

From Equality to Fairness: The Path of Political Reform since Baker v Carr

Bruce E. Cain, Karin Mac Donald and Michael McDonald

UC Berkeley

George Mason University

Paper prepared for The Brookings Institution/Institute of Governmental Studies
Conference on “Competition, Partisanship, and Congressional Redistricting,” April 16,
2004, The Brookings Institution, Washington, DC.

DRAFT – April 12, 2004 – Please do not cite or quote without permission of the authors.

The redistricting reform journey from *Baker v Carr* to the present has been more like a lengthy, hesitant walk through a maze than a quick, straightforward trip down the interstate highway that some initially thought it might be. Apportionment reform seems simple and arithmetical: make districts as nearly equal as possible so that everyone's vote counts the same. But the highway to equality eventually led to unforeseen destinations, including several dead-ends. Invoking the federal constitution's equal protection clause in order to knock down malapportionment, the Warren Court unleashed a powerful principle on the murky, political enterprise of district boundary drawing. The equally weighted vote principle gradually morphed into other overlapping and often ill-defined equity claims such as the rights to fair and effective representation, proportionate shares of representation, non-retrogression, non-exclusion, non-dilution, and now, perhaps, competitive seats.

The Supreme Court explicitly rejected some of these claims (e.g., the right to proportionate shares for political parties, and post-Shaw, rough proportionality for minorities). Others have passed constitutional scrutiny and survived in the rough and tumble of real world redistricting pretty well (e.g. the Section 5 protection against retrogression). Some were never defined clearly enough to be implemented (e.g. the right to fair and effective representation). And there are new ones on the horizon, such as the claim to competitive elections.

Other aspects of redistricting have changed as well. Political conditions under which lines were drawn in 2001 differed dramatically in 1971, 1981, and 1991. More

large states operated under divided government in 2001, altering the incentives of political deals struck in these state capitols governing the consideration concerning a majority of districts that were draw. More groups now participate in redistricting, with a greater number of citizen commissions and higher expectations of access and transparency. Some of these well-intentioned commission reforms ironically institutionalize bipartisan compromise and have a negative effect on electoral competition. More groups and individuals submit proposals than in the past, and possess the computer capability to analyze and thus of know what proposed plans will do almost instantaneously. This has quickened the bargaining process significantly. The improvements in redistricting technology have opened up participation and increased the accuracy of the line-drawing activity (for both better and worse).

This paper will provide an interpretation of redistricting reform since *Baker v Carr* in the US, emphasizing the inter-related changes between the legal, technological and political constraints. First, we will consider some phases of redistricting evolution, and attempt to explain why some reforms failed while others succeeded. Then we will analyze the current issue of competitive seats in the context of this evolution. Lastly, we will comment on some of the problems associated with achieving more competitiveness though redistricting.

The Long Twisting Path of Redistricting Reform.

Much has happened and changed since the decision in *Baker v Carr*. It is not our intent to provide a comprehensive summary of all those events. But we do think it is valuable to characterize the changes in broad terms and to try to understand the lessons that might be obtained from looking back at the past. This is particularly important as we enter what seems to be a third wave of redistricting reform, focused on state criteria and the problem of rising partisanship in the United States. Some reforms have succeeded: some have not. It is useful to speculate on why this is so. In this section of the paper, we will describe three eras of redistricting reform: the apportionment period (1962-1981), the vote dilution period (1982-1993), and the non-federal criteria period (1994-present). We will describe the legal, political and technical state of affairs in each era, and the lessons that can be gleaned from them.

The Apportionment Era (1962-1981)

Contemporary redistricting reform began with the Supreme Court's decision in *Baker v Carr*, which subjected redistricting and apportionment to legal scrutiny under Article 1 Section 2 and the equal protection clause of the federal constitution. *Baker v Carr* 369 U.S. 186 (1962) was a judicial reaction to a seemingly non-self correcting political problem: i.e. that it was sometimes to the political advantage of certain groups in power to postpone redistricting and allow districts to become mal-apportioned. Overturning the precedent in *Colegrove v Green* 328 U.S. 549 (1946) was even in retrospect as revolutionary as it seemed at the time. It opened up the door to a whole wave of

judicial involvement in political matters, including most dramatically, the outcome of the 2000 Presidential election.

It is safe to say that the *Baker* majority could not have foreseen how powerful the equal protection clause would become in American political reform. Judging from the evidence of notes and memoranda at the time, Chief Justice Warren became convinced that it was simply unfair for the votes of some to be counted as less than those of others (Anderson-Cully and Cain, 2004). He was less focused on the likely outcomes and political consequences of judicial intervention than on the principle of fairness.

The one person - one vote criterion as applied to line drawing emerged out of subsequent cases: *Wesberry v Sanders* 376 US (1964) for Congressional districts, *Reynolds v Sims* 377 U.S. 533 (1964) for state legislative seats, and *Avery v Midland County* 390 U.S. 474 (1968) for general purpose local governments. These decisions had two important effects on American representation. First, they elevated population equality to the highest redistricting priority. This meant that no matter how strongly a community or state felt about other legitimate goals such as preserving city/county boundaries or following communities of interest, those criteria could not take priority over population equality—or to put it another way, they had to be implemented within the constraint of equally populated districts.

This inevitably wreaked havoc on geographic areas and units since on the edges of Congressional and state legislative districts, it is usually necessary to split some local

jurisdictions. The Court has in some cases allowed for greater flexibility in state redistricting when a good justification could be presented (e.g. *Abate v Mundt* 403 U.S. 182 (1971); *Mahan v Howell* 410 U.S. 315 (1973); *Brown v Thomson* 462 U.S. 835 (1983); *Voinovich v Quilter* 507 U.S. 146 (1993)). But it has also been suspicious when there are larger than plus or minus five percent population deviations without acceptable reasons (*Swann v Adams* 385 U.S. 440 (1967)). The pressure in Congressional redistricting has been in the direction of zero deviations with little flexibility (*Kirkpatrick v Preisler* 394 U.S. 526 (1969) and *White v Weiser* 412 U.S. 783 (1973)).

As the dates of these cases indicate, the population deviation issue was settled pretty quickly and has not been modified much in the intervening decades. The concept was clear (even if, as some think, misguided), and it could be simply measured. The need for clarity and the tendency of political actors to abuse what is unclear drove the Court to a pretty bright and inflexible test: districts had to have population deviations within a given range unless local jurisdictions had a compelling and unusual reason to make local and state lines conform to local boundaries.

The second effect of the apportionment revolution was to wipe out geographically based upper house representation for all but the US Senate. Given that the Chief Justice Warren had previously defended non-population based districts as a reform device for controlling bossism in California, the Court's decision (written by the Chief Justice) in *Reynolds* and its companion cases was quite a shocking reversal. This had several effects on the redistricting world. At a minimum, it caused more political activity and

involvement since upper house boundaries had to be redrawn decennially after the census to create equally populated districts. It also introduced some new problems that some states had not had to worry much about before: when do representatives running in staggered terms (as many upper houses required) officially represent new areas; does the assignment of a new district number change the date when an incumbent must run for re-election; or should lower house seats should be nested within the boundaries of upper house lines?

A third effect of the apportionment revolution was a restructuring of some state constitutions and state statutes to assure that districts would be redistricted in a timely fashion to comply with equal population requirements. Malapportionment was a concern as early as 1851, when Ohio adopted the first U.S. redistricting commission to deal with state legislative redistricting to handle population imbalances caused by westward migration into the state. The same motivation was present for the thirteen states that adopted some form of commission system for their congressional or state legislative districts between 1963 and 1977. Other states wrote into their constitutions or state code provisions for a timely redistricting and requirements for equal population.

What were the important lessons of the apportionment era? First and foremost, the courts would from that point forward be looking over the shoulders of line drawers, and a redistricting plan, even for state and local jurisdictions, could be thrown out for violating the federal constitution. Two, equal protection was a powerful principle that rapidly extended from federal to local districts, and from district populations to the

actual structure of representation. It could mow down conventional and widely accepted practices if they did not conform to the norm of population equality. Three, equal population did not mean the elimination of unfairness. The 1981 Congressional redistricting for example, featured the Phillip Burton California partisan redistricting plan that added five seats to the Democratic caucus while conforming to equal population very strictly. By the end of the seventies and the early eighties, reformers realized that “fair and effective” representation, whatever that meant, required more than equally populated districts and equally weighted votes. But what? The litigation prompted by the 1981 redistricting took up this question in the vote dilution reform era.

Politically, there was a great deal of speculation that the apportionment revolution would help urban areas over rural ones and Democrats over Republicans. Since Republicans dominated the rural areas and Democrats the urban ones, logically, the one person, one vote rule would bolster the Democratic Party’s share of representation. In reality, this calculation under-estimated Republican growth in the suburbs, minimizing the partisan implications (O’Rourke, 1980). But that is not to say that there were no important shifts. Rural areas had less control over policy-making, and there were measurable changes in terms of policy and spending (McCubbins ?; Ansolabehere, Gerber and Snyder, 2003).

It was also politically significant that the Court rejected challenges to the population basis of redistricting. Given that nonvoters and noncitizens are more prevalent in poor and minority areas, there would have been a significant shift in

representation had the Court allowed jurisdictions to redistrict on the basis of registered voters or even age-eligible citizens. But the Court rejected these claims, and has accepted non-census data as a substitute only under specific conditions (see *Burns v Richardson*, 384 US 73 (1966)). On the other hand, the courts have not compelled jurisdictions to use data that purport to fix undercount problems, allowing Republican controlled administrations in 1991 and 2001 to temporarily block the distribution of sampled data that would have adjusted for the undercount. Since these corrected data were widely perceived to favor the Democratic areas, Republicans were not interested in handing their opposition a significant electoral bonus. Given the problems associated with sampling and correcting the data, the Courts did not find the federal government's decisions in 1991 and 2001 to be irrational.

Towards the end of this era and by the 1981 round of redistricting, the political system had pretty much adapted to the new rules. Computers were just beginning to make their way onto the scene, and several states had the capacity to draw lines by precincts or census blocks and tracts with the new technology. The California and New Jersey Congressional plans illustrated how the game could be played within the new rules. The New Jersey lines left just enough population deviation (i.e. 0.6984 percent) for the Court to intervene (*Karcher v Daggett* 462 US 725 (1983)) while the California plan (which was much more partisan) stood up to challenges because it had virtually no population deviations.

And even though new technology was starting to make its way into redistricting in this period, the process was still primarily closed. Public input was largely confined to the pre-decision phase and to post plan comment. There were few public submissions, and very few outside groups had the capacity to analyze the legislatures' proposals, let alone submit a plan of their own. This meant little transparency and minimal public participation. Secrecy allowed for more back room negotiation and compromise, with both good and bad consequences. Changing district lines in the era before computers was an onerous task, and had the state legislatures wanted greater public input (which on the whole they did not), it would have been difficult technically to involve the public and incorporate their changes in a timely manner.

Secondly, incumbency played a significant role in plan development. Term limits had not yet passed, and several large state legislatures had become highly professionalized. Professionalization meant larger salaries, pension systems, more staff support and politics as a full time career. Legislators at all levels learned how to use the franking privilege and district staffs to build a personal vote, and with it to add to the natural advantages of money and incumbency that come with office-holding. Reelection rates went up and turnover went down. Watergate drove down Republican support in many states, but when GOP's fortunes turned up towards the end of the Carter administration, it did not always translate into dramatic gains in state legislative and Congressional district shares. Understandably, this fanned Republican frustration, and caused RNC lawyers in the eighties to become staunch advocates for redistricting reform.

An important point to note here, since we will refer to it later, is that incumbency considerations did not always mesh with partisan considerations. Sometimes incumbents wanted areas because they were familiar with them or because they had other advantages (e.g. fund-raising). This made the task of drawing partisan efficient lines more difficult. The more natural trade was across party lines, with Democrats trading away their Republican areas for more Democratic ones, and vice versa.

Finally, bipartisan accommodation in this period did not have the bad image that it currently has. In *Gaffney v Cummings* 412 US 735 (1973), the Court held that maintaining a fair balance of Democrats and Republicans might be a legitimate state purpose, that there could be legitimate reasons for preserving existing district arrangements to the greatest extent possible, and that plans could try to allow incumbents fair opportunities for reelection. Less consideration went into the more contemporary problem that bipartisan plans tend to make each party's seats safer and more homogenous. The more serious perceived unfairness at the time was that of the controlling party using redistricting to gain electoral advantage over the other.

The Vote Dilution Era (1982-1993)

By the early eighties, the redistricting reform frontier had moved past the simple goal of attaining equal populations. If anyone seriously thought that the one-person one-vote constraint could cabin political mischief, the 1981 redistrictings dispelled their

illusions. Small to nonexistent population deviations ruled out some mischievous options, but still left plenty of ways that one group or party could gain advantage over another. The right to an equally weighted vote, once achieved, did little to remedy the most common kinds of political unfairness that seemed to be inherent in legislative redistricting. The Court's attempt in 1983 to use population deviations as a pretext for striking down partisanship was restricted to Congress and easily evaded, as discussed earlier. Reformers asked whether additional constraints might be necessary. Could equal protection prevent one party from claiming more than its fair share of seats?

At the same time, those who sought to achieve greater representation for racial minorities were running into the limitations of 14th amendment litigation. Required by the Court to show that a particular redistricting was intended as discriminatory (*Mobile v Bolden* 446 US 55 (1980)) and met the totality of circumstances test laid out in *White v Regester* 412 US 755 (1973), the civil rights community felt stymied in their pursuit of fuller political representation for historically under-represented groups. If the Apportionment era began with a judicial bolt of lightning (i.e. *Baker v Carr*), the Vote Dilution era began with dramatic legislative action (i.e. the 1982 revision of the Voting Rights Act) and prolonged partisan bickering that followed the 1981 round of redistrictings.

The underlying legal right was relatively clear in the apportionment cases and a more or less bright line test could be found, but neither the right nor the measure were obvious with respect to either racial or partisan vote dilution. What is an undiluted vote?

The simplest answer, used in many other democracies in the world, would say that an undiluted vote yields a proportionate share for a party or racial group: if a group receives X% of the vote, it should get X% share of the seats as well (Rogowski, 1981; Low-Beer, 1984). But there were problems with this potential bright line test. First, it is hard to hold a district based single member simple plurality system to a proportionality standard. A SMSP system by its nature tends to exaggerate the seat share of the larger party and to severely punish dispersed minority groups/parties. Moreover, a standard based on vote shares is not obviously the right one for redistrictings that are based on population rather than voters. And most importantly, the Court itself refused to require proportionality in either partisan or racial representation.

If not proportionality, then what? The options were non-exclusion, rough proportionality and symmetry/bias estimations. Non-exclusion was the default for both partisan and racial gerrymandering. In the partisan case, *Davis v Bandemer* 478 US 109 (1986) the Court declared that partisan gerrymandering could be justiciable, but set the bar so high that it effectively killed all attempts to use the equal protection clause in this way. The major parties had to show “evidence of continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.” Since it was a rare occurrence for a majority to be drawn into a minority (i.e. since they can “referend” bad plans in many states, or elect a Governor to veto an unfavorable redistricting bill), the more likely prospect was a systematic lock-out/exclusion of the minority party. But that too is very rare in the US since the breakup of the one-party South. Given the prevalence of divided government,

the “out” party usually holds the Governor’s office or one branch of the legislature at some point in each decade. Exclusion for the Democratic and Republican parties in this country is more a theoretical possibility than a recurrent reality.

With respect to racial vote dilution, the earliest victories in the wake of the amended VRA and *Thornburg v Gingles* 478 US 30 (1986) began with cases in which protected groups were shut out entirely, but by the late eighties, the standard moved informally in the direction of rough proportionality. Applying the Gingles criteria, if an area contained a sufficiently large concentration of a given group, if there was evidence that they voted as a coherent bloc and if voting patterns were racially polarized, a jurisdiction could be obliged to draw additional majority-minority districts even when members of the protected group held office at the time of the redistricting. An informal expectation based upon the experience of Justice Department reviews and lower court decisions held that if a majority minority district could be built, it should be. While the Court eschewed actual proportionality, the process itself developed the informal norm of rough proportionality. Rough proportionality meant that one drew as many majority-minority seats as one could within the Gingles parameters. This expectation was eventually limited in important ways by the Shaw line of cases, marking the end of the vote dilution era.

The third standard the Court might have adopted but did not would have been more conceptually compatible with an SMSP system. However, it is not a simple bright line test. A fair system, it holds, is one that produces a symmetric seats-vote curve such

that both parties get seat shares that approximate their vote shares. The underlying assumption of this approach is that single member simple plurality systems cannot be expected to produce proportional outcomes, but they should provide similar outcomes to the parties: to put it another way, the system should be equal in its disproportionality. If party A gets 25% of the seats with 35% of the votes, then so should party B. A related concept is responsiveness, which in essence measures the steepness of the seat-votes curve and thus addresses the competitiveness issue. But we will reserve a fuller discussion of that for a later section of the paper.

Computing this curve involves some heroic statistical assumptions about what would have happened had the election results been different. Such counter-factual calculations are contestable, to say the least. That, combined with the concept's inherent complexity, was enough to keep it from ever being seriously considered by any court in a redistricting case.

The main legal lesson of the second era was that applying the equal protection clause to vote dilution was not as simple as implementing one person, one vote. Given that the Court did not want to recognize a right to proportional representation, and the standard of total exclusion did not meet the expectations of either the political reform community or voting rights advocates, the enterprise of ending vote dilution hit a dead-end. In the case of partisan vote dilution, the concept was virtually stillborn after the 1982 California Congressional redistricting failed to rise above the threshold of

constitutional injury. In the case of racial vote dilution, the drift towards rough proportionality proved to be controversial and eventually was limited after *Shaw v Reno*.

Politically, partisan gerrymandering in this period was more prominent than bipartisan deals. The solution to the incumbency advantage in a number of states seemed to be term limits. Starting in the early nineties, states began to adopt term limitations for their state legislative seats, partly as a result of the low turnover rates that professionalization seemed to bring. If representatives could be rotated out after a set term, it did not matter whether they negotiated a sweetheart districting deal for themselves. States like California, Colorado and Oklahoma that adopted term limits in 1990 were also the first states to undertake redistricting with members who could not aspire to holding the seat indefinitely. This caused members in some cases to be less interested in the design of the seat they occupied than the one they desired to run in the future. This in turn destroyed the conventional log-roll that those states had developed (the lower and upper houses design their own lines and pass the other house's lines), and lessened somewhat the idiosyncratic district requests members would make (since the party leaders had to design the seat to be held by someone other than the incumbent later in the decade).

The racial redistricting caused political controversy as well. White liberals fretted with some justification that the packing minority-majority seats weakened some of the neighboring white Democratic incumbents, and worked to the disadvantage of the Democratic Party as whole. Some Republicans became advocates of minority-majority

seats for the same reason. All of this was playing out against the backdrop of a realigning south, as Southern Republicans gained more representation in the Congress and state legislatures. Even within the protected minority communities, there were those who questioned whether a strict majority-minority redistricting strategy really advanced the political agenda of African-Americans and Latinos. In short, the quest for ending vote dilution even created some ambivalence within the progressive and reform community.

The advances in computer technologies in this period were beginning to open up the process to a wider range of participants. Using a computer as a redistricting tool to implement traditional redistricting criteria in a neutral manner was first proposed by Weaver and Hess (1963). Iowa and Delaware used computers in 1968 to address equal population concerns. In 1971, Iowa's legislature requested the University of Iowa's computing center to draw twelve congressional maps from which legislature choose the adopted map (CQ 1972). The legislature then chose the map from that menu. Given the technology at the time, these computers were expensive mainframes that required specialized training to use.

The advent of the personal computer in the 1980s, and later the laptop, which were more powerful than the mainframes of the late 1960s, along with Geographic Information Systems (GIS) software, provided state legislatures, commissions, interest groups, courts, and even private citizens the tools to draw their own maps. By the 1990s round of redistricting, most states had become computerized and equipped with some type of geographic information system that could be used to draw lines, usually with

ESRI products like ArcInfo. Some states contracted out to consultants that were able to customize general GIS applications for redistricting purposes while others made due with what they already had in their planning departments. A few states paid consultants to write redistricting software, but only five attempted to draw Congressional lines without a mapping program in the 1990s.

With the 2000 redistricting, a virtual software revolution had occurred with respect to GIS applications. Smaller competitors to ESRI, like the Caliper Corporation, had been able to break into the niche market of redistricting software, presenting a strong challenge to the GIS giant. Prices dropped sharply, and redistricting mapping applications became over-the-counter merchandise, which could be run on any semi-current home computer. Gone were the days of having to invest tens of thousands of dollars to draw a plan with a computer. Additionally, mapping software had become much more user friendly than it had been previously. While still not 'easy' to use, it was possible for a computer novice to pick up enough skills in a few hours to be able to draw a redistricting plan. The combination of the ease of use, the steep drop in price and the fact that these new stand-alone redistricting packages were quite sophisticated--for example, providing multiple measures of compactness, various report functions, contiguity checks and assignment verifications-- resulted in the participation of many more actors in the redistricting process, many of whom became quite expert.

At the same time, many states began to feel pressure from groups wanting to participate in the redistricting, to make their political databases publicly available. With

California leading the way, states like Texas followed, and complex datasets that included census data, voter registration figures and the statement of vote became available to the public. Civil rights groups such as MALDEF and the NAACP, smaller special interest groups like the Center for Voting and Democracy, and even members of the general public were suddenly able to participate in the redistricting process using the same data and tools that the legislatures and commissions were using. This development increased the scrutiny of the process dramatically, as outside groups were quickly able to confirm or dispute any analyses done by the line-drawers. It also increased the amount of plans that were submitted by outside groups, as alternatives to those developed by the congressional line-drawers. In 2001, Ohio made redistricting software publicly available to anyone who wished to draw their own maps, and other states provided public terminals with redistricting software and data.

Computers enabled courts to draw their own maps rather than to depend on maps submitted by interested parties in redistricting lawsuits. Court appointed special masters drew one congressional map in 1971 in Washington and one in 1981 in Missouri. Presumably these early special masters put pen to paper. In all other court cases during this period, courts adopted maps proposed by a political party, or in one case in Arizona, an American-Indian tribe. In 1991, special masters drew congressional maps in California, Florida, Michigan, Minnesota, and South Carolina. In New York, the legislature modified a map produced by a special master rather than give the court full control of redistricting. In 2001, courts drew maps in Colorado, Minnesota, New Hampshire, Oregon, South Carolina, Texas, and New Mexico.

Sometimes courts produce maps that are blind to partisan and incumbent interests, however courts have a penchant for drawing maps that minimize the impact of redistricting on the existing political balance. In many respects these minimal change maps are similar to bipartisan incumbent protection gerrymanders since they protect incumbent interests by maintaining districts' core constituencies. The Texas map adopted by a court in 2001 illustrates the danger of this approach. Since the map did not reflect the partisan climate of the state, when the opportunity arose after the 2002 elections, the new unified Republican state government embarked upon a costly and sometimes comic mid-decade redistricting that was widely condemned in the press.

The Non-Federal Criteria Period (1994-present)

The third wave of reform begins with the Shaw line of cases and the emergence of increased partisanship as an emerging redistricting issue. The push for rough proportionality in the 1991 redistricting resulted in some extreme solutions to the underrepresentation of protected groups, particularly in the South due to widely dispersed African-American populations. Fearing that their own efforts would be judged inadequate by the Justice Department, some states drew districts with highly contorted shapes to try to achieve more representation for Blacks and Latinos. The paradigmatic seat was North Carolina's new 12th CD in 1991 that was so bizarrely contorted that its image has been reproduced many times in the press and in scholarly publications as an extreme example of affirmative action gerrymandering. Struck down in *Shaw v Reno* 509 US 630 (1993)

for demonstrating through shape that the lines had no rational explanation except to separate voters by race, the unconstitutionality of the 12 CD marked the end of the aggressive search for racial vote dilution remedies. In *Miller v Johnson* 515 US 900 (1995), the Court's emphasis moved somewhat from shape per se to the subordination of traditional redistricting criteria generally. Race could be considered, but it could not be the predominant criteria. Going into the 2001 round of redistricting, there was much debate about whether this would sharply limit the number of majority minority districts that could and would be drawn. In the end, while the Shaw doctrine prevented extreme racial gerrymandering, it did not lead to the dire consequences that many voting rights advocates predicted—in part because the Court set the threshold for finding race as a predominant factor at a fairly high level (*Hunt v Cromartie* 532 US 121 (2001)).

With the limits established on vote dilution, reformers could not expect to ride the 14th amendment much further. Some of the more cutting edge reform efforts in the last round of redistricting were focused more on nonfederal criteria such as competitiveness, compactness and communities of interest. In the sections that follow, we consider some of these criteria and the problems they are meant to solve.

Declining Competition as a Redistricting Problem

Competition is a necessary condition for the existence of democracy (Dahl 1971). Although the concept may seem self-evident, defining a workable competitiveness standard is a more difficult proposition. Academics struggled with many alternative

methods for measuring a district's competitiveness. Mayhew (1974) was among the first to offer a definition of what he termed "marginal" districts – those districts in which the vote share for one of the two major party candidates is between 45-55%. Mayhew and many academics since, factor out minor parties by calculating the vote share for a political party as a percentage of the two-party vote, i.e., the total Democratic plus Republican vote.¹ Redistricters generate similar measures of the partisanship of a district using vote totals for statewide offices, particularly those that are "down-ballot" where partisanship of the candidates is the primary cue guiding voting decisions. Partisan affiliation of registered voters may also be used in those states where such information is gathered.

Mayhew pointed out the decline of the number of marginal congressional districts as he defined it and subsequent research looked for an explanation. Some tied it to the rise of the incumbency advantage, possibly from the rise of constituency service (Fiorina 1989) or through artful gerrymandering (Tufte 1973, but see Ferejohn 1977 for a response refuting Tufte's argument). One noteworthy response came from Gary Jacobson (1987), who noted that although the number of marginal districts declined, the probability of incumbents winning reelection had not changed, a phenomenon that Jacobson attributed to the rise of strategic challengers – rising campaign costs increased the opportunity costs for candidates challenging incumbents, and these challengers modified their behavior by challenging only vulnerable incumbents.²

¹ They do so because including third party candidates require complex statistical models that often fail to generate meaningful statistical estimates (if any at all).

² Since incumbents enjoy an electoral "incumbency advantage" over challengers, when incumbents are placed within otherwise competitive districts, election outcomes in those districts may no longer truly be

A competitive district is generally agreed to be one where there is a balance of support for the two major political parties, somewhere around 50%. But as Jacobson's critique of Mayhew suggests, there is no special virtue assigned to the 45-55% range for identifying what constitutes a "marginal" district. Indeed, some researchers have proposed a range as tight as 48-52% (Swain, Borrelli, and Reed 1998). A problem with ranges so defined is that the boundaries are subjective. A method to remove subjective evaluation is to rely on statistics to guide the choice of the range. Jacobson's approach of measuring competition in terms of probability of reelection is the forerunner to a statistical method of forecasting election outcomes proposed by Gelman and King (1994). Gelman and King's method, which they call "JudgeIt," uses a statistical model to forecast elections under hypothetical circumstances, and most importantly, may be used to forecast elections following a redistricting. These election forecasts may in turn be used to identify the competitiveness of a given district.

Gelman and King's important contribution is recognizing that statistical forecasts are inherently subject to error. It is this error that is both a consequence of statistical modeling and the uncertainty of electoral politics, which may be used to identify competitive districts. For example, a district may be estimated to have a major candidate vote share of 48.2% for a Democratic candidate. Because of the uncertainty of statistical

competitive. Clever gerrymandering may entail moving, by way of manipulating district boundaries, unwanted voters or even the homes of potential challengers into an adjacent district. On the other hand, incumbent-blind redistricting may force incumbents into a vulnerable position by divorcing them from their support base or even by forcing them to run against another incumbent. As a by-product, incumbent-blind redistricting creates more competitive districts. See Cain (1984) and Butler and Cain (1992) for a detailed description of incumbent gerrymanders.

modeling, this estimate is understood to be (hopefully) close to the true value, but will be in error. The true value will likely lie within a given range, known as the “confidence interval.” Furthermore, the actual outcome will fluctuate from election to election as factors that cannot be taken into account well in a statistical model – such as the quality of campaigns and candidates, or the nature of the general political climate – can also affect election results. When the confidence interval is large enough so that the election outcome within a district cannot be predicted with certainty, that district is then, statistically speaking, a competitive district.

The concepts here are important enough to merit a short digression. Statistical error is akin to the margin of error of a poll, and refers to the uncertainty that an estimate, such as a vote for a Democrat equaling 48.2%, is imprecise, and may actually fall anywhere within a given range. One component of the magnitude of the error is dependent on how well the statistical model explains the observed world, which in this case are elections prior to a redistricting. Including factors that are strongly correlated with election outcomes into the statistical model, such as the presence of incumbents in an election, demographic information about the voters in a district, or a measure of the underlying partisanship of a district, may reduce statistical error, although the error may still be quite large depending on the volatility of prior election outcomes.

Competitive Range	Year							
	<u>1970</u>	<u>1972</u>	<u>1980</u>	<u>1982</u>	<u>1990</u>	<u>1992</u>	<u>2000</u>	<u>2002</u>
45-55%	266	265	284	281	305	290	223	206
48-52%	108	109	129	129	144	126	88	81

Table 1. Competitive Districts, Predicted Hypothetical Contested Open Seats.

Using Gelman and King’s methodology, McDonald (2004) estimates the number of competitive districts before and after a national round of redistricting in 1971, 1981, 1991, and 2001. The districts are evaluated as if no incumbent was running in a district. Two ranges of competitiveness are presented in Table 1, one for a “wide” 45-55% range and another for a “narrow” 48-52% range. The narrow range is nested in the wide range meaning those districts counted in the narrow are also counted among the wide range. In some respects, these ranges attempt to simplistically display the same information as the aforementioned statistical confidence intervals. Statistically speaking, those districts that fall in the narrower range are more likely to be more competitive districts.

The analysis shows that the number of competitive districts experienced small or no declines in both ranges before and after the 1971 and 1981 rounds of redistricting. However, in 1991 and 2001, the number declined significantly. The redistricting of 1991 resulted in eighteen fewer competitive districts in the narrow range and fifteen in the wide range. The redistricting of 2001 resulted in seven fewer in the narrow competitive range and thirteen in the wide range. Interesting, too, is the between-redistricting decline

from 1992 and 2000. The 1990s saw a decline of twenty-eight districts in the narrow competitive range and sixty-seven in the wide range. Modern redistricting does play a role in the decline of competitive districts, but so does the distribution of partisans among and within the states.

	1971	1981	1991	2001
Number of States	15	20	19	20
Number of Affected Districts	153	153	147	233

Table 2. Number of states that adopted a bipartisan gerrymander.

A culprit often cited for the decline in competitive districts is the bipartisan, incumbent protection gerrymander. Pitting ambition against ambition might work for the legislative process, but in redistricting it is a recipe for incumbency protection. The trash of one party's incumbent is the treasure of another's. Incumbents of different parties can make mutual trades of partisans to secure victory in a general election. Forced to work together, the parties will collude to secure the reelection of all their incumbents, resulting in the least competitive of maps.

Table 2 shows that the number of states enacting bipartisan gerrymanders increased from fifteen to twenty between 1971 and 1981, and since has fluctuated between twenty and nineteen. Although the number of bipartisan plans increased by only one from 1991 to 2001, the number of districts that were drawn under a bipartisan

compromise grew from 147 to 233 due to the adoption of bipartisan plans among larger states, most notably California and Texas. Other large states such as New York and Ohio drew bipartisan plans in both 1991 and 2001.

The shift of bipartisan plans from smaller states to larger states has an important effect on the prospects for drawing competitive districts. Smaller states tend to be politically homogeneous, so redistricting in these states often has only minimal effects on competitiveness, and it matters little if a partisan, bipartisan, or a neutral map is adopted. Redistricting is more potent in larger, heterogeneous states where diverse populations can be strategically grouped for political purposes. California realized a sizable decline in the number of competitive districts between 1991 and 2001, as did Texas, to a lesser extent.

Redistricting institutions are varied among the states, with states sometimes having different institutions for congressional and state legislative redistricting (McDonald 2004). Bipartisan deals emerge in two circumstances. In those states that use the legislative process to adopt maps bipartisan deals may arise when there is divided state government. Among the states that use various commissions, some forms of commission are explicitly designed to elicit bipartisan compromise. The growth of bipartisan deals is a twofold result of an increase of divided government and the adoption of bipartisan commissions among the states.

Divided government can take two forms, a divided legislature or, a unified legislature with a governor of a different party. A caveat is that a state government is not

truly “divided” when one party controls a super-majority of the legislature, thus enabling an over-ride of a governor’s veto. A bipartisan compromise plan in these divided government situations is a map that protects incumbents of both parties. In state legislative redistricting, such compromises arise when the legislatures are divided and result in the respective chambers drawing their own districts. There is always the possibility that a compromise between the parties cannot be found, but because redistricting must occur, these situations are then resolved in the courts.

Among the states that used the legislative process for congressional redistricting and had divided government, we found the following:

- In 1971: Fifteen states were in a divided government situation. Ten adopted bipartisan compromises, four went to the courts, and in Tennessee the governor strategically calculated that the Democratic map would give Republicans a chance to win in the partisan gerrymandered districts. Inter-party factional bickering led to a bipartisan map in Pennsylvania.
- In 1981: Fourteen states were in a divided government situation. Nine adopted bipartisan compromises and five went to the courts. Coalitions between wings of different parties arose in Arizona, Nevada and Washington, resulting in bipartisan maps.
- In 1991: Fourteen states were in a divided government situation. Eight adopted bipartisan compromises and five went to the courts.

- In 2001: Sixteen states were in a divided government situation. Ten adopted bipartisan compromises and six went to the courts.

Commissions are often cited as the cure to the mischief of politics in redistricting, bipartisan commissions are sometimes characterized as “nonpartisan” because they force the two parties to work together. These bipartisan institutions are codified into state constitutions and harbinger future bipartisan deals. There are generally two types of commission systems that produce bipartisan maps. Commissions in Idaho (adopted: 1994), Maine (1964), Missouri (state legislature: 1945 House, 1966 Senate) and Washington (1983) must adopt a map by a super-majority vote among an equal number of partisan appointees. Michigan used a similar commission from 1963 to 1982, when it was declared unconstitutional by the state Supreme Court. Both times the Michigan commission worked to redistrict congressional districts, the commission stalemated and a court undertook redistricting. For the other states, commission members are forced to bipartisan compromise during the redistricting process, which resulted in bipartisan maps in every instance in which these commissions redistricted congressional seats from 1971 to 2001.

Bipartisan compromise occurs at the beginning of the process on commissions in Arizona (2000), Connecticut (Congress: 1980, state legislature 1976), and Hawaii (1968). In these states, an equal number of partisan commission members select a tie-breaking member by a super-majority vote, thereby forcing the commission to develop at an early stage a bipartisan compromise in selection of the tie-breaker. Except for Arizona, in all

states where such bipartisan commissions operated for congressional redistricting from 1971-2001, a bipartisan map was adopted. Arizona is unique in that its commission is composed of citizen members who must follow politically neutral criteria in drawing districts, which facilitates the adoption of a neutral, rather than a bipartisan, map.

In two of these commission states the legislature plays some role, so that bipartisan compromise is also institutionalized. In Maine, the bipartisan commission has to send proposed maps to the legislature for adoption with a two-thirds vote. . Connecticut's procedure calls for the legislature to adopt a map on a super-majority vote, and if failing action, the task falls to the bipartisan commission. Under these systems, these states have consistently adopted bipartisan maps.

Fostering Competitiveness

Competitiveness is also constrained by various redistricting realities, such as the drawing of majority-minority districts or the drawing of districts to respect communities of interest and existing geographical and political boundaries.

In states that lean towards one particular party, it is theoretically impossible to draw every district to be competitive. Niemi and Deegan (1978) describe creating a competitive district in an uncompetitive state, which resulted in minority party voters being placed into a district at a level of strength greater than their overall statewide strength. In this situation, the pool of residual voters will lean even more towards the

dominant party. Eventually, the supply of minority party partisans is exhausted, and the remainder of the state must be composed of uncompetitive districts for the dominant party. Drawing districts to achieve competitiveness in a partisan leaning state politically favors the minority party, and is in its own way, a partisan gerrymander.

Opportunities for drawing competitive districts may also be affected through the building of majority-minority districts to comply with the Voting Rights Act. Majority-minority districts, as the term suggests, concentrate minority populations, and since non-white groups (except for Cuban-Americans in Southern Florida) tend to vote heavily Democratic, these districts tend to be noncompetitively Democratic. This tendency is further exacerbated by the fact that non-minorities living within minority communities often come from similar demographic backgrounds and favor minority voting patterns. If Democrats are the dominant statewide political party, majority-minority districts (depending on how many will be drawn) will be consistent with the goal of competitiveness overall, because they will balance the districts with the residual pool of voters in a more competitive direction. If Republicans are the dominant political party then the drawing of majority-minority districts will reduce the opportunities for competitive districts because already “scarce” Democrats have been moved into noncompetitive majority-minority districts.

Competitiveness, Nonfederal Criteria and Communities of Interest (CoI)

The increased use of computer technology and GIS software enabled more sophisticated participation by outside groups and led to the submission of many more plans that specifically reflected community values. After *Shaw v. Reno*, civil rights groups had to find the balance between voting rights remedies and a potential violation of the 14th amendment's equal protection clause. In many jurisdictions, questions also arose about whether an argument might be made about building majority-minority districts with more than one racial group. Advancing minority representation within the guidelines of the new racial jurisprudence and within the framework of race neutral districting principles were critical challenges in 2001.

As we have stated several times in this paper, most redistricting criteria beyond population equality are anything but straightforward in their application. Compactness, for example, is commonly measured by no less than 8 different methods, which all result in different outcomes. Contiguity can be debated when bodies of water or bridges are involved, and even the seemingly innocuous goal of preserving political subdivisions raises the questions of which ones are relevant and most important. Of all redistricting criteria, however, the community of interest concept is the most vague and ill defined. It implies, by definition, a similarity or sameness of the population at stake: but similarity in what sense?

Only two states mention communities of interest as a redistricting principle in their state constitutions. Prior to 1991, only six states mentioned, required or allowed communities of interest as a districting principle in any form whatsoever. The early

nineties saw thirteen additional states adopting language that ordered communities of interest to be considered when drawing lines. In Congressional redistricting specifically, there were thirteen states that required or allowed communities of interest to be used in a redistricting in 1991 and in 2001, one of which did not allow it in the 1991 redistricting but does now, and one which did in 1991 but does not currently. Of the nineteen states that require or encourage the use of communities of interest in redistricting, only six have attempted to define what a community of interest is. The definitions range from the very vague “traditional neighborhoods and local communities of interest” (Idaho) to the very specific “ethnic, cultural, economic, trade area, geographic, and demographic factors...” (Colorado) but overall, there is more ambiguity than certainty in the application and use of this criterion. For states that have no language posted about COI in redistricting, the principle can of course still be used with the justification that it is one of a list of generally accepted and utilized ‘traditional’ criteria.

While communities of interest as a districting principle has been ‘on the books’ for many of the recent redistrictings, the restriction of using race as a predominant criterion through the Shaw line of cases resulted in an increased use of CoI, especially in states with large minority populations. The vagueness of the criterion and the lack of a commonly accepted definition lend itself to creative arguments on what could and should constitute a community of interest. Gone were the days in which census data could be used to try and make some type of common economics argument about CoI. Census data available for most redistrictings did not include socio-economic data but consisted of only race, ethnicity and voting age variables, and consequently alternative data sources

had to be developed and utilized by many outside groups and even some states. Alaska, for example, found itself engaged in a full-fledged consultant-conducted study, interviewing hundreds of residents on their commonalities to define communities of interest. In addition, groups that were not protected under the Voting Rights Act like gays and lesbians also began asking for consideration under this criterion.

The increased use of communities of interest in redistricting combined with the improved access to and use of computing technology by ‘outside’ groups likely had a negative effect on the competitiveness of districts. That is because competitiveness is often at odds with preserving communities of interest. Communities of interest tend to be politically homogenous, while competitiveness requires a diversity of opinion that may be found in heterogeneous districts. In a similar manner, competitiveness is also constrained by preserving visible geographic features, along with city, town and county boundaries (and undivided census tracts) since these geographic and political boundaries often coincide with communities of interest. In order to draw competitive districts, large communities of interest must be split and diametrically opposed communities must be grouped together. When partisan differences are high, drawing districts in this manner may result in a loss of representation by the candidate elected with support of the winning community.

Institutional Solutions to the Competitiveness Problem.

A way to ensure the creation of competitive districts is to mandate it through law. Two states, Arizona and Washington, have competitiveness clauses in their state constitutions mandating that their commissions must draw districts to favor competitiveness. These states, along with the Iowa system, provide examples of the types of redistricting institutions that may foster the creation of competitive districts.

In Washington, a bipartisan commission meets behind closed doors to conduct redistricting. Bipartisan deals that are brokered between the parties are not challenged in court since usually only the political parties have the monetary muscle to enjoin lawsuits. Thus, while on the constitution, the Washington's competitiveness clause goes by largely un-enforced.

In Arizona, a citizen redistricting commission was established by initiative in 2000. Proposition 106 stipulates six criteria for the commission to follow as it formulates new districting plans. The first five criteria deal with traditional redistricting goals such as equal population, respect of the Voting Rights Act, ignorance of incumbent homes, respect for communities of interest and existing political boundaries. The sixth requirement is that "To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals." Unlike Washington, the members of the Arizona commission are citizens who have limited ties to government and the political parties. The tie-breaking member on the commission must not be registered as a member of a major party. Together, these factors favor the creation of competitive districts over the Washington commission.

Iowa is often referred to as a “commission state” because a non-partisan legislative support staff called the Legislative Service Bureau (LSB) proposes maps to the legislature for their approval. In this respect, the Iowa commission is modeled on civil service (commonly called) boundary commissions in other countries, where career bureaucrats, not politicians, draw district boundaries. The legislature influences the actions of the LSB through a temporary advisory redistricting legislative committee to answer queries from the LSB. The LSB cannot consider the location of incumbent homes and political election data when drawing districts, thereby limiting the possibility of bipartisan and partisan gerrymanders.

The Iowa system exists only under state statute, and the legislature can assume the authority of redistricting within the context of the statute and can amend that statute. The LSB proposes a sequence of three maps to the legislature, any of which may be adopted by majority vote. The first two maps may only be amended for technical reasons; however the third map may be amended within the full context of the normal legislative process. It is here that the legislature may invoke its authority. However, in the history of this convoluted process that was adopted in 1970, the legislature has never rejected a third proposal from the LSB, fearing that a rejection would invite the perception that partisan politics are at play in the process. For this reason, too, perhaps, the legislature has not amended the state statute governing the process.

Iowa's process is often placed on a pedestal because of the outcome it produces, but in reality, Iowa's system is not a panacea for removing politics from redistricting.³ Iowa consistently produces competitive districts, four of the five are currently widely considered competitive. However, these districts are competitive because they have Republican incumbents mismatched in Democratic districts, and these districts would not be as competitive if a Democrat replaced the Republican incumbents. Much of the state is politically and ethnically homogenous, and the districts would likely be the same regardless of whether incumbent or partisan interests drew them.

A lesson from these states is that there are two factors that play a role in creating competitive districts. One is the role of partisans in redistricting and the other is the role of incumbents. Limiting their respective roles in the redistricting process will have a positive effect on the creation of competitive districts. Partisan interests can be minimized by removing overt partisans from the redistricting process, which was achieved by the creation of a citizen commission in Arizona, and the non-partisan legislative support staff model in Iowa. Given highly partisan legislative staff in other states, the import of the Iowa model may not be ideal in all states. Incumbent interests can be limited by disallowing the use of the incumbents' home addresses.

Competitiveness might be a sensible inclusion to a redistricting criteria list, if the goal is to create competitive districts. But election results are needed to evaluate the

³ Although the LSB cannot consider politics when drawing maps, the legislature can and does. In 1981, when Republicans controlled the state government, the legislature approved the map on the third attempt, after two previous attempts had negatively impacted the reelection of two incumbent Republicans (CQ 1982).

competitiveness of districts, and are also needed to evaluate the impact of redistricting on Voting Rights Act concerns. Iowa's censorship of partisan data from redistricting would therefore conflict with this goal, and likewise, it would not be possible in a jurisdiction that falls under Section 5 pre-clearance.

Conclusion

Most of the redistricting reforms in the post-WW II period were driven by the logic of the federal equal protection clause. The vote dilution doctrine seems at this point to have gone as far as the Court will allow it. Moreover, the new problem of non-competitive districts seems ill fitted for a rights framework. This means that reform will have to rely on state constitutional and statutory provisions, or institutional arrangements such as redistricting commissions. It will not be easy to define competition into a bright line test, and many institutional arrangements that bring accommodation between competing parties (whether represented by citizens or elected officials) tend to reduce rather than increase the number of competitive seats.