how, if at all, should a court review a plan for adherence to these procedural requirements? Should it, for

example, invalidate a plan if it later appears that some people had private communications with those in charge? If so, under what standard? Only if the communication contained information that was central to the shaping of the final plan? Moreover, if a redistricting body must explain its choices, how deferentially, if at all, should a court review its explanations? Should it make sure that substantial evidence supports them? Should it require the redistricting body to have made the best choices or only acceptable ones?

Rigorous judicial review will cause those redistricting to take procedural requirements more seriously, but it will add another level of legal uncertainty to a plan's prospects and provide opportunities for those unhappy with a plan on other grounds to shoot it down. If the redistricting body is truly nonpartisan and independent, perhaps the burden of judicial review — or at least strict judicial review — of procedures is unnecessary, especially since judicial review will always be available for the plan's substance.

Discussion Questions

1. Should public participation in redistricting occur through written comments, as in most rulemaking proceedings, or should it occur in some part through more formal public hearings?

2. Should the law prohibit private communications between outsiders and the redistricting body and require that the content and source of any such communications that nevertheless occur be made public?

3. What, if any, materials of the redistricting body should remain secret after the process is completed? When during the process should other materials be made public?

4. What types of judicial review should be available? Courts will obviously need the right to review plans for their compliance with legal requirements, like "one person, one vote" and the Voting Rights Act. Should they also be able to review the process for compliance with procedural requirements? If the redistricting body is required to explain why it made certain choices, should the courts be able to review whether it adequately justified them?

PRINCIPLE 3

PROMOTE PARTISAN FAIRNESS AND COMPETITIVENESS

Partisan fairness and competitiveness are almost universally lauded goals of redistricting. But how to define, measure, operationalize, and interrelate these two concepts receives far too little attention from reformers and academics alike.

Partisan fairness — the roughly symmetrical treatment of the two major political parties — protects the fundamental principle of majority rule, as it ensures that the more popular of the two major political parties has at least an even chance of garnering a majority of legislative seats. Severely biased partisan gerrymanders stand democracy on its head by turning popular minorities into governing majorities.

Competitiveness, or responsiveness (as political scientists often refer to it), protects the fundamental principle of democratic accountability, as it ensures that shifts in popular opinion will be reflected in shifts in legislative membership. If all districts are gerrymandered to be lopsided and noncompetitive, political power shifts from the voters to the mapmakers. And if the voters can never "throw the bums out," eventually their legislatures may be filled with them.

Partisan fairness is just the flip side of partisan bias. Intuitively, the key feature of a fair, unbiased redistricting plan is that the political party whose candidates attract the most popular votes should generally be rewarded with the most seats in the legislature. More broadly, a fair plan treats the two major parties symmetrically. If the parties have equal support in the electorate, they should win a roughly equal number of seats in the legislature. A 50 percent vote share should translate into a roughly 50 percent seat share. If either party succeeds in attracting support from more than half the electorate, it should be rewarded with more than half the seats — and neither party should profit more from such success than would the other party, if the tables were turned. For example, if the Democrats would be rewarded with 60 percent of the seats for winning 55 percent of the popular vote, then an unbiased plan should likewise give Republicans 60 percent of the seats if their candidates win 55 percent of the vote.

Political scientists have developed various ways of measuring a redistricting plan's responsiveness — or, put differently, a way of summarizing the overall level of competitiveness in the plan's districts. As the plan's responsiveness to shifts in voting behavior increases, the electoral system begins to resemble a winner-take-all system, roughly akin to at-large (rather than districted) elections. With extremely high responsiveness and low bias, a bare 51 percent majority of votes will be magnified into a 100 percent supermajority of seats. A gubernatorial election is a good example of a winner-take-all election: The party whose candidate gets 51 percent of the vote wins "all" of the governorship. There is nothing proportional about that outcome; but at least the popular majority is rewarded. Analogously, if a politically competitive state is divided into ten districts, each of which is a perfect microcosm of the state as a whole, then a slight shift in the statewide electorate, from narrowly favoring one political party to narrowly favoring the other, will result in all ten seats "flipping" from the former party to the latter. Again, that is not at all proportional; but it is majoritarian.

One key point here is often overlooked: In a single-member districting system, where each district elects one and only one member to the legislative body (so the total number of districts is identical to the size of the body), redistricting plans that are both fair and responsive do not guarantee, and in most circumstances will not generate, proportional representation. For example, under an unbiased redistricting plan, it would not be unusual to see the following pattern: If either party attracts 51 percent of the vote, it would be expected to win roughly 52 percent of the seats; a party with 55 percent of the vote would expect roughly 60 percent of the seats; and a party with 60 percent of the vote would expect roughly 70 percent of the seats. As long as these expectations are the same for each party, the redistricting plan that generates them is unbiased. Thus, capping partisan bias is a far cry from demanding proportional representation.

One advantage of a single-member districting system over a proportional-representation system is that — absent gerrymandering — it tends to generate relatively high levels of responsiveness. In a districted system, a party that increases its popularity in the electorate should be well rewarded with additional seats in the legislature. But as has become clear in recent elections — especially the last two rounds of U.S. House elections — gerrymandering can undermine this desirable feature and create an unresponsive system. Unfortunately, that is where we find ourselves today, not only in Congress, but also in most state legislatures.

Less widely recognized is that the combination of better computers and political databases, more predictable voting patterns, and continued judicial insouciance has rendered partisan gerrymandering much more effective than it was 20 or 30 years ago. The confluence of high levels of partisan bias with low levels of responsiveness presents a unique danger to our democracy. Partisan bias makes the legislature unrepresentative of the people and the scarcity of competitive seats drains any potential for fixing that imbalance through the normal electoral process.

To see why, first imagine a nationwide congressional plan with low responsive-

ness and low bias. Assume the nation has 200 solidly Republican districts and 200 solidly Democratic districts. Although voters in 400 of the 435 districts might be deprived a meaningful choice in the general elections, partisan control of the House of Representatives would still be determined by voters (albeit in only thirty-five of the 435 districts) — not by mapmakers. Conversely, if a plan had a high degree of both responsiveness and bias — say, with 150 solidly Republican districts, only 100 solidly Democratic districts, and 185 truly competitive ones — the deck would be stacked against the Democrats, but they still potentially could take control of the House by running strong campaigns and winning at least 118 of the 185 competitive districts.

But in a system with high bias and low responsiveness, one party can develop what is effectively a "lock" on the legislature. Imagine a plan with 220 solidly Republican districts, 170 solidly Democratic districts, and only forty-five truly competitive districts. Even if Democrats ran the table in the competitive districts, capturing all forty-five and taking a solid majority of the nationwide vote in the process, they would remain the minority party in the House with only 215 seats. Under that scenario, control of the House would be determined by the mapmakers, not the voters — a fundamental affront to our democratic system of government.

While it is important to understand the linkages between partisan fairness and competitiveness, it is also important to recognize a key difference: From a public-policy perspective, there is no legitimate argument favoring partisan bias in districting. The ideal amount of partisan bias is zero. But there is plenty of room for disagreement about the ideal level of responsiveness, or the ideal number of competitive districts, as we can see from two hypotheticals. The hypothetical discussed above — where the level of responsiveness is very high because every district in a highly competitive state is a perfect microcosm of that state and thus is itself highly competitive — runs the risk of transforming a very slight partisan edge in the electorate into a one-party sweep of every district. That could leave a political party supported by nearly half the state's voters with absolutely no representatives, which may unfairly stifle minority voices. And at the congressional level, the repeated occurrence of such upheavals would place the state at a tremendous disadvantage, as its delegation would accumulate no seniority in the House.

At the other end of the spectrum, if one party or the other is likely to win at least 60 percent of the vote in every district, only an unprecedented political tidal wave would put any of the seats in play. Such a plan would lack responsiveness and undermine democratic accountability. It seems that the U.S. House of Representatives and most state legislatures today are closer to this latter hypothetical than to the former one; recent districted elections have been disturbingly uncompetitive. But we should not assume that the best antidote would be literally to maximize competitiveness. Put differently, it may not be a bad thing that some districts are overwhelmingly Republican and conservative and that other districts are overwhelmingly Democratic and liberal, so long as a significant number of districts are "in the middle" and truly up for grabs in com-

petitive general elections.

Fortunately, the first step toward at least modestly increasing competitiveness — reducing the number of lopsidedly noncompetitive districts — is also the first step toward reducing severe partisan bias. That is because the lynchpin to a successful partisan gerrymander is to over-concentrate, or "pack," the other party's voters into the fewest possible districts and thus effectively waste votes that otherwise might have had a meaningful impact in neighboring districts. If one party controls all the truly lopsided districts, the other party's supporters will be much more efficiently distributed across districts. That asymmetric distribution of Democrats and Republicans across districts is the essence of a partisan gerrymander.

The problem, however, is that eliminating "packed" districts is not always possible without severe costs to other redistricting principles (such as compactness or respect for county or municipal lines), severe costs to minority voting strength, or both. That is because partisan bias sometimes flows from residential patterns where one party's voters are much more geographically concentrated than the other's. The enormous concentration of Democratic voters in New York City is a perfect example of this phenomenon.

This "natural" form of partisan packing raises at least two difficult legal questions. First, if a state wishes to minimize partisan bias, should its redistricting rules require affirmative attempts to counteract this "natural" packing? If so, how much, if at all, should efforts to promote partisan fairness and competitiveness trump other redistricting principles such as compactness or respect for municipal or county lines? Second, if the concentrations of one party's voters are (as in New York and many other large American cities) heavily populated by African-Americans and/or Latinos, is it possible to "unpack" these partisan strongholds without diluting minority voting strength and perhaps violating the Voting Rights Act? Or will the unpacking of these heavily minority urban districts actually enhance minority citizens' political power and fully comport with the aims of the Voting Rights Act?

Finally, even if consensus can be reached about the proper levels of competitiveness and the acceptable tradeoffs that can be made to reduce partisan bias, a whole host of practical and technical issues must be resolved. How should we measure the partisanship of any given district? Should partisan registration matter (in those states where voters register by party)? Or should redistricters focus instead on actual voting patterns from recent elections? What contests should be considered, and how many years back should redistricters go when analyzing election returns? Should incumbency be "factored out" of election returns, to better reflect underlying partisanship? And when projecting future outcomes, should incumbency be "factored in"? How should the "pairing" of two or more incumbents in the same new district be treated? Should redistricters take affirmative steps to ensure that the burdens of being "paired" will not fall entirely on the incumbents from one political party? Most of these questions have become standard fare in Voting Rights Act litigation, but with surprisingly little consensus on how best to answer them. Without answers to these questions any attempt to operationalize

the relatively abstract principles of partisan fairness and competitiveness may fail.

Discussion Questions

1. Can "neutral" processes (e.g., bipartisan or nonpartisan commissions, or preventing redistricters from considering political data) or "neutral" criteria (e.g., maximizing compactness or minimizing county splits) create adequate levels of competitiveness and partisan fairness?

2. If — as most advocates of the Voting Rights Act would argue — "colorblind" redistricting cannot cure minority vote dilution, can "politics-blind" redistricting cure partisan vote dilution?

3. Can a state draft sufficiently specific and unambiguous laws to ensure adequate competitiveness and partisan fairness? How would they read?

PRINCIPLE 4

RESPECT EXISTING POLITICAL SUBDIVISIONS AND COMMUNITIES OF INTEREST

This principle requires redistricting plans to pay some respect to political boundaries and communities that exist independently of the plan itself. Thus, a plan drawing state legislative districts would have to keep one eye on city and county boundaries and try not to split up concentrations of certain cultural and socioeconomic groups. Like many of the other redistricting principles, this one plays both a constructive and preventive role, but in each case it is only partially successful.

On the constructive side, the principle serves three different values. First, it seeks to ensure that various political and social communities have some representation in the legislature. By avoiding splitting communities as much as possible, redistricters increase the chances that representatives find themselves responsive to a more unified set of interests. A representative whose district falls all within a city, for example, is likely to find herself more consistently taking an urban position on issues, to the extent such a position exists, than would a representative whose district encompasses both urban and rural areas. On the other hand, this principle sometimes can deny a city or community the advantages that flow from having representatives on both sides of the aisle in the legislature. This principle can, moreover, affect the character of the legislature in an important way. It increases to some degree the likelihood that the legislature will consist of representatives who will stand for a particular set of interests, rather than of representatives each of whom represents a compromise among different interests at the district level. This change promotes the representation of diverse views in the legislature, but may make compromise there more difficult.

Second, this principle may in some circumstances promote more informed discussion of political candidates. To the extent legislative districts correspond to other political and social boundaries, they may make it easier for voters to engage the candidates and issues. If everyone in a city falls in the same congressional district, for example, everyone will be interested in the same contest and will discuss the same candidates, and local media cov-

erage will likely be more focused. In the case of communities of interest, political discussion may be especially keen since many of these communities rest on vibrant social networks.

Third, this principle helps facilitate an important feature of some states' political process: local legislation. Where needs vary greatly from locality to locality, having representatives closely identified with particular political subdivisions may increase the responsiveness of state politics to local needs. Especially in those states that grant political subdivisions relatively little power and autonomy, many local needs must be addressed at the state level. Town and city councils simply lack the power to manage them. A county that needs state approval for a particular bond, tax, or land-use policy, for example, might more easily find a legislator to champion its interests if it is not split among several legislative districts.

This principle also plays an important preventive role. Even if it failed to promote any of the three above interests, it would confine the redistricters' freedom to gerrymander. To the extent a redistricting body must pursue one goal, it will be more difficult for it to pursue others like partisan advantage. The only question is how much more difficult it will be. Does this principle make gerrymandering only a little or much more difficult? Like some other traditional redistricting principles, this one constrains gerrymandering but not as much as many people believe and hope. First, given the demanding "one person, one vote" rule, cutting across the boundaries of political subdivisions and communities of interest is inevitable to some degree and those in control of redistricting can exercise their discretion to favor one political party or the other. Different ways of cutting across political and community lines are likely to have different political impacts. A redistricting body, for example, might have to choose between splitting a largely Democratic city or Republican county. The effects would be quite different and would depend, in part, upon the political complexion of the other areas each area is combined with.

Second, given that the many goals of redistricting often conflict, compromise among them is often necessary. This leaves much discretion to those who redistrict. If they are so inclined, they may be able to justify in the name of "compromise" splitting political subdivisions and communities of interest in ways that advantage one party or the other.

Third, this principle itself sometimes inevitably entails partisan advantage. Consider a 70 percent Democratic county, half the population of which lives in a single nearly 100 percent Democratic city. If the county is entitled to ten districts, respecting the city boundaries means that all five of the city districts will go Democratic by very large margins, while all five suburban districts might go Republican by much slimmer margins. Ironically, this is exactly what a Republican gerrymander would seek to do: to pack the Democrats into as few districts as possible in order to waste much of the Democratic vote.

Respecting communities of interest can work similarly. To the extent that some communities vote disproportionately for one party, respecting them by packing their voters into fewer districts may dampen the prospects of the party they support and lessen the community's overall influence in the legislature.

A community may, for example, prefer to have its members split over two districts rather than concentrated in a single one if that means twice as many representatives will respond to its interests. This debate, in fact, has led to much recent litigation under the Voting Rights Act.

Practical issues further lessen this principle's constraining force. To implement the principle, one must decide a whole host of questions, the answers to which may favor a particular party. Is it, for example, better to split one county three ways and preserve two counties intact or instead to split two counties two ways and leave one intact? Should respect for political subdivisions and communities of interest be measured from the subdivisions' and communities' perspective or from the perspective of the district? That is, should we care more about how often political subdivisions and communities are split or about how often districts are split across political subdivisions and communities? Furthermore, should all political subdivisions matter equally and how much should we care about different communities of interest? Showing great respect to all of them would make redistricting practically impossible. Should we respect rural communities as much as ethnic ones? Should all ethnic and racial communities count the same? If not, how much more should we count some than others?

Perhaps the hardest and most important question is the most basic. The courts have never really defined the concept of "community of interest." It could encompass not only racial, ethnic, religious, social, economic, and various cultural groups, but, especially on the local level, groups like university communities and retirement areas. How far should the notion extend before it becomes unhelpful? Should different kinds of communities count only for certain kinds of plans — *e.g.*, should we respect a university community in drawing city council, but not state legislative districts?

Because we can operationalize this principle in many different ways and because it is difficult to make all these choices in advance of redistricting, this principle will necessarily leave some room for partisan politics to play. This possibility does not mean, of course, that this principle makes gerrymandering worse, but just that it fails to constrain gerrymandering as much as many people hope and that this principle can sometimes systematically advantage one party over another. The Voting Rights Act may also conflict with this principle in some cases.

Discussion Questions

1. To what extent does this principle achieve the constructive goals claimed for it and how important are those goals today?

2. How effectively does this principle control partisan gerrymandering?

3. Can this principle be framed in a way that minimizes its potential for misuse to justify partisan redistricting?

4. How should we define "communities of interest"?

5. How should this principle be operationalized — *e.g.*, how much respect should different types of political subdivisions and communities of interest receive, how much should different

kinds of splitting matter, and how should we measure "respect" as a practical matter?

6. To what extent should choices among ways of operationalizing this principle be made by those who actually redistrict and when should those choices be made — in the redistricting process or in advance?

7. How, if at all, should redistricters use modern technology, like sophisticated consumer profiling, to identify "communities of interest"?

PRINCIPLE 5

ENCOURAGE GEOGRAPHICAL COMPACTNESS AND RESPECT FOR NATURAL GEOGRAPHICAL FEATURES AND BARRIERS

Like Principle 4, this principle serves both constructive and preventive purposes. On the one hand, it can further several important representational goals. In earlier times when travel was hard, compactness and, contiguity generally made it easier for candidates to meet and engage their constituents and to represent them once in office. Campaigning and keeping in touch once elected were much easier the less one had to travel within a district. Similarly, when most media were locally based and personal communication was largely by word of mouth, which required face-to-face interaction, compactness would have made it easier for voters to inform themselves of both candidates and issues and to vigorously discuss them. In addition, since communities of interest were often geographically based and often followed natural geographical features — think of low-country plantation culture versus mountain culture in colonial Virginia and South Carolina or of farming versus mining cultures in early Colorado — respecting compactness and natural geographical features could further, indirectly, the interests more directly promoted by Principle 4.

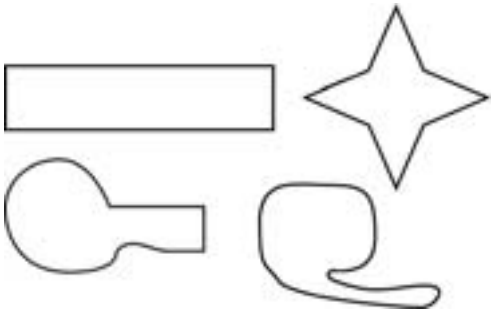
Today these justifications carry somewhat less weight. Modern ease of travel allows candidates both to campaign over much wider areas and across natural barriers without great difficulty and to more easily keep in touch with their constituents once elected. And since modern media operates on a broader geographical scale, voters obtain more of their information from non-local sources. A voter trying to decide which congressional candidate to vote for may, for example, consult a blog written by someone in a different state and hosted on a server located across the nation. The modern economy and transportation, moreover, have greatly increased citizen mobility, thereby lessening the tie of communities of interest to particular geographical areas. Today a river may more likely be seen as real estate perk than as an obstacle to transportation or communication and the people on one bank may have more in common with those on the other than either group has with people further inland.

Even if compactness and respect for natural geographical features promote

these particular goals less effectively than before, they still do so to some degree and they also serve an important preventive function. They constrain those who redistrict from pursuing less legitimate objectives, like partisan advantage. Most academics and political commentators, however, believe their constraining effect is somewhat overstated. Although these concerns may foreclose the most egregious gerrymanders, they leave much room for partisan politics to operate. This is especially true when they can be traded off opportunistically against other traditional redistricting principles and when redistricters have reliable information down to the precinct level, as they typically now do, about how people vote.

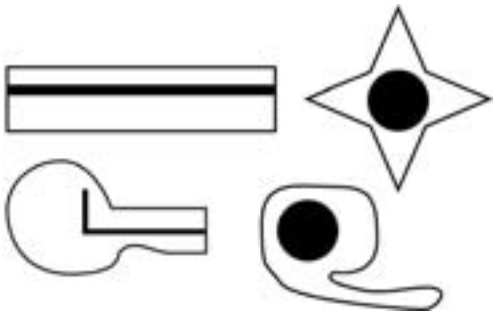
Compactness, moreover, is not really a politically neutral criterion. All other things being equal, it advantages interests that are more widely and evenly dispersed over the whole geographic jurisdiction. Geographically concentrated interests will tend to find themselves packed into a few individual districts. Consider the example of two political parties who have roughly the same number of supporters in a jurisdiction with ten districts. If 70 percent of one party's members live in a single, dense geographic enclave with the rest evenly dispersed over the remaining territory while the other party is more evenly dispersed across the jurisdiction as a whole, the other party will usually win more districts if they are reasonably compact. That is so because the first party's members would be disproportionally packed into fewer districts. Many believe, that for this reason, compactness can harm political parties whose supporters reside disproportionately in cities.

Compactness and respecting natural geographical features also raise many thorny practical issues. People have proposed many different formal measures of geographical compactness. Which one should be used? Although nearly everyone agrees that a circle is perfectly compact, one cannot create a plan of only circular, single-member districts. But once one moves away from circular districts, agreement as to what counts as compact ends. Should one care more about how broad a district is compared to its height, about how many tentacles it has, about how far those tentacles extend away from it, or about how much they curve around once they extend out? Should one worry about how often a straight line drawn from one arbitrary point in the district to another would cross outside it? Should the aesthetic ungainliness of a district matter if nearly all the population actually lives in a single relatively compact core within it? To understand these issues visually, consider how relatively compact the following districts are:



To make things even harder, then consider whether that judgment is justified without actually knowing where people live within those districts. If 90 percent

of the populations were evenly dispersed in the shaded areas of each district below, would your instincts change?



Compactness, moreover, is usually thought of narrowly as only geometric compactness — that is, how nice the district looks on a map. Should geometric compactness represent the only viable form? What if a district lacks geometric compactness but is "functionally" compact — that is, despite its visual ungainliness it ties together people of similar interests? Should such a form of compactness count? If so, how should we measure it?

Similar practical questions arise with respect to natural geographical features. Should all rivers be equally respected? Should a broad river matter as much as a tall mountain? As much as a swamp? Should natural barriers matter if many highways cross them, if people on either side of them look the same, or if media markets disregard them?

Since these questions all have many possible answers, compactness and respecting natural features will leave much room for other concerns, including politics, to play out. At worst, these two criteria can be manipulated to justify results reflecting less principled aims and in some cases they can conflict with the Voting Rights Act. It may sometimes, for example, only be possible to construct a plan satisfying the Voting Rights Act if one stretches the notion of compactness somewhat. None of this is to say, of course, that this principle should play only a small role — or no role — in redistricting but rather to caution that geography may matter less now than it used to and that it can sometimes be used opportunisticly to legitimate what its proponents fear: partisan gerrymandering.

Discussion Questions

1. In an age where travel and communication are easy, how much should physical proximity and natural boundaries matter?

2. How can this principle be framed so as to minimize the possibility that some may misuse it to justify partisan redistricting?

3. How should this principle be operationalized — for example, how should compactness be measured and how much should different kinds of natural boundaries matter? Should we focus on each plan's average district or on each plan's least compact district?

4. Who should make these choices and when should they make them — while redistricting or before?

5. Should we broaden the notion of compactness beyond simply geometry?

PRINCIPLE 6

EXCLUDE CONSIDERATION OF THE RESIDENCE OF INCUMBENTS AND CANDIDATES

At first glance, this principle seems relatively uncontroversial. Taking into account where incumbents and likely candidates live allows the redistricting body to play favorites among both candidates and parties. The redistricters could, for example, carve away an incumbent's residence from the core of her existing district and place her in a less hospitable one, thereby lessening her chances of reelection. Similarly, if one party controls the redistricting process, it can redraw district lines so that powerful incumbents of the other party have to run against each other while its own incumbents face less well-known challengers. This strategy both advantages the controlling party's own established candidates and diminishes the number of senior representatives on the other side.

Should those who redistrict remain neutral among individual candidates? In particular, should they not avoid deliberately giving additional electoral advantage to incumbents, who often already enjoy advantages in name recognition, fundraising, subsidized communications to constituents, and ability to draw media coverage? Likewise, should not the redistricting process remain neutral as among political parties? If not, partisan fairness, electoral competition, and political responsiveness all suffer. Closer analysis reveals, however, that this principle, just like several of the others, is somewhat more complicated and may involve policy tradeoffs. This is not to say that it should not guide redistricting, just that its place in the process needs to be well understood.

Some believe that taking incumbency into account can promote legitimate political values. For one thing, in a system where seniority rules the legislature, a jurisdiction may want to protect incumbents in order to increase the collective power of its representatives in a larger assembly. Thus, a state eager for more money for highway construction, mass transit, or agricultural subsidies might rationally want to send a slate of relatively senior members to the U.S. House of Representatives. In that way it could increase their power relative to other states' representatives on the relevant committees. The same holds true for poli-

cies other than appropriations that may affect the state's interests.

Seniority, however, is a zero-sum game — that is, one representative's seniority always comes at the expense of another's. Promoting seniority, thus, only makes sense when the jurisdiction performing the redistricting is redrawing districts for a body in which it competes against other jurisdictions. Enhancing the seniority of its congressional delegation, for example, may increase one state's influence and power in the House of Representatives. But enhancing the seniority of some members of its own state legislature would be fruitless. Their added seniority would come at the expense of others in the same body, who also represent people who live within the state. In this situation, the state would simply be playing favorites among its own, not increasing its power and influence in a body where it competes with other states. Whether one believes that promoting incumbency for this reason is legitimate or not, the rationale applies at most to congressional races.

In addition, protecting incumbents can increase the level of know-how in representative bodies. In a term-limited body, for example, some might want to respect incumbency at least a little in order to increase experience within the representative body. Not only would such experience help the body function better but it would also empower it relative to other branches of government and to outside interests. Rapid turnover in a term-limited legislature, some feel, weakens the body of government closest to the people, leads to a more powerful executive and perhaps judiciary, and places representatives more at the mercy of lobbyists and powerful private interests. This justification is obviously controversial. To some, it smacks of incumbent self-interest and many believe that the voters in individual races, not those who redistrict, should decide how much, if at all, to weigh this particular factor.

One concern in ignoring where incumbents and other candidates live is that it might not be possible. Under some circumstances, the Voting Rights Act might require redistricters to take into account where particular incumbents live. And, even if it does not, those who redistrict may already know or can easily find out where candidates, especially incumbents, live. Officially denying them knowledge which they can easily obtain on their own may only serve to empower those within the process who are willing to cheat. Thus, this "principle" may sometimes unfortunately serve as an invitation to corruption.

One might also criticize this principle in quite a different way — for not going far enough. Incumbents care even more about where their supporters live than where they themselves do. An incumbent pitted against another can always move to another district, especially if she has some name-recognition and support there. An incumbent whose supporters are broken up among other districts, however, has nowhere to go. For this reason, one might consider expanding the principle to exclude consideration not only of the residence of incumbents and of other candidates, but also of where their support lies. Of course, such an expanded principle, just like the more narrow one, would sometimes have to bend to the requirements of the Voting Rights Act.

Discussion Questions

1. Are the better values that some claim for maintaining incumbency truly legitimate or just smokescreens for incumbent self-interest?

2. If these values are legitimate, do they outweigh the potential for incumbent protection and partisan favoritism that considering where incumbents and candidates live creates?

3. If considering residence generally creates too much risk of mischief, are there some situations where it makes sense to allow jurisdictions to take residency into account — e.g., in congressional redistricting and in redistricting term-limited bodies?

4. Does the ability of redistricters to easily find out where incumbents and other candidates live mean that cheaters will be advantaged if this information is officially excluded from the process?

5. Should the principle extend to exclude consideration of where candidates' electoral support is based?

PRINCIPLE 7

MINIMIZE PARTISAN POLITICAL CONTROL BY ASSIGNING THE REDISTRICTING POWER TO AN INDEPENDENT COMMISSION

Advocates of "independent" redistricting commissions often elide the distinction between two very different models. The first model, which equates "independence" with nonpartisanship, suggests that redistricting should be made apolitical: Self-interested political actors should be replaced with neutral redistricters, who then must be shielded from the kinds of influences and data that might "re-politicize" the process. The second model, which equates "independence" with bipartisanship (at least in a two-party system such as ours), suggests that redistricting is inherently, indeed inescapably, political, but seeks to minimize unfairness by transferring the redistricting power from legislative bodies — which at any given time may be dominated by one political party — to balanced, bipartisan commissions, where both major parties are ensured an equal number of seats at the bargaining table.

The choice between these two models will drive many other considerations when crafting state constitutional amendments or statutes creating independent redistricting commissions. If the goal is to make the process nonpartisan and apolitical, then elected officials, party officers, and those who work closely with them cannot serve as commissioners. And commissioners furthermore must be "sealed off" from certain types of information, including most electoral data. For example, Principle No. 6 discusses the pros and cons of prohibiting redistricters (or attempting to prohibit them) from learning the locations of incumbents' and other candidates' residences. As the discussion there explains, any such efforts to deny decision-makers relevant information raise the risk of corruption — as cheaters who break the rules and obtain the prohibited data will gain a systematic edge over commissioners who follow the rules. Iowa's redistricting (which does not actually involve a "commission" but instead is done largely by legislative staff) suggests that, under certain circumstances, the nonpartisan model may be feasible. But the Iowa example cannot easily be transferred to other states that have more combative political cultures, less tradition of professional nonpartisan legislative staffing, more convoluted political-subdivi-

sion lines, and more Voting Rights Act issues.

On the other hand, if the goal of creating an independent redistricting commission is conceived more narrowly, so as to focus on preventing extreme partisan gerrymanders, then there is considerably greater flexibility regarding the composition of the commission, the criteria it may apply, and the data it may consider when seeking to satisfy those criteria. Elected officials, party officers, and even political consultants can serve as highly knowledgeable commissioners, so long as both major political parties have the same opportunity to appoint them, in equal numbers. Redistricting criteria can be overtly, and transparently, political — for example, taking into account the massive electoral advantages held by incumbents, rather than pretending that they do not exist. And all manner of relevant data — including detailed, precinct-level returns from recent elections — are fair game. This model reduces the need to police the commissioners as it eliminates censorship of sensitive political information.

In terms of membership, this bipartisan model only demands an equal number of seats for the two major parties. How many commissioners each party gets to appoint, and whether the state party chairs, the legislative leaders, or statewide elected officials (Governor, Attorney General, etc.) have the power to appoint are important questions.

But usually, the most important membership question is who, if anyone, will serve as the "odd" member of the commission — that is, as the tiebreaker. Absent a tiebreaker, there is too great a risk of partisan gridlock, which will simply result in court-ordered redistricting, hardly a satisfying reform. Sometimes the two party delegations to the commission can attempt to agree upon a tiebreaker. But barring such an agreement, who should appoint the tiebreaker? Options include the state supreme court, the state's chief justice, or a panel of retired judges. And who should be appointed — a political scientist, a geographer, a well-respected civic leader, or some other type of person?

Simply placing an equal number of Democrats and Republicans on the commission and then adding a tiebreaker does not necessarily generate good results, even if the tiebreaker is sophisticated and well intentioned. If the two parties' delegations decide that a bipartisan, sweetheart, pro-incumbent gerrymander is in their mutual best interests, then any effort by the tiebreaker to demand the creation of competitive districts will be futile, as he simply will be outvoted by the two sets of partisans. This risk is at its zenith in congressional redistricting, where a state's less popular party may be satisfied to strengthen its grip on a minority of seats while allowing the more popular party to strengthen its grip on the majority of seats. By contrast, at the state-legislative level, each party must compete for a majority of seats unless it is willing to surrender any hope of winning control of the chamber. That dynamic may thwart bipartisan action by the redistricting commission and thus prevent the tiebreaker from becoming powerless.

One way to ensure the tiebreaker a central role is to give him more votes than the two party delegations combined — effectively, to turn him into the sole ultimate decision-maker, and thus to transform the two partisan delegations into "inside lobbyists" whose job is to win the tiebreaker's support. But

placing that much discretionary power in the hands of one person (or even in a committee of three tiebreakers) may be too dangerous, unless the tiebreakers' discretion can be meaningfully constrained through clear, judicially enforceable state-law rules.

Because it is much easier to design bright-line rules for evaluating, or ranking, redistricting plans than for drawing them, and because the partisan delegations will likely have more plan-drawing resources at their disposal than will the tiebreaker, it may make sense to treat the commission's work as a competition, where the two partisan delegations take turns competing to see which one can best satisfy a discrete list of specific redistricting criteria, as judged by the tiebreaker. Each delegation would be required, in turn, to present a map that at least matches the other delegation's last map on all criteria and that also beats it on at least one criterion. For example, if state law established that the commission's only relevant criteria were minimizing the number of county splits and minimizing some specific measure of partisan bias, then the tiebreaker would be authorized to accept the most recent plan submitted to him unless the other side timely submitted a plan with the same level of partisan bias and fewer county splits or with the same number of county splits and less partisan bias. As the process continued with multiple iterations, plans alternately emanating from each partisan delegation would tend to converge toward the absolute minimum number of county splits. From then on, the two delegations would have no choice but to compete to minimize partisan bias. The tiebreaker's role would be tightly confined: "scoring" the most recent plan on both criteria, challenging the other partisan delegation to beat the most recent pair of scores, and deciding when to cut off the iterative process and adopt the last proposal.

An interesting wrinkle here would be to open this tournament to the public (see generally Principle No. 2). If the most recently submitted plan — along with the county-split and partisan-bias scores that the tiebreaker gave to it — were posted on the Internet, then members of the public could propose plans, too. If the two partisan delegations were not inclined to move quickly toward a good map, injecting a high-scoring plan drawn by a member of the public would force both sides to compromise and improve their proposals, to prevent the tiebreaker from simply choosing the public's high-scoring proposed plan.

One major problem with this format is that some valid redistricting criteria are not matters of degree, where the partisan delegations (or the partisan delegations plus members of the public) should be allowed to compete freely. For example, in most states, any plan containing a noncontiguous district should be rejected out of hand. Likewise, and more importantly, plans that violate the "one person, one vote" doctrine should be automatically ineligible for consideration, no matter who submits them and how well they score on other key criteria such as county splits and partisan bias. Satisfying "one person, one vote," however, is relatively simple: The state constitution or statute could simply demand a total population deviation of no more than one person or (in the case of non-congressional districts) a total population deviation of no more than 10 percent of the average dis-

trict population. Any plan violating that bright-line rule would be flatly rejected.

But satisfying the federal Voting Rights Act is not such a simple criterion. Reasonable minds can differ about whether a plan does or does not comply with the Act; and no simple, mathematical "rule of thumb" can replace a thorough, nuanced evaluation of minority electoral opportunities under the totality of circumstances. So when a partisan delegation or a member of the public submits a proposed plan, the tiebreaker's determination of whether the plan does or does not comply with the Voting Rights Act may be hotly contested and may ultimately have to be resolved in court.

Questions of compliance with federal law, of course, can be resolved by federal or state courts. But the tiebreaker's compliance with state redistricting rules such as those described here can be resolved only by state courts, as the Eleventh Amendment bars federal courts from enjoining state officials for violating state law. So the application of criteria such as minimizing county splits or minimizing partisan bias, the "scoring" of plans proposed by partisan commissioners or members of the public, and the number of iterations that the competition is allowed to consume before the tiebreaker cuts off the process and adopts the last map are all issues that ultimately may be tested in state court by any aggrieved citizen. A thorough reform proposal should also address the issue of which state court will have jurisdiction to review the commission's decisions. Perhaps the best option is the state supreme court, although that may raise some issues if the court will in effect be reviewing acts taken by the tiebreaker who it appointed. Another possibility is to allow any state trial court of general jurisdiction to hear challenges, but that would promote judge shopping and "races to the courthouse." Another solution, then, would be to grant exclusive jurisdiction to the state trial court located in the state's capital, with an automatic right of expedited appeal.

Given that, in many states, judges themselves are elected officials, and sometimes are elected on a partisan ballot, it is important that the state's redistricting rules be unambiguous and straightforward. Sacrificing equity for certainty may be wise, in order to minimize the judiciary's entanglement in the partisan politics that redistricting inevitably entails.

Discussion Questions

1. Is it correct to assume that partisan politics can be constrained, but can never be fully removed from the redistricting process?

2. Should the same commission take responsibility for congressional, state senate, and state house redistricting, or are these tasks best divided among two or three separate commissions? Would combining them in one commission encourage the tiebreaker to adopt one party's congressional plan and the other party's state-legislative plans, or one party's senate plan and the other party's house plan? If so, is that good or bad?

3. What criteria are sufficiently clear to constrain both the tiebreaker and the state court that ultimately will review his handiwork? Will this proposal work if state law mandates five or ten criteria, rather than just two or three?

4. Would a state court be allowed to replace the commission's plan with one that was equal or better on all state-law criteria? What if the superior plan had never been presented to the commission?

5. Should the commission's plan be subject to a vote of ratification in the legislature? If so, should the legislature be allowed to consider amendments?

6. Is this "bipartisan" commission proposal unfair to third parties? Is it any worse for third parties than the system it would replace?

PRINCIPLE 8

LIMITING REDISTRICTING TO ONCE FOLLOWING EACH DECENNIAL CENSUS

This principle aims to restrict opportunities for partisan redistricting. Under the "one person, one vote" requirement of the United States Constitution, any jurisdiction electing district-based representatives effectively must redistrict after each decennial census. If it does not, a court will do so in order to equalize the districts' populations. The "one person, one vote" rule, however, does not restrict redistricting from occurring more frequently. Unless state law provides otherwise, a jurisdiction could redistrict itself every two years — or even more often — if it wanted.

This possibility leaves much room for partisan opportunism. If a single party controls the redistricting process, it can redraw district lines before a particular election to maximize its chances of maintaining control. Indeed, it could do so before every election. The most notorious example of this type of opportunism is the Texas congressional redistricting of 2003. After the 2000 census, Texas had to redraw its congressional districts. Because the Texas legislature failed to agree upon a plan, a three-judge federal district court redrew them. According to the court's opinion, the court began by drawing those districts necessary to satisfy the Voting Rights Act and then located Texas's two new seats where the population had grown most. It then adjusted the districts to make them more compact, to ensure they were contiguous, to follow the prior boundaries of the congressional districts as much as possible, and to respect local political subdivisions. It then considered the effect of the plan on incumbents who held major leadership positions and its overall partisan implications. It found that the plan was likely to produce a congressional delegation roughly proportional to each major party's share of the statewide vote. The next election produced a congressional delegation of seventeen Democrats and fifteen Republicans.

In that same election, Republicans gained control of both the Texas House and Senate. At the urging of U.S. House Majority Leader Tom DeLay, the Republican-controlled legislature decided to redistrict to gain more Republican seats. The attempt caused such bitterness

that Democratic state representatives repeatedly decamped the state to deprive one house or the other of the state legislature of the two-thirds quorum necessary to pass a new plan. After much wrangling, including attempts to fine the absent Democrats and punish their staffs, enough Democrats returned to create a quorum and a new plan was passed and signed by the Republican governor. In the 2004 elections, this new plan produced a congressional delegation of eleven Democrats and twenty-one Republicans, thereby switching six seats. Significantly, Republicans now control the House of Representatives with a margin of only fifteen seats.

Limiting redistricting to once immediately after each decennial census accomplishes two goals. First, it removes any possibility of partisan opportunism after the post-census redistricting unless a court finds that the post-census plan is itself invalid. Even if a single party later came to control all the arms of the redistricting process, it simply could not redistrict to its advantage. It would have to live with the existing plan until after the next census. Second, redistricting only once after each census injects some healthy uncertainty into the redistricting process. Gerrymandering works only to the extent that those in control of redistricting can accurately predict voting behavior. The strategy depends on one party being able to spread out its own support so as to create relatively slim majorities in many districts while packing the other party's support into as few districts as possible, each with a very large majority. That strategy can backfire if the controlling party cuts its own margin of support too thin. When that happens, a slight shift in voter sentiment to the other party will give it majorities in many districts leaving some to argue that gerrymandering is inherently self-limiting. In their view, parties will overreach and their misjudgments will come back to bite them. That is true, however, only if parties cannot well predict future voting behavior. If they must predict it up to ten years out, there is much uncertainty, which may discourage them from gerrymandering as aggressively as they would otherwise. If they can fine-tune district boundaries every two years, however, there is much less uncertainty and they are apt to press much further.

Limiting redistricting to once after every decennial census thus makes some sense when partisan opportunism is a threat. When it is not present, however, as when an independent, non-partisan commission controls the redistricting process, it makes less sense. In fact, when partisanship or incumbent self-dealing is not a concern, more frequent redistricting might serve wholesome political goals. For example, state and especially local governments might legitimately want to redistrict more than once every ten years when they have reliable data that varying population growth across the jurisdiction as a whole has led once equipopulous districts to contain very different numbers of people. Such a jurisdiction could minimize opportunities for partisan advantage-taking by setting an objective trigger in advance — e.g., requiring or allowing redistricting only when the population of the largest district exceeded that of the smallest by a set percentage. Practically speaking, however, few jurisdictions are likely to have sufficiently reliable data on population growth between federal decennial censuses to

justify this type of redistricting.

More innovatively, a jurisdiction in which the redistricting process is controlled by political actors might actually try to use more frequent redistricting to combat partisan gerrymandering. If its law required redistricting whenever some previously stated criterion of partisan fairness was violated, the jurisdiction would force redistricting whenever one party had substantially more seats than its support warranted. If the subsequent redistricting were not controlled by players all of the same party, a compromise, not a partisan plan would presumably result. And even if the same players as before controlled the process, the situation would presumably be no worse. Or, if the jurisdiction wanted, it could kick the redistricting to a different type of body, like an independent commission. In fact, the prospect that a very partisan plan would automatically trigger a redistricting, control of which would be uncertain, would likely discourage partisan actors from reaching for too much in the first place. If nothing else, the thought of perhaps losing control of the process the second time around would force them to balance their own private incumbency concerns against partisan advantage. Of course, agreeing on a measure of partisan fairness would not be easy. Many different approaches exist and they might all have different political implications within the jurisdiction.

In short, limiting redistricting to once following every decennial census could help constrain partisan opportunism in cases where political actors redistrict. It adds little, on the other hand, when an independent commission does so. And even in the case where political actors control the process, more frequent redistricting might be structured innovatively to discourage excessive partisan behavior and to pursue more legitimate objectives.

Discussion Questions

1. Can the reasons one might want to redistrict out-of-cycle ever be legitimate?

2. If they can be, are they important enough to justify the risk of partisan advantage-taking that redistricting controlled by political actors can present?

3. Can out-of-cycle redistricting be structured in such a way as to minimize the dangers of partisan gerrymandering or even to control it?

PRINCIPLE 9

RECOGNIZE THE LIMITED PRECISION AND TRANSITORY NATURE OF DECENNIAL CENSUS DATA TO JUSTIFY APPROPRIATE FLEXIBILITY ON POPULATION VARIANCE

Redistricting depends upon numbers and census taking is necessarily an inexact project. Every ten years the federal government mounts an increasingly thorough effort to count the American population and every ten years it misses the mark. Some people never get their forms; others get them but never return them; others get them, return them, but fill them out incorrectly; and the government's follow-up never catches up with some of these people or introduces inaccuracies of its own. Still, other people receive duplicate forms and fill out both. The Census Bureau now estimates that the 2000 census overcounted nationwide by 0.48 percent. That overall figure may seem low but it constitutes roughly 1,350,825 people. More importantly, it masks some very large differences among social subgroups. The estimated undercount of African-Americans males aged 30-49 was 8.29 percent; of all African-American males, 4.19 percent; of Asian and Pacific Islanders, 2.12 percent; and of non-homeowners, 1.14 percent. On the other hand, the estimated overcount of women aged 50 and above was 2.53 percent; of adolescents aged 10-17, 1.32 percent; of non-Hispanic whites, 1.13 percent; and of homeowners, 1.25 percent.

Time only compounds these initial inaccuracies. The census is supposed to enumerate the population as of April 1st of each year ending with a zero. The Census Bureau, however, does not publish even its earliest figures until the end of that year. By the time a redistricting body can get seriously down to work, the figures are already nearly a year out-of-date. In that time, some people have died, some people have been born, some people have moved out, and others have moved in — all at different rates across different geographic areas. In other words, the day it is published the census is not only "off" but is differentially "off" in different places and for different demographic groups.

Given the census's unavoidable imprecision, many have suggested that the "one person, one vote" rule should be flexible in application. So-called de minimis population deviations, they believe, should not cause constitutional problems. After all, why should the Constitution require

more precision than the census itself can give, especially if a jurisdiction could perhaps use the added flexibility to boost the representation of those groups that the census itself disproportionately overlooks? In particular, why should the Constitution require more exact equality than the estimated imprecision of the census? To many, requiring more exact equality than that appears arbitrary.

The Supreme Court has heard versions of this argument several times and each time has firmly rejected it, most recently in 1983. In that case, New Jersey argued that the "one person, one vote" rule should overlook de minimis deviations from equality. Relying on the "inevitable statistical imprecision of the census," New Jersey argued that "[w]here, as here, the deviation from the ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero." In response, the Supreme Court characterized the particular *de minimis* line New Jersey proposed as one giving only "the illusion of rationality and predictability." The Court found two problems with the approach:

> First, [New Jersey] concentrate[s] on the extent to which the census systematically undercounts actual population—a figure which is not known precisely and which, even if it were known, would not be relevant to this case. Second, the mere existence of statistical imprecision does not make small deviations among districts the functional equivalent of equality.

The census's general imprecision, the Court found, was irrelevant because little was known about its distribution. If the undercount, which it reflected, were evenly distributed across districts, it would make no difference to population deviations among districts. As the Court explained it,

> The undercount in the census affects the accuracy of the *deviations* between districts only to the extent that the undercount varies from district to district. For a one-percent undercount to explain a one-percent deviation between the census populations of two districts, the undercount in the smaller district would have to be approximately three times as large as the undercount in the larger district.

In other words, for the imprecision to explain away a particular *de minimis* inequality between two districts, certain unlikely assumptions would have to be true.

The Supreme Court rejected deviations within the range of the estimated undercount as the "functional equivalent of equality" for a different reason. It admitted the imprecision, but then firmly rejected its claimed significance:

> The census may systematically undercount population, and the rate of undercounting may vary from place to place. Those facts, however, do not render meaningless the differences in population between congressional districts, as determined by uncorrected census counts. To the contrary, the census data provide the only reliable — albeit less than perfect — indication of the districts' "real" relative population levels. Even if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one can say with

> certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size. That certainty is sufficient for decisionmaking. Furthermore, because the census count represents the "best population data available," it is the only basis for good-faith attempts to achieve population equality. Attempts to explain population deviations on the basis of flaws in census data must be supported with a precision not achieved here.

The Court has offered two other arguments why it should not accept de minimis population variances. First, if that were the standard, redistricters would strive to achieve it rather than more exact equality. To some, of course, that would not be a bad idea because it would give redistricters more flexibility to consider other worthy redistricting goals. Second, whatever *de minimis* level the Court accepted would be arbitrary. If 0.7 percent were acceptable, why not 0.8 percent? Why not 1.0 or 1.2 percent? There would be no non-arbitrary place to draw the line. While this is true, some have asked why exact equality based on admittedly imprecise census numbers is not just as arbitrary. In the end, the Court acknowledged the argument and fell back upon somewhat vague constitutional "aspirations":

> Any standard, including absolute equality, involves a certain artificiality. As appellants point out, even the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed. Yet problems with the data at hand apply equally to any population-based standard we could choose. As between two standards — equality or something less than equality — only the former reflects the aspirations of [the Constitution].

Whatever one thinks of the Court's rejection of flexibility here — and many have criticized it — it really only matters in congressional redistricting. In state legislative and local redistricting, the Supreme Court has already relaxed application of the "one person, one vote" rule so that total deviations of 10 percent or less are presumptively legitimate and usually require no justification (see Principle 1). So long as those redistricting state and local bodies stay within this tolerance, they have great freedom to be flexible and to promote legitimate redistricting objectives other than equality of population. Only when they draw lines for congressional districts will redistricters be severely pinched by the "one person, one vote" rule.

Discussion Questions

1. To what extent does the "one person, one vote" rule's largely inflexible application to congressional redistricting impede pursuit of other legitimate aims?

2. Do states and localities employ the extra flexibility they have in designing state legislative and local districts to actually pursue more fully the aims they assert they would in congressional districting or do they use the added flexibility to engage in partisan gerrymandering?

3. How valid, if at all, are the Supreme Court's reasons for not allowing *de minimis* population variations in congressional redistricting?

4. Should the Supreme Court apply a uniform population variance standard to all redistricting or continue to apply a stricter standard to congressional districts and a more flexible standard to state legislative and local districts?

SUGGESTED FURTHER READING

Mitchell N. Berman, Managing Gerrymandering, 83 Tex. L. Rev. 781 (2005).

David Butler & Bruce E. Cain, Congressional Redistricting: Comparative and Theoretical Perspectives (Macmillan 1992).

Bruce E. Cain, The Reapportionment Puzzle (Univ. Calif. Press 1984).

Adam Cox, Partisan Fairness and Redistricting Politics, 79 N.Y.U. L. Rev. 751 (2004).

Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (Oxford University Press 1968).

Andrew Gelman & Gary King, A Unified Method of Evaluating Electoral Systems and Redistricting Plans, 38 Am. J. Pol. Sci. 514 (1994).

Bernard Grofman, Lisa Handley & David Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C.L. Rev. 1383 (2001).

J. Gerald Hebert et al., The Realists' Guide to Redistricting: Avoiding the Legal Pitfalls (American Bar Association 2000).

Sam Hirsch, The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting, 2 Election L.J. 179, 183 (2003).

Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002).

Samuel Issacharoff, Pamela S. Karlan and Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process (Foundation Press Rev. 2d Ed. 2002 & Supp. 2004).

Ron Johnston, Charles Pattie, Danny Dorling and David Rossiter, From Votes to Seats: The Operation of the UK Electoral System Since 1945 (Manchester University Press 2001).

Jeffrey C. Kubin, The Case for Redistricting Commissions, 75 Tex. L. Rev. 837 (1997).

Daniel H. Lowenstein & Jonathan Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?, 33 U.C.L.A. L. Rev. 1 (1985).

David Lublin, The Paradox of Representation (Princeton Univ. Press 1997).

Nathaniel Persily, When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans, ___ Geo. Wash. L. Rev. ___ (forthcoming 2005), available at www.persily.com.

Richard H. Pildes, The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28 (2004).

Richard H. Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights, 92 Mich. L. Rev. 483 (1993).

Peter H Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325 (1987).

Jeffrey Toobin, The Great Election Grab: When Does Gerrymandering Become a Threat to Democracy?, New Yorker, Dec. 8, 2003.

National Conference of State Legislatures, Redistricting Law, available at http://www.ncsl.org/programs/legman/redistrict/redistlaw.htm.

Political Gerrymandering and the Courts (Bernard Grofman,ed., Agathon Press 1990).

Race and Redistricting in the 1990s (Bernard Grofman, ed., Agathon Press 1998).

THE REFORM INSTITUTE'S UNIQUE, INDEPENDENT VOICE

The health of a free society can be measured by the willingness of ordinary people to take an active role in the nation's democratic institutions. The Reform Institute's mission is to help reestablish the essential connection between citizens and their government, and to renew the American tradition of meaningful, active citizen participation in the nation's civic life.

The Institute is a nonprofit, nonpartisan 501(c)(3) educational organization dedicated to achieving those goals by promoting open and fair elections, by reducing the influence of special interests in our politics, and by neutralizing the political influences percolating into the reform debate.

The Institute is a unique, independent voice in the constellation of watchdog organizations. We are entirely nonpartisan and strive for objectivity in our approach. We believe the reform agenda can only flourish when partisan politics are largely removed from the debate.

The Institute brings together a broad base of reformers from all ideological spectrums, including business leaders, elected officials and, most importantly, average Americans who are tired of politics as usual.

The Institute's distinctive network is reflected in the members of our Advisory Board—a bipartisan group of notable academics, legal experts, election administrators and public officials. This includes Charles Kolb (Committee for Economic Development), Norm Ornstein (American Enterprise Institute), Tom Mann (Brookings Institution), U.S. Senator Lindsey Graham, David Pottruck (The Pottruck Group) and former U.S. Senators David Boren and Bob Kerrey. The Advisory Board is chaired by former Congressman Amo Houghton. These and other members of the Board have joined forces to carry forward the reform agenda from a moderate vantage point.

The Reform Institute
211 North Union Street, Suite 205
Alexandria, VA 22314

Tel (703) 535-6897 ★ Fax (703) 683-6891

www.reforminstitute.org ★ info@reforminstitute.org