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Congressional Redistricting: Legal and Constitutional Issues

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Summary

Congressional redistricting is the drawing of district boundaries from which the people choose their representatives to the U.S. House of Representatives. The legal framework for congressional redistricting resides at the intersection of the Constitution's limits and powers, requirements prescribed under federal law, and the various processes imposed by the states. Prior to the 1960s, court challenges to redistricting plans were considered non-justiciable political questions that were most appropriately addressed by the political branches of government, not the judiciary. In 1962, in the landmark ruling of *Baker v. Carr*, the Supreme Court pivoted and held that a constitutional challenge to a redistricting plan was not a political question and was justiciable. Since then, a series of constitutional and legal challenges have significantly shaped how congressional districts are drawn.

Key Takeaways from This Report

- The Constitution requires that each congressional district contain approximately the same population. This equality standard was set forth by the Supreme Court in a series of cases articulating the principle of "one person, one vote." In order to comport with the equality standard, at least every 10 years, in response to changes in the number of Representatives or shifts in population, most states are required to draw new congressional district boundaries.
- Congressional districts are also required to comply with Section 2 of the Voting Rights Act (VRA), prohibiting any voting qualification or practice—including congressional redistricting plans—that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.
- Under certain circumstances, the VRA may require the creation of one or more "majority-minority" districts, in which a racial or language minority group comprises a voting majority. However, if race is the predominant factor in the drawing of district lines, then a "strict scrutiny" standard of review applies. In 2015, in *Alabama Legislative Black Caucus v. Alabama*, the Supreme Court set forth standards for determining whether race is a predominant factor in creating a redistricting map when considering a Fourteenth Amendment equal protection claim.
- *Alabama* also held that the inoperable preclearance requirement in Section 5 of the VRA does not require that a new redistricting plan maintain the same percentage of minority voters in a majority-minority district. Instead, the Court held that Section 5 requires that the plan maintain a minority's ability to elect candidates of choice.
- Last year, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Court held that states can establish independent commissions, by ballot initiative, to conduct congressional redistricting.
- In April 2016, in *Evenwel v. Abbott,* the Court held that states may draw their legislative districts based on total population rather than based on eligible or registered voters.
- As of the date of this report, two redistricting cases are pending before the Supreme Court: *Harris v. Arizona Independent Redistricting Commission*, regarding whether partisanship can justify differences in population; and *Wittman v. Personhuballah*, regarding what challengers must demonstrate in proving that race was a predominant factor in the creation of a redistricting plan.

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During the New York debates ratifying the U.S. Constitution, Alexander Hamilton commented that "the true principle of a republic is, that the people should choose whom they please to govern them."[1] This principle is embodied in congressional redistricting, the drawing of district boundaries from which the people choose their representatives to the U.S. House of Representatives.[2]

Prior to the 1960s, court challenges to redistricting plans were considered non-justiciable political questions that were most appropriately addressed by the political branches of government, not the judiciary. In 1962, in the landmark ruling of *Baker v. Carr,*[3] the Supreme Court pivoted and held that a constitutional challenge to a redistricting plan was not a political question and was justiciable. Since then, a series of constitutional and legal challenges have significantly shaped how congressional districts are drawn. Furthermore, recent and pending Supreme Court cases will likely continue to impact the process of congressional redistricting, and the degree to which challenges to redistricting plans will be successful. For example, the Supreme Court recently clarified how a court should evaluate whether race was a predominant factor in the development of a redistricting plan when considering a Fourteenth Amendment equal protection claim.[4] It also recently upheld, under the Elections Clause, an Arizona constitutional provision, enacted by initiative, which established an independent commission for drawing congressional districts.[5]

During the 2015 Supreme Court term, the Court is continuing to focus on redistricting. In April 2016, the Court ruled that states may draw their legislative districts based on total population rather than based on eligible or registered voters. In addition, as of the date of this report, two redistricting cases are currently pending before the Court: one case presents the question of whether partisanship can justify differences in population in the context of state legislative redistricting;[6] another case presents the question of whether, in proving that race was a predominant factor in the creation of a redistricting plan, challengers must demonstrate that considerations of race predominated over politics.[7]

This report first examines key constitutional and federal statutory requirements applicable to congressional redistricting, including the standard for equality of population among districts, and the Voting Rights Act (VRA). It then analyzes case law interpreting the constitutional requirement of congressional district equality—the "one person, one vote" standard—including the degree to which districts must be drawn to achieve exact population equality. It also explores the unsettled question of whether partisanship can justify differences in population, which the Supreme Court is considering in the pending case of *Harris v. Arizona Independent Redistricting Commission*. Then, it discusses the question of who should be counted for the purposes of achieving equality among districts, focusing on the Court's recent ruling in *Evenwel v. Abbott*. Next, it examines the application of Section 2 of the VRA to congressional redistricting, and relatedly, limits to VRA compliance under the Fourteenth Amendment. This section includes discussion of a pending Supreme Court case, *Wittman v. Personhuballah,* regarding what challengers must demonstrate in proving that race was a predominant factor in the creation of a redistricting plan. Case law in this

[1] 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876).

[2] For discussion of the processes of congressional apportionment and redistricting, see CRS Report R41357, *The U.S. House of Representatives Apportionment Formula in Theory and Practice*, by Royce Crocker, and CRS Report R42831, *Congressional Redistricting: An Overview*, by Royce Crocker.

[3] 369 U.S. 186 (1962).

[4] *See* Ala. Black Caucus v. Alabama, 135 S.Ct. 1257 (2015), discussed *infra* at 10-11.

[5] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S.Ct. 2652 (2015), discussed *infra* at 12-13.

[6] *See* Harris v. Ariz. Indep. Redistricting Comm'n, No. 14-232, discussed *infra* at 5-6.

[7] *See* Wittman v. Personhuballah, No. 14-1504, discussed *infra* at 10-11.

area demonstrates a tension between compliance with the VRA and conformance with standards of equal protection. The report then addresses the Court's 2015 ruling in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, upholding an Arizona constitutional provision—enacted through initiative—that established an independent commission for drawing congressional districts. Finally, the report provides an overview of selected legislation in the 114th Congress that would establish additional statutory requirements and standards for congressional redistricting.

Constitutional and Statutory Requirements

The legal framework for congressional redistricting involves, in addition to various state processes, both constitutional and federal statutory requirements, and case law interpretations of each. The Elections Clause of the Constitution, Article I, Section 4, clause 1,[8] provides that the times, places, and manner of holding congressional elections be prescribed in each state by the legislature thereof, but that Congress may at any time make or alter such laws. Article I, Section 2, clause 3 requires a count of the U.S. population every 10 years,[9] and based on the census, requires apportionment of seats in the House of Representatives among the states, with each state entitled to at least one Representative.[10] A federal statute requires that apportionment occur every 10 years.[11] In order to comport with the constitutional standard of equality of population among districts, discussed below, at least once every 10 years, in response to changes in the number of Representatives apportioned to it or to shifts in its population, most states are required to draw new boundaries for its congressional districts.[12]

The Supreme Court has interpreted the Constitution to require that each congressional district within a state contain approximately the same population. This requirement is known as the "equality standard" or the principle of "one person, one vote."[13] In 1964, in *Wesberry v. Sanders*,[14] the Supreme Court interpreted Article I, Section 2, clause 1 of the Constitution, which states that Representatives be chosen "by the People of the several States" and "apportioned among the several States ... according to their respective Numbers," to require that "as nearly as is

[8] U.S. CONST. art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[9] U.S. CONST. art. I, §2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.").

[10] U.S. CONST. amend. XIV, §2, cl. 1 ("Representatives shall be apportioned among the several States according to their respective numbers ..."); U.S. CONST. art. I, §2, cl. 3 ("The number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least one Representative ... ").

[11] 2 U.S.C. §2a(a).

[12] In general, however, it does not appear that states are prohibited from also enacting redistricting plans mid-decade, particularly in order to replace court-ordered plans. The Supreme Court has announced that the Constitution and the Court's case law "indicate that there is nothing inherently suspect about a legislature's decision to replace, mid-decade, a court-ordered plan with one of its own." League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 418-419 (2006). For further discussion, *see* CRS Report RS22479, *Congressional Redistricting: A Legal Analysis of the Supreme Court Ruling in League of United Latin American Citizens (LULAC) v. Perry*, by L. Paige Whitaker. Pending federal legislation would limit redistricting to once per decade. *See infra*, at p.13-14.

[13] *See* Gray v. Sanders, 372 U.S. 368 (1963) (holding that the conception of political equality means one person, one vote).

[14] 376 U.S. 1 (1964).

practicable, one man's vote in a congressional election is to be worth as much as another's."[15] With regard to state legislative redistricting, later that year, the Court issued its ruling in *Reynolds v. Sims*.[16] In *Reynolds*, the Supreme Court held that the one person, one vote standard also applied in the context of state legislative redistricting, holding that the Equal Protection Clause requires all who participate in an election "to have an equal vote."[17]

Congressional districts must be drawn consistent with the Voting Rights Act (VRA).[18] The VRA was enacted under Congress's authority to enforce the Fifteenth Amendment, providing that the right of citizens to vote shall not be denied or abridged on account of race, color, or previous servitude.[19] In a series of cases and evolving jurisprudence, the U.S. Supreme Court has interpreted how the VRA applies in the context of congressional redistricting. Congressional district boundaries in every state are required to comply with Section 2 of the VRA.[20] Section 2 provides a right of action for private citizens or the government to challenge discriminatory voting practices or procedures, including minority vote dilution, the diminishing or weakening of minority voting power. Specifically, Section 2 prohibits any voting qualification or practice—including congressional redistricting plans—applied or imposed by any state or political subdivision that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority.[21] The statute further provides that a violation is established if, based on the totality of circumstances, electoral processes are not equally open to participation by members of a racial or language minority group in that its members have less opportunity than other members of the electorate to elect representatives of their choice.[22]

Based on this legal framework, this report next analyzes legal issues that arise in the context of congressional redistricting, addressing: the extent to which precise or ideal mathematical population equality among districts is required; whether partisanship justifies small differences in population between districts; whether the total population or eligible voters should be counted for the purposes of achieving equality among districts; when creation of a majority-minority district is required under the VRA; what limits the Fourteenth Amendment places upon congressional redistricting; and who is authorized to draw and implement a redistricting plan.

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[15] *Id.* at 7-8.

[16] 377 U.S. 533 (1964).

[17] *Id.* at 557-558.

[18] For further discussion of the application of the Voting Rights Act in the context of redistricting, *see* CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

[19] U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). Since its ratification in 1870, however, the use of various election procedures by certain states diluted the impact of votes cast by African Americans or prevented voting by African Americans entirely. As case-by-case enforcement under the Civil Rights Act proved to be protracted and ineffective, Congress enacted the Voting Rights Act of 1965. *See* H. REP. NO. 89-439, at 1, 11-12, 15-16, 19-20, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439-44, 2446-47, 2451-52 (discussing discriminatory procedures such as poll taxes, literacy tests, and vouching requirements).

[20] Section 5 of the VRA has been rendered inoperable as a result of the Supreme Court's 2013 ruling in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). For more information, *see* CRS Legal Sidebar WSLG574, *Supreme Court Strikes Key Provision of Voting Rights Act*, by L. Paige Whitaker, and CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

[21] 52 U.S.C. §§10301, 10303(f).

[22] 52 U.S.C. §10301(b).

Legal Issues

How Close to Exact Equality?

In a series of cases since 1964, the Supreme Court has described the extent to which precise or ideal mathematical population equality among districts is required. Ideal or precise equality is the average population that each district would contain if a state population were evenly distributed across all districts. The total or "maximum population deviation" refers to the percentage difference from the ideal population between the most populated district and the least populated district in a redistricting map. It is important to note that for congressional districts, less deviation from precise equality has been found to be permissible than for state legislative districts.[23]

For example, in *Kirkpatrick v. Preisler*,[24] the Supreme Court invalidated a congressional redistricting plan where the district with the greatest population was 3.13% over the equality ideal, and the district with the lowest population was 2.84% below it. The Court considered the maximum population deviation of 5.97% to be too great to comport with the "as nearly as practicable" standard set forth in *Wesberry*. Further, in *Karcher v. Dagett*,[25] the Court held that "absolute" population equality is the standard for congressional districts unless a deviation is necessary to achieve "some legitimate state objective." These include "consistently applied legislative policies" such as achieving greater compactness, respecting municipal boundaries, preserving prior districts, and avoiding contests between incumbents. In *Karcher*, the Court rejected a 0.6984% deviation in population between the largest and the smallest district.

More recently, in *Tennant v. Jefferson County Commission*,[26] the Court further clarified that the "as nearly as is practicable" standard does not require congressional districts to be drawn with precise mathematical equality, but instead requires states to justify population deviation among districts with "legitimate state objectives." Relying on *Karcher*, the Court outlined a two-prong test to determine whether a congressional redistricting plan passes constitutional muster. First, the challengers have the burden of proving that the population differences could have been practicably avoided. Second, if successful, the burden shifts to the state to demonstrate "with some specificity" that the population differences were needed to achieve a legitimate state objective.[27] The Court emphasized that this burden is "flexible," and depends on the size of the population deviations, the importance of the state's interests, the consistency with which the plan reflects those interests, and whether alternatives exist that might substantially serve those interests while achieving greater population equality.[28] In *Tennant*, the Court determined that avoiding contests between incumbents, maintaining county boundaries, and minimizing population shifts between districts were neutral, valid state policies that warranted the relatively minor population disparities. The Court also determined that none of the alternative redistricting plans that achieved greater population equality came as close to vindicating the state's legitimate objectives.

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[23] *See, e.g.,* Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding a Connecticut legislative redistricting plan with a total maximum population deviation of 7.83%). *But see,* Cox v. Larios, 542 U.S. 947 (2004) (summarily affirming the invalidation of a state legislative redistricting plan with a total maximum population deviation of 9.98%).

[24] 394 U.S. 526 (1969).

[25] 462 U.S. 725, 740 (1983).

[26] 133 S.Ct. 3 (2012).

[27] *Id.* at 5 (quoting *Karcher,* 462 U.S. at 734, 740-41).

[28] *Id.* (quoting *Karcher,* 462 U.S. at 741).

Therefore, the Court upheld the 0.79% maximum population deviation between the largest and smallest congressional district.

Can Partisanship Justify Differences in Population?

As discussed above, Supreme Court case law has permitted state legislative districts a greater deviation from precise equality than congressional districts. Nonetheless, such deviation can be found to be improper if it is motivated by partisanship. In *Cox v. Larios*,[29] the Supreme Court summarily affirmed a district court decision striking down a state legislative redistricting plan, with a maximum population deviation of 9.9%, as a violation of the one-person, one-vote principle of the Equal Protection Clause. (A summary affirmance does not necessarily signal that the Court agrees with the district court's reasoning in this case, just the result.) Among other things, the district court held that the plan was intentionally designed for partisan purposes. Specifically, the district court determined that the plan allowed Democrats to maintain or increase their delegation by under-populating the districts held by incumbent Democrats, over-populating those held by Republicans, and deliberately pairing numerous Republican incumbents in districts to run against one another.[30]

During the 2015 term, the Supreme Court has the opportunity to clarify the scope of the *Larios* decision. In *Harris v. Arizona Independent Redistricting Commission*,[31] the Court is considering whether partisan goals can justify the drawing of state legislative districts that deviate from the principle of population equality. This case also presents the Court with an opportunity to address whether the goal of obtaining preclearance under the VRA justified the creation of unequal districts, and if so, whether that justification still exists in light of the Supreme Court's 2013 decision in *Shelby County v. Holder* rendering the preclearance requirement inoperable.[32] Although this case is currently limited to addressing permissible deviations from precise population equality in the context of state legislative redistricting, a broad ruling by the Court might also impact congressional redistricting. A decision is expected by June 2016.

The lower court in *Harris* held that population deviations among the state legislative districts primarily resulted from efforts to comply with the Voting Rights Act, and that even though partisanship played some role in the map's design, the Fourteenth Amendment challenge failed. Among other things, the three-judge district court panel held that bipartisan support for changes that lead to the population deviations undermine the notion that partisanship, rather than compliance with the Voting Rights Act, motivated the population deviations.[33] Among the districts in the state legislative map, the district with the largest population is 4.1% above the ideal population, and the district with the smallest population is 4.7% below the ideal population, creating a maximum population deviation of 8.8%.

[29] *See* 542 U.S. 947 (2004).

[30] *See* Larios v. Cox, 300 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004).

[31] No. 14-232.

[32] The preclearance requirement of Section 5 of the VRA has been rendered inoperable as a result of the Supreme Court's 2013 ruling in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). For more information, *see* CRS Legal Sidebar WSLG574, *Supreme Court Strikes Key Provision of Voting Rights Act*, by L. Paige Whitaker, and CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

[33] *See* Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1062 (D. Ariz. 2014).

Who Is Counted: Total Population or Eligible Voters?

While the Supreme Court has issued several decisions on the extent to which precise mathematical equality among districts is constitutionality required, until recently, it had not addressed *who* should be counted (i.e., total population, eligible voters, or some other measure of population) within districts in order to achieve such equality. It had left that determination to the states. When the Court refused to review a case presenting this issue in 2001, Justice Thomas dissented, arguing that the Court should settle the matter: "[t]he one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means."[34]

In April 2016, the Court addressed this issue. In *Evenwel v. Abbott*,[35] a unanimous Supreme Court upheld, against a Fourteenth Amendment equal protection claim, a state's decision to draw its legislative districts based on total population. Notably, however, the Court declined to rule specifically on the constitutionality of a state drawing district lines based on some other measure of population, such as eligible or registered voters. Justice Ginsburg wrote the opinion for the Court, which was joined by five Justices; while concurring in the judgment, Justices Alito and Thomas wrote separate concurrences and did not join in Justice Ginsburg's opinion.

The majority opinion in *Evenwel* relied on constitutional history, Court precedent, and longstanding practice in analyzing the question presented. First, the opinion pointed to the analogous determination made by the framers of the Constitution who decided that apportionment of seats in the U.S. House of Representatives was to be based on *all* inhabitants, not just voters, even though the states were free to deny many inhabitants the right to vote for such representatives.[36] Likewise, the opinion noted, when it debated the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats, and expressly rejected allocation based on voter population. Therefore, the Court reasoned, "[i]t cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis."[37] The Court also determined that Court precedent reinforces its holding. For example, the Court in *Evenwel* noted, in *Reynolds*, discussed above, it "described 'the fundamental principle of representative government in this country' as 'one of equal representation for equal numbers of people.'"[38] Finally, the Court in *Evenwel* discussed the significance of the representational duties of legislators, emphasizing that they are elected to "serve all residents, not just those eligible or registered to vote."[39] Nonvoters—including children—have an "important stake" in many legislative debates, and in receiving constituent

[34] Chen v. City of Houston, 532 U.S. 1046, 1048 (2001) (Thomas, J., dissenting).

[35] No. 14-940, slip op. (U.S. April 4, 2016). The litigation in *Evenwel* began with a challenge to the constitutionality of a Texas redistricting map that created state senate districts with roughly equal numbers of people, but with unequal numbers of voters. Plaintiffs argued in federal district court that by not apportioning districts based on both total population and voter population, the redistricting map violated the one person, one vote principle. In support of their position, plaintiffs interpreted Supreme Court precedent as establishing that voters have a right to an equally weighted vote. A three-judge federal district court panel disagreed, holding that the Supreme Court has unambiguously left this choice of "the nature of representation" to the states, and dismissed the case. *See* Evenwel v. Perry, 2014 U.S. Dist. LEXIS 156192 (W.D. Tex. 2014) (quoting Burns v. Richardson, 384 U.S. 73, 92 (1966)).

[36] *See id.*, slip op. at 16.

[37] *Id.*, slip op. at 22.

[38] *See id.*, slip op. at 28 (quoting *Reynolds*, 377 U.S. at 560-61 (1964)).

[39] *Id.*, slip op. at 31.

services.[40] Therefore, the Court concluded that drawing district lines based on the total population of inhabitants serves to promote equitable and effective legislative representation.[41]

In a concurrence, Justice Thomas reiterated his earlier observation that the Court's case law addressing the principle of one person, one vote lacks clarity, and criticized the majority for once again failing to provide a sound basis for the principle in this case.[42] In Justice Thomas' view, the Constitution does not prescribe any one basis for drawing district lines, and states have "wide latitude" to decide whether to draw districts based on total population, eligible voters, or "any other nondiscriminatory voter base."[43]

If the Court had ruled differently in this case, that is, by requiring the drawing of district lines based on the number of eligible or registered voters, the consequences could have been significant. For example, some have argued that redistricting based on such populations could reduce the number of districts in densely inhabited urban areas, and increase the districts in more rural or suburban areas.[44] It is important to note, however, that the *Evenwel* decision did not foreclose a state from choosing to use such a practice in the future. As the Court expressly announced, it did not resolve the question—as Texas had advocated in this case—of whether states *may* draw districts based on the population of eligible voters.[45] The question resolved was only that states were not required to do so as opposed to using total population. Therefore, that question could come before the Court in a future case. Finally, although it does not appear that the Court's ruling in *Evenwel* affects congressional redistricting, and instead impacts only state legislative and local redistricting, arguments based on *Evenwel* could be relevant to congressional redistricting cases in the future.

When Is a "Majority-Minority" District Required?

Under certain circumstances, the creation of one or more "majority-minority" districts may be required in a congressional redistricting plan. A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid racial vote dilution by preventing the submergence of minority voters into the majority, and the denial of an equal opportunity to elect candidates of choice. In the landmark decision *Thornburg v. Gingles*,[46] the Supreme Court established a three-prong test that plaintiffs claiming vote dilution under Section 2 must prove:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district....
>
> Second, the minority group must be able to show that it is politically cohesive....

[40] *Id.*, slip op. at 31-32.

[41] *See id.*, slip op. at 32.

[42] *See id.*, slip op. at 34 (Thomas, J., concurring in judgment).

[43] *Id.*, slip op. at 58 (Thomas, J., concurring in judgment).

[44] *See* Richard L. Hasen, *Only Voters Count*?, Slate, May 26, 2015, http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/evenwel_v_abbott_supreme_court_case_state_districts_count_voters_or_total.html. For further discussion of redistricting data and departure from the use of total population figures, *see* CRS Report R42483, *Legal Issues Regarding Census Data for Reapportionment and Redistricting*, by Margaret Mikyung Lee.

[45] *See Evenwel*, No. 14-940, slip op. at 32-33.

[46] 478 U.S. 30 (1986).

> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.[47]

The Court also discussed how, under Section 2, a violation is established if based on the "totality of the circumstances" and "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."[48] In order to facilitate determination of the totality of the circumstances, the Court listed the following factors, which originated in the legislative history accompanying enactment of Section 2:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[49]

Further interpreting the *Gingles* three-prong test, in *Bartlett v. Strickland*,[50] the Supreme Court ruled that the first prong of the test—requiring geographical compactness sufficient to constitute a majority in a district—can only be satisfied if the minority group would constitute more than 50% of the voting population if it were in a single-member district.[51] In *Bartlett*, it had been argued that Section 2 requires drawing district lines in such a manner to allow minority voters to join with other voters to elect the minority group's preferred candidate, even where the minority group in a given district comprises less than 50% of the voting age population. Rejecting that argument, the Court held that Section 2 does not grant special protection to minority groups that need to

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[47] *Id.* at 50-51 (citation omitted). The three requirements set forth in *Thornburg v. Gingle*s for a Section 2 claim apply to single-member districts as well as to multi-member districts. *See* Growe v. Emison, 507 U.S. 25, 40-41 (1993) ("It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district.") *Id.* at 40.

[48] *Id.* at 44.

[49] *Id.* at 36-37, (quoting S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177). ("Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.") *Id.*

[50] 556 U.S. 1 (2009).

[51] *See id.* at 25-26.

form political coalitions in order to elect candidates of their choice. To mandate recognition of Section 2 claims where the ability of a minority group to elect candidates of choice relies upon "crossover" majority voters would result in "serious tension" with the third prong of the *Gingles* test.[52] The third prong of *Gingles* requires that the minority be able to demonstrate that the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

As the discussion above indicates, in certain circumstances, Section 2 can require the creation of one or more majority-minority districts in a congressional redistricting plan. By drawing such districts, a state can avoid racial vote dilution, and the denial of minority voters' equal opportunity to elect candidates of choice. As the Supreme Court has determined, minority voters must constitute a numerical majority—over 50%—in such minority-majority districts. However, as examined in the section below, there are constitutional limits on the creation of minority-majority districts.

What Are the Limits Under the Fourteenth Amendment Equal Protection Clause?

Congressional redistricting plans must also conform with standards of equal protection under the Fourteenth Amendment to the U.S. Constitution.[53] According to the Supreme Court, if race is the predominant factor in the drawing of district lines, above other traditional redistricting considerations—including compactness, contiguity, and respect for political subdivision lines—then a "strict scrutiny" standard of review is applied. In this context, strict scrutiny review requires that a court determine that the state has a compelling governmental interest in creating a majority-minority district, and that the redistricting plan is narrowly tailored to further that compelling interest. These cases are often referred to as "racial gerrymandering" claims, in which plaintiffs argue that race was improperly used in the drawing of district boundaries. Case law in this area demonstrates a tension between compliance with the VRA and conformance with standards of equal protection.[54]

The Supreme Court has held that, to prevail in a racial gerrymandering claim, the plaintiff has the burden of proving that racial considerations were "dominant and controlling" in the creation of the districts at issue. In *Easley v. Cromartie (Cromartie II)*,[55] the Supreme Court upheld the constitutionality of the long-disputed 12th Congressional District of North Carolina against the argument that the 47% black district was an unconstitutional racial gerrymander. In this case, North Carolina and a group of African American voters had appealed a lower court decision holding that the district, as redrawn by the legislature in 1997 in an attempt to cure an earlier violation, was still unconstitutional. The Court determined that the basic question presented in *Cromartie II* was whether the legislature drew the district boundaries "because of race rather than

[52] *Id.* at 16.

[53] U.S. CONST . amend. XIV, §1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.").

[54] *See, e.g.,* Shaw v. Reno (Shaw I), 509 U.S. 630, 653-57 (1993) (holding that if district lines are drawn for the purpose of separating voters based on race, a court must apply strict scrutiny review); Miller v. Johnson, 515 U.S. 900, 912-13 (1995) (holding that strict scrutiny applies when race is the predominant factor and traditional redistricting principles have been subordinated); Bush v. Vera, 517 U.S. 952, 958-65 (1996) (holding that departing from sound principles of redistricting defeats the claim that districts are narrowly tailored to address the effects of racial discrimination).

[55] 532 U.S. 234 (2001).

because of political behavior (coupled with traditional, nonracial redistricting considerations)."[56] In applying its earlier precedents, the Court determined that the party attacking the legislature's plan had the burden of proving that racial considerations are "dominant and controlling."[57] Overturning the lower court ruling, the Supreme Court held that the attacking party did not successfully demonstrate that race, instead of politics, predominantly accounted for the way the plan was drawn.

In the 2015 case of *Alabama Legislative Black Caucus v. Alabama*,[58] the Court held that in determining whether race is a predominant factor in the redistricting process, and thereby whether strict scrutiny is triggered, a court must engage in a *district-by-district* analysis instead of analyzing the state as an undifferentiated whole.[59] The Court further confirmed that in calculating the predominance of race, a court is required to determine whether the legislature subordinated traditional race-neutral redistricting principles to racial considerations. The "background rule" of equal population is not a traditional redistricting principle and therefore should not be weighed against the use of race to determine predominance, the Court held. In other words, the Court explained, if 1,000 additional voters need to be moved to a particular district in order to achieve equal population, ascertaining the predominance of race involves examining which voters were moved, and whether the legislature relied on race instead of other traditional factors in making those decisions.[60] The *Alabama* Court also determined that the preclearance requirements of Section 5 of the VRA,[61] which are no longer operable, did not require a covered jurisdiction to maintain a particular numerical majority percentage of minority voters in a minority-majority district. Instead, the Court held that Section 5 required that a minority-majority district be drawn in order to maintain a minority's *ability* to elect a preferred candidate of choice. The Supreme Court vacated the lower court's ruling and remanded for reconsideration using the standards it articulated. The principal dissent, written by Justice Scalia, joined by the Chief Justice and Justices Thomas and Alito, characterized the Court's ruling as "sweeping."[62] The dissent cautioned that the Court's ruling will have "profound implications" for future cases involving the principle of one person, one vote; the VRA; and the primacy of states to manage their own elections.[63] In a separate dissent, Justice Thomas criticized the Court's voting rights jurisprudence generally, and this case specifically, calling it "nothing more than a fight over the 'best' racial quota."[64]

Alabama is notable in that minority voters successfully challenged, under the Equal Protection Clause, districts that the state maintained were created to comply with the Voting Rights Act. The

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[56] *Id.* at 256 (emphasis included).

[57] *Id.* (citing *Miller*, 515 U.S. at 913).

[58] 135 S. Ct. 1257 (2015). For further discussion, see CRS Legal Sidebar WSLG1230, *Supreme Court Rules: Incorrect Standards Used in Upholding Alabama Redistricting Map Against Claim of Unconstitutional Racial Gerrymandering*, by L. Paige Whitaker.

[59] *See id.* at 1265-68.

[60] *See id.* at 1270-72.

[61] 52 U.S.C. §10304. Section 5 of the VRA has been rendered inoperable as a result of the Supreme Court's 2013 ruling in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), which invalidated the coverage formula in Section 4. For more information, *see* CRS Legal Sidebar WSLG574, *Supreme Court Strikes Key Provision of Voting Rights Act*, by L. Paige Whitaker, and CRS Report R42482, *Congressional Redistricting and the Voting Rights Act: A Legal Overview*, by L. Paige Whitaker.

[62] *Id.* at 1274 (Scalia, J., dissenting).

[63] *Id.* at 1281.

[64] *Id.* at 1281 (Thomas, J., dissenting).

decision also represents the Court's most recent interpretation of the requirements of Section 5 of the VRA. This could be of interest to Congress should it decide to draft a new coverage formula in order to reinstitute Section 5 preclearance.

In another pending case, *Wittman v. Personhuballah,*[65] the Supreme Court is poised to clarify what challengers must demonstrate in proving that race was a predominant factor in the creation of a redistricting plan. In *Wittman*, appellants are appealing a federal district court ruling that invalidated, for a second time,[66] Virginia's Third Congressional District—comprised of a 56.3% majority African-American voting age population—as an unconstitutional racial gerrymander. The three-judge panel, by a 2-1 vote, ordered the Virginia legislature to draw a new congressional district map.[67] In addition to citing circumstantial evidence of the district's shape and other characteristics, the court found that in establishing the district's racial composition, the legislature's predominant purpose was compliance with Section 5 of the VRA.[68] The court also observed that the Supreme Court has not yet decided whether continued compliance with the VRA is a compelling state interest for a district drawn prior to the Court's ruling in *Shelby* rendering Section 5 inoperable.[69] Relying on *Alabama*, discussed above, the court explained that Section 5 does not require a covered state, in drawing a redistricting plan, to maintain a particular numerical minority percentage in majority-minority districts. Instead, it is proper to inquire as to what extent existing minority percentages need to be preserved in order to maintain the minority's *ability* to elect its candidate of choice.[70] As compared to Virginia's earlier redistricting plan, the 2012 plan increased the African-American voting age population in the Third Congressional District from 53.1% to 56.3%. Noting that African-American voters in the district had successfully elected representatives of choice for two decades, the court determined that the increase in African-American voters was not justified in order to avoid retrogression and therefore, was not narrowly tailored to achieve the goal of complying with Section 5.[71] The dissent argued that the plaintiffs failed to prove that race was the predominant factor in drawing the district lines, and instead, maintained that the creation of the district was motivated by traditional redistricting principles and incumbency protection.[72]

Intervenor-defendants in the lower court proceeding, consisting of current and former Members of Congress, appealed to the Supreme Court.[73] They argued that the lower court failed to require the challengers to the redistricting plan to prove, as required by *Alabama*, that the legislature subordinated the traditional race-neutral redistricting principles of incumbency protection and political affiliation to racial considerations.[74] Further, they maintained that because race and

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[65] No. 14-1504.

[66] *See* Page v. Va. State Bd. of Elections, 58 F. Supp. 3d 533 (E.D. Va. 2014), *vacated sub nom*. Cantor v. Personhuballah, 135 S. Ct. 1699 (2015).

[67] *See* Page v. Va. State Bd. of Elections, No. 3:13cv678, slip op. (E.D. Va. June 5, 2015).

[68] *See id.*, slip op. at 18-19.

[69] *See id.*, slip op. at 50-51.

[70] *See id.*, slip op. at 17-18.

[71] *See id.*, slip op. at 51-57.

[72] *See id.*, slip op. at 118-19 (Payne, J. dissenting).

[73] In the district court, the Virginia State Board of Elections defended the redistricting plan. However, in the Supreme Court proceedings, the Board is moving to affirm the district court decision. *See* Motion to Affirm by Virginia State Board of Elections Appellees, *available at* http://www.scotusblog.com/wp-content/uploads/2015/08/No.-14-1504-VSBE-Motion-to-Affirm-July-22-2015.pdf.

[74] *See* Reply Brief For Appellants, *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/14-1504_rb_appellants.authcheckdam.pdf.

political affiliation are often highly correlated, challengers must prove that race *rather than* politics caused subordination of traditional redistricting principles. In addition to questions relating to the merits of the case, as a threshold matter, the Court is also considering the question of whether the appellants lack standing because they neither reside in, nor represent, the congressional district that is being challenged. A decision in this case is expected by June 2016.

Who Is Authorized to Draw and Implement a Redistricting Plan?

In the bulk of the states, the legislature has primary authority over congressional redistricting.[75] Due in part to concerns about partisan political gerrymandering—the drawing of districts for partisan political advantage—some states have adopted independent commissions for conducting redistricting. For example, Arizona[76] and California[77] created such independent redistricting commissions by ballot initiative, thereby removing control of congressional redistricting from the states' legislative bodies and vesting it in commissions. The ballot initiatives specify how commission members are to be appointed, and the procedures to be followed in drawing congressional (and state legislative) districts. In Arizona, the state legislature filed suit challenging the constitutionality of the independent commission.

In 2015, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[78] the Supreme Court upheld the constitutionality of an independent commission, established by initiative, for drawing congressional district boundaries. Affirming a lower court ruling,[79] the Supreme Court held that the Elections Clause of the Constitution, Article I, Section 4, clause 1, permits a commission—instead of a state legislature—to draw congressional districts. The Elections Clause provides that the times, places, and manner of holding congressional elections be prescribed in each state "by the Legislature thereof." It further specifies that the Congress may at any time "make or alter" such laws. Announcing that "all political power flows from the people," the Court stated that the history and purpose of the Elections Clause do not support a conclusion that the people of a state are prevented from creating an independent commission to draw congressional districts.[80] The main purpose of the Elections Clause, in the Court's view, was to empower Congress to override state election laws,[81] particularly those that involve political

[75] *See* All About Redistricting, Professor Justin Levitt's guide to drawing the electoral lines at http://redistricting.lls.edu/who-state.php.

[76] ARIZ. CONST. ART. IV, pt. 2, §1.

[77] CAL. GOV'T CODE §§8251-8253.6.

[78] 135 S.Ct. 2652 (2015).

[79] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 997 F. Supp. 2d 1047 (D. Ariz. 2014). By a 2-1 vote, the three-judge panel held that removing congressional redistricting authority from the state legislature did not violate the Elections Clause. The term "Legislature," the court held, "encompasses the entire lawmaking function of the state." *Id.* at 1054 (quoting Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1278-79 (11th Cir. 2012)). The Arizona state legislature appealed the ruling to the U.S. Supreme Court in accordance with a federal law providing that constitutional challenges to federal or state legislative districts are considered by a three-judge federal district court panel, with direct appeal to the U.S. Supreme Court. 28 U.S.C. §§2284, 1253. Note that in a pending case, discussed *supra*, n.36, the U.S. Supreme Court will be considering the scope of §2284.

[80] Ariz. State Legislature, 135 S.Ct. at 2677 (citing McCulloch v. Maryland, 17 U.S. 316 (1819)).

[81] *Id.* at 2672 ("[T]he Clause 'was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.'" (citing Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253 (2013))).

"manipulation of electoral rules" by state politicians acting in their own self-interest. It was not designed to restrict "the way" that states enact such legislation.[82]

As the Court has recognized in other cases, the term "legislature" is used several times in the U.S. Constitution. The Court reviewed the cases in which it had considered the term, and read them to evidence that the meaning of the term differs according to its context. For example, in a 1916 case, the Court held that the term "legislature" was not limited to the representative body alone, but instead, encompassed a veto power held by the people through a referendum.[83] Similarly, in a 1932 case, the Court held that a state's legislative authority included not just the two houses of the legislature, but also the veto power of the governor.[84] In a 1920 case, however, the Court held that in the context of ratifying constitutional amendments, the term "legislature" has a different meaning, one that excludes the referendum and a governor's veto.[85]

While acknowledging that initiatives were not addressed in its prior case law, the Court found no constitutional barrier to a state empowering its people with a legislative function. Furthermore, even though the framers of the Constitution may not have envisioned the modern initiative process, the Court ruled that legislating through initiative is in "full harmony" with the Constitution's conception that the people are the source of governmental power.[86] The Court further cautioned that the Elections Clause should not be interpreted to single out federal elections as the one area where states cannot use citizen initiatives as an alternative legislative process.[87]

The Court also held that Arizona's congressional redistricting process comports with a federal redistricting statute, codified at 2 U. S. C. Section 2a(c), providing that until a state is redistricted as provided "by the law" of the state, it must follow federally prescribed congressional redistricting procedures. Examining its legislative history, the Court determined that Congress clearly intended that the statute provide states with the full authority to employ their own laws and regulations—including initiatives—in the creation of congressional districts. When Congress replaced the term "legislature" in the congressional apportionment laws of 1862 through 1901, to "the manner provided by the laws" of the state in the 1911 law, the Court determined that Congress was responding to several states supplementing the representative legislature mode of lawmaking with a direct lawmaking role for the people through initiative and referendum.[88] As Congress used virtually identical language when it enacted Section 2a(c) in 1941, the Court concluded that Congress intended the statute to include redistricting by initiative.[89]

This case was decided by a 5-4 vote. In contrast to the majority, the dissent advocated for greater reliance on the text of the Elections Clause, maintaining that the meaning of the term "legislature" is unambiguous, with one consistent meaning throughout the text of the Constitution: a representative body that makes the laws of the people, rather than, as the Court held, differing meanings depending on its context. Writing the primary dissent in this case, Chief Justice Roberts pointed out that the Constitution contains 17 references to a state's legislature. All such references, he argued, are consistent with the understanding of a legislature as a representative body. More importantly, he maintained, many of these references to "legislature" in the

[82] *Id.* at 2672.

[83] *See id.* at 2666-67 (citing Ohio *ex rel.* Davis v. Hildebrant, 241 U. S. 565 (1916)).

[84] *See id.* at 2667 (citing Smiley v. Holm, 285 U. S. 355 (1932)).

[85] *See id.* at 2666-67 (citing Hawke v. Smith (No. 1), 253 U. S. 221 (1920)).

[86] *Id.* at 2674.

[87] *See id.* at 2673.

[88] *Id.* at 2668-69.

[89] *See id.* at 2669-70.

Constitution are only consistent with the concept of an institutional legislature, and are indeed incompatible with the majority's interpretation that the term means the people as a whole.[90] In sum, the dissent concluded that the Court's ruling had no basis in the text, structure, or history of the Constitution.[91]

While Congress retains the power under the Constitution to make or alter election laws affecting congressional elections, this decision clarifies that states can enact such laws through the initiative process. For example, as discussed above, California has an initiative-established independent commission for drawing congressional district boundaries similar to Arizona.[92] Furthermore, election laws in other states, such as Ohio, prohibiting ballots providing for straight-ticket voting along party lines,[93] and Oregon, shortening the deadline for voter registration to 20 days before an election,[94] were enacted through the initiative process. This ruling suggests that such state laws regulating congressional elections are likely to withstand challenge under the Elections Clause.

Selected Legislation in the 114th Congress

- H.R. 75, the Coretta Scott King Mid-Decade Redistricting Prohibition Act of 2015, would prohibit the states from carrying out more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA.
- H.R. 1347, the John Tanner Fairness and Independence in Redistricting Act, would prohibit the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to comply with the Constitution or to enforce the VRA, and would require the states to conduct redistricting through independent commissions.
- H.R. 934, the Redistricting and Voter Protection Act of 2015, would require any state that, after enacting a congressional redistricting plan following a decennial census and apportionment, enacts a subsequent congressional redistricting plan prior to the next decennial census and apportionment, to obtain a declaratory judgment or preclearance as provided under Section 5 of the VRA in order for the subsequent plan to take effect.
- H.R. 1346, the Redistricting Transparency Act of 2015, would require the states to conduct the process of congressional redistricting in such a manner that the public is informed about proposed redistricting plans through a public Internet site, and has the opportunity to participate in developing congressional redistricting plans before they are adopted.
- H.R. 2173, the Redistricting Reform Act of 2015, would prohibit the states from conducting more than one congressional redistricting following a decennial census and apportionment, unless a state is ordered by a court to do so in order to

[90] *See id.* at 2680-81 (Roberts, C.J., dissenting).

[91] *Id.* at 2677 (Roberts, C.J., dissenting) ("The Court today performs … a magic trick with the Elections Clause.").

[92] CAL. CONST., Art. XXI, §2; Cal. Gov't. Code Ann. §§8251-8253.6.

[93] OHIO CONST., Art. V, §2a.

[94] ORE. CONST., Art. II, §2.

comply with the Constitution or to enforce the VRA, and would require the states to conduct redistricting through independent commissions.

Conclusion

The legal framework for congressional redistricting resides at the intersection of the Constitution's limits and powers, requirements prescribed under federal law, and the various processes imposed by the states. Since the 1960s, after determining that constitutional challenges to redistricting plans are justiciable, the Supreme Court has issued a series of rulings balancing these competing commands. The Court's case law has significantly shaped how congressional districts are drawn. For example, a recent redistricting decision held that the Constitution permits states to create, by ballot initiatives and referenda, nonpartisan independent redistricting commissions for congressional redistricting. If more states adopt similar laws, it could change the process of congressional redistricting nationwide. Another recent Court decision construed the inoperable preclearance requirements in Section 5 of the Voting Rights Act to require a covered jurisdiction to maintain minority voters' ability to elect candidates of choice in a new redistricting plan, not to require that a particular numerical percentage of minority voters in a minority-majority district be maintained. Looking ahead, pending Supreme Court cases could likewise impact the process of congressional redistricting, and the degree to which challenges to redistricting plans will be successful.

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